



STATE OF NEW YORK RETAIL COMPENDIUM OF LAW

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Retail, Restaurant, and Hospitality Guide to New York Premises Liability

Introduction	1
A. The New York State Court System	2
B. New York Federal Courts	2
Negligence	3
A. General Negligence Principles	3
B. Elements of a Cause of Action of Negligence	4
1. Creation of the Dangerous Condition	4
2. Actual Notice	4
3. Constructive Notice	5
C. The “Out of Possession Landlord”	5
D. Assumption of Risk	6
Examples of Negligence Claims	8
A. “Slip and Fall” Type Cases	8
1. Snow and Ice – “The Storm in Progress” Doctrine	8
2. “Black Ice”	9
3. Snow Removal Contractors	10
4. Slippery Surfaces – Cleaner, Polish, and Wax	10
5. Defenses	10
a. Plaintiff Failed to Establish the Existence of a Defective Conditions	11
b. Trivial Defect	11
c. Open and Obvious Defects	12
B. Liability for Violent Crime	14
1. Control	14
2. Foreseeability	14
3. Joint and Several Liability	15
4. Security Contractors	16
5. Defenses	16
C. Claims Arising From the Wrongful Prevention of Thefts	19
1. False Arrest and Imprisonment	19
2. Malicious Prosecution	20
3. Defamation	21
4. Negligent Hiring, Retention, or Supervision of Employees	21
5. Shopkeeper Immunity	21
a. General Business Law §218	22
D. Food Poisoning	24
E. Construction-Related Accidents (New York Labor Law)	24
1. Labor Law §200	24
2. Labor Law §240(1)	25
a. Parties Liable Under §240(1)	25
b. “Sole Proximate Cause” Defense	26
3. Labor Law §241(6)	27

Indemnification and Insurance-Procurement Agreements	29
A. Indemnification	29
1. Statutory Limitations on Indemnification	29
2. Partial Indemnification	30
B. Insurance Procurement Agreements	30
C. The Duty to Defend	31
Damages in Premises Liability Cases	33
A. The Importance of Understanding Damages	33
B. Compensatory Damages	33
1. General Damages	34
2. Special Damages	35
C. Nominal Damages	36
D. Punitive Damages	36
E. Wrongful Death	37
1. Pecuniary Loss	37
2. Survivor Action	38
Retail, Hospitality, and Development Practice Group	40

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.

New York, like many states, has its own unique legal structure, theories, and statutes. With that in mind, we have included a brief overview of the New York legal system below, and at the end of each section, we have included a checklist of recommendations and considerations for addressing the specific types of claims presented, based on our experience handling these types of cases in courts across New York.

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 Goldberg Segalla's Retail, Hospitality, and Development Practice Group.



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A. The New York State Court System

The trial-level court in New York is the Supreme Court. Each county in the state has a Supreme Court that hears all manners of civil disputes. Virtually all personal injury actions filed in state court are filed in Supreme Court. Supreme Court judges are elected officials and serve 14-year terms.

The intermediate appellate-level court is the Appellate Division of the Supreme Court. The state is divided into four judicial departments. The First and Second Departments are located in the New York City area. The Third Judicial Department encompasses the counties surrounding Albany and the southern tier of the state. The Fourth Department hears appeals from the Supreme Courts located in the central and western New York counties. Appellate Division judges are actually Supreme Court judges who have been elevated by appointment to the appellate courts.

The Court of Appeals is the highest-level appellate court in New York. The judges of the New York Court of Appeals are appointed by the governor.

The procedural rules in New York are controlled by the Civil Practice Law and Rules. These rules differ in many ways from federal court practice.

B. New York Federal Courts

Although the federal courts are governed by different procedural rules, the location of the various courts, in some ways, mirrors the New York state courts. There are four judicial districts in the state. The Eastern and Southern Districts are located in the downstate area. The Northern District encompasses the central and northern New York counties. The Western District includes the counties in the western part of the state.

Negligence

A. General Negligence Principles

By definition, negligence is the failure to exercise “that degree of care that a reasonably prudent person would have used under the same circumstances.”¹ It arises from a breach of a duty owed by one to another. As a result, a claim for damages cannot arise unless there is a relationship sufficient to give rise to a legal duty.

In the context of a premises liability case, liability may be imposed upon an owner, occupant, or other person or entity in control of the premises.² Further, in certain instances, where a landowner does not actually own a piece of public property, but makes a “special use” of that property and brings it under their control for its own individual benefit, liability may be imposed.³

Liability can arise in many different ways. For example, a landowner may sometimes have a duty to protect tenants and patrons from the criminal conduct of others present on the premises. As the Court of Appeals has explained:

“Landowners, for example, have a duty to protect tenants, patrons and invitees from foreseeable harm caused by the criminal conduct of others while they are on the premises, because the special relationship puts them in the best position to protect against the risk. That duty, however, does not extend to members of the general public. Liability is in this way circumscribed, because the special relationship defines the class of potential plaintiffs to whom the duty is owed.”⁴

In other words, if the defendant cannot control the conduct or the condition giving rise to the accident, no liability can be imposed.

Generally, New York law does not distinguish between classes of persons who are on the premises, such as invitees, licensees, and trespassers. Instead, the analysis is based upon the reasonableness of the conduct under the circumstances.⁵

¹ New York Pattern Jury Instructions, 2:10 (3d ed. 2010).

² *Clifford v. Woodlawn Volunteer Fire Co., Inc.*, 31 A.D.3d 1102, 818 N.Y.S.2d 715 (4th Dept. 2006), citing *Balsam v. Delma Eng’g Corp.*, 139 A.D.2d 292, 532 N.Y.S.2d 105 (1st Dept. 1988), *lv. dismissed in part and denied in part*, 73 N.Y.2d 783, 533 N.E.2d 671, 536 N.Y.S.2d 741 (1988); *Ruffino v. New York City Tr. Auth.*, 55 A.D.3d 817, 865 N.Y.S.2d 667 (2d Dept. 2008).

³ *Noia v. Maselli*, 45 A.D.3d 746, 846 N.Y.S.2d 326 (2d Dept. 2007).

⁴ *532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 727 N.Y.S.2d 7 (2001) (citations omitted).

⁵ *Basso v. Miller*, 40 N.Y.2d 233, 386 N.Y.S.2d 564 (1976); *see also Tagle v. Jakob*, 97 N.Y.2d 165, 168, 737 N.Y.S.2d 331 (2001).

B. Elements of a Cause of Action of Negligence

To establish a *prima facie* case of negligence in a premises liability action — that is, one that “at first blush” presents evidence sufficient to prove the case — a plaintiff must demonstrate either that the landowner created the dangerous or defective condition which caused the accident, or that the landowner had actual or constructive notice of the condition.⁶ Where notice of the condition is alleged, a plaintiff must establish that the condition existed for a reasonable length of time to allow a defendant the opportunity to discovery and correct the defect.⁷

1. Creation of the Dangerous Condition

Liability may be imposed where the property owner or occupant actually creates the dangerous condition that led to the plaintiff’s injuries. For instance, the application of a polish, paint, cleaner, or wax to a floor which makes it dangerously slippery may result in a finding of negligence. Landowners should also be wary of diverting runoff water such that it could create icy walkways. In short, a landowner can create a dangerous condition in a variety of different ways. A few of these are discussed in further detail below.

2. Actual Notice

Liability for a dangerous condition may be imposed where there is evidence that the property owner was aware of the dangerous condition.⁸ Proof of actual notice can be established by evidence of prior accidents.⁹ By the same token, however, evidence of the absence of prior accidents over an extended period of time may be admissible to show the absence of a defect.¹⁰

Before evidence of prior accidents or a lack of prior accidents may be used as evidence in court, the party offering the evidence must establish that the conditions giving rise to the accident at issue were the same as those that existed either at the time of the prior accidents or for an

⁶ *Martin v. RP Assoc.*, 37 A.D.3d 1017, 830 N.Y.S.2d 816,(3d Dept. 2007); *Charvala v. Kelly & Dutch Real Estate, Inc.* (appeal no. 2), 273 A.D.2d 936, 709 N.Y.S.2d 785 (4th Dept. 2000); *Dima v. Breslin Realty, Inc.*, 240 A.D.2d 359, 658 N.Y.S.2d 115 (2d Dept. 1997).

⁷ *Fasolino v. Charming Stores, Inc.*, 77 N.Y.2d 847, 567 N.Y.S.2d 640 (1991); *Derosia v. Gasbarre & Szatkowski Assn.*, 66 A.D.3d 1423, 885 N.Y.S.2d 862 (4th Dept. 2009); *Lewis v. Metro. Transp. Auth.*, 99 A.D.2d 246, 427 N.Y.S.2d 368 (1st Dept. 1984) *affd* 64 N.Y.2d 670, 485 N.Y.S.2d 252 (1984).

⁸ *Garrido v. International Bus. Mach. Corp. (IBM)*, 38 A.D.3d 594, 832 N.Y.S.2d 71 (2d Dept. 2007).

⁹ *Hyde v. County of Rensselaer*, 51 N.Y.2d 927, 434 N.Y.S.2d 984 (1980); *Mazerbo v. Murphy*, 52 A.D.3d 1064, 860 N.Y.S.2d 289 (3d Dept. 2008), *appeal dismissed* 11 N.Y.3d 770; 866 N.Y.S.2d 597 (2008); *Bounds v. Western Reg’l Off Track Betting Corp.*, 256 A.D.2d 1165, 684 N.Y.S.2d 105 (4th Dept. 1998).

¹⁰ *Orlick v. Granit Hotel & Country Club*, 30 N.Y.2d 246, 331 N.Y.S.2d 651 (1972); *Zammiello v. Senpike Mall Co.*, 5 A.D.3d 1001, 773 N.Y.S.2d 634 (4th Dept. 2004); *Laguesse v. Storytown U.S.A. Inc.*, 296 A.D.2d 798, 745 N.Y.S.2d 323 (3d Dept. 2002).

extended period of time prior to the accident at issue.¹¹

3. Constructive Notice

To establish constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident that the defendant should, in the exercise of reasonable care, have discovered it and taken remedial action.¹²

If there is no evidence as to how long the condition existed prior to the accident, constructive notice is not established.¹³

Further, a “general awareness” that a dangerous condition may be present does not constitute notice of the specific condition that caused a particular plaintiff to fall.¹⁴

C. The “Out-of-Possession Landlord”

Under most commercial leases, responsibility for the interior of a leased space is the responsibility of the tenant. It is well settled that an out-of-possession landlord cannot be held liable for injuries to third parties on the leased premises.¹⁵ It is equally well settled that “without notice of a specific dangerous condition, an out-of-possession landlord cannot be faulted for failing to repair it.”¹⁶

¹¹ *Hyde v. County of Rensselaer*, 51 N.Y.2d 927, 434 N.Y.S.2d 984 (1980); *McDonald v. Long Is. R.R.*, 77 A.D.3d 712, 909 N.Y.S.2d 514 (2d Dept. 2010); *Bounds v. Western Reg'l Off Track Betting Corp.*, 256 A.D.2d 1165, 684 N.Y.S.2d 105 (4th Dept. 1998).

¹² *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 501 N.Y.S.2d 646 (1986); *Vidor v. 6 Jones St. Assoc., LLC*, 85 A.D.3d 449, 924 N.Y.S.2d 387 (1st Dept. 2011); *Bravo v. 564 Seneca Ave. Corp.*, 83 A.D.3d 633, 922 N.Y.S.2d 88 (2d Dept. 2011); *King v. Sam's E., Inc.*, 81 A.D.3d 1414, 917 N.Y.S.2d 480 (4th Dept. 2011).

¹³ *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 501 N.Y.S.2d 646 (1986); *Ford v. Citibank, N.A.*, 11 A.D.3d 508, 783 N.Y.S.2d 622 (2d Dept. 2004); *Dombrower v. Maharia Realty Corp.*, 296 A.D.2d 353 (1st Dept. 2002).

¹⁴ *Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967, 622 N.Y.S.2d 493 (1994); *Krieger v. McDonald's Rest. of N.Y., Inc.*, 79 A.D.3d 1827, 914 N.Y.S.2d 480 (4th Dept. 2010), *lv. dismissed* 2011 NY Slip Op 74286 (2011); *Gershfeld v. Marine Park Funeral Home, Inc.*, 62 A.D.3d 833, 879 N.Y.S.2d 549 (2d Dept. 2009); *Martin v. RP Assoc.*, 37 A.D.3d 1017, 830 N.Y.S.2d 816 (3d Dept. 2007).

¹⁵ *Alnashmi v. Certified Analytical Group*, 89 A.D.3d 10, 929 N.Y.S.2d 620 (2d Dept. 2011); *Sciammarella v. Manorville Postal Assoc.*, 87 A.D.3d 530, 927 N.Y.S.2d 798 (2d Dept. 2011); *Lockwood v. Layton*, 79 A.D.3d 1342, 916 N.Y.S.2d 243 (3d Dept. 2010); *Sexton v. Resinger*, 70 A.D.3d 1360, 894 N.Y.S.2d 640 (4th Dept. 2010); *Ram v. 64th Street-Third Ave. Assocs., LLC*, 61 A.D.3d 596, 878 N.Y.S.2d 27 (1st Dept. 2009).

¹⁶ *Chapman v. Silber*, 97 N.Y.2d 9, 734 N.Y.S.2d 541 (2001); *see also Starr v. Holes*, 87 A.D.3d 1395, 930 N.Y.S.2d 519 (4th Dept. 2011); *Oates v. Iacovelli*, 80 A.D.3d 1059, 915 N.Y.S.2d 711 (3d Dept. 2011); *Nelson v. Cunningham Assoc., L.P.*, 77 A.D.3d 638, 908 N.Y.S.2d 713 (2d Dept. 2010); *Lopez v. 1372 Shakespeare Ave. Hous. Dev. Fund Corp.*, 299 A.D.2d 230, 750 N.Y.S.2d 44 (1st Dept. 2002).

Generally, the only circumstances under which an out-of-possession landlord can be held liable for such injuries is if the landlord has “retained control over the premises or is contractually obligated to repair or maintain the premises.”¹⁷ One important exception to the general rule, however, is that if a lessor rents premises for a public use when the lessor knows or should have known that the property is in a “dangerous condition” at the time of the lease, the out-of-possession landlord will be liable.¹⁸ Further, if there are questions concerning the scope of an out-of-possession landlord’s duties or control concerning the property, those issues may necessitate a trial.¹⁹

D. Assumption of Risk

Despite being a pure comparative fault state, New York recognizes both express assumption of risk and implied assumption of risk. “The theory upon which its retention has been explained and upon which it has been harmonized with the now dominant doctrine of comparative causation is that, by freely assuming a known risk, a plaintiff commensurately negates any duty on the part of the defendant to safeguard him or her from the risk.”²⁰

The concept of assumption of risk, generally, has been limited to athletic or recreational activities.²¹ The assumption of risk doctrine applies where a consenting participant in sporting and amusement activities “is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks.”²² “If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty.”²³

“Express assumption of risk” involves an agreement, such as a signed waiver, between the parties in advance in which the plaintiff agrees to assume the known risks associated with the

¹⁷ *Alnashmi v. Certified Analytical Group*, 89 A.D.3d 10, 929 N.Y.S.2d 620 (2d Dept.2011); *Euvino v. Loconti*, 67 A.D.3d 629, 888 N.Y.S.2d 571 (2d Dept. 2009); *see also Hart v. O’Brien*, 72 A.D.3d 1257, 898 N.Y.S.2d 697 (3d Dept. 2010); *Ferro v. Burton*, 45 A.D.3d 1454, 846 N.Y.S.2d 850 (4th Dept. 2007); *Negron v. Rodriguez & Rodriguez Stor. & Warehouse, Inc.*, 23 A.D.3d 159, 806 N.Y.S.2d 180 (1st Dept. 2005).

¹⁸ *Fuller v. Marcello*, 38 A.D.3d 1162, 832 N.Y.S.2d 351 (4th Dept. 2007); *Landau v. Beach Haven Shopping Ctr., LLC*, 276 A.D.2d 752, 715 N.Y.S.2d 334 (2d Dept. 2000); *June v. Bill Zikakis Chevrolet*, 199 A.D.2d 907, 606 N.Y.S.2d 390 (3d Dept. 1993).

¹⁹ *Jewett v. M.D. Fritz, Inc.*, 83 A.D.3d 1572, 921 N.Y.S.2d 444 (4th Dept. 2011), *reargument denied* 87 A.D.3d 1414, 930 N.Y.S.2d 171 (4th Dept. 2011); *Greis v. Eckerd Corp.*, 54 A.D.3d 895, 864 N.Y.S.2d 147 (2d Dept. 2008); *Wright v. Olympia & York Cos. (U.S.A.) Inc.*, 273 A.D.2d 24, 709 N.Y.S.2d 41 (1st Dept. 2000); *Cooper v. Bogel*, 246 A.D.2d 760, 667 N.Y.S.2d 776 (3d Dept. 1998).

²⁰ *Trupia v. Lake George Cent. School Dist.*, 14 N.Y.3d 392, 901 N.Y.S.2d 127 (2010).

²¹ *Trupia v. Lake George Cent. School Dist.*, *supra*.

²² *Bukowski v. Clarkson Univ.*, 19 N.Y.3d 353, 948 N.Y.S.2d 568 (2012).

²³ *Bukowski v. Clarkson Univ.*, *supra*, quoting *Turcotte v. Fell*, 68 NY2d 432, 439, 502 N.E.2d 964, 510 N.Y.S.2d 49 (1986).

activity.²⁴ “Implied” arises when despite the absence of an express agreement, the plaintiff is fully aware of the risk associated with the activity.²⁵

The risk assumed in each case is that which is known or inherent in the sport and whether the injured person appreciated that risk. Participants will not be deemed to have assumed hidden risks or dangers not inherent to the sport.²⁶ However, “[i]t is not necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results.”²⁷ Whether a risk is inherent to a sport or activity is often a question of fact.²⁸

Liability Checklist/Considerations for Negligence Claims

- 1. Defendant’s relationship to property where plaintiff’s accident occurred:**
 - Owner?
 - Tenant?
 - Party in control of public property?
 - “Out-of-possession landlord?”
- 2. Was there a defective condition on the premises involved in plaintiff’s accident?**
- 3. Defendant’s notice – did defendant:**
 - Actually create the defective condition?
 - Have actual notice of the defective condition?
 - Have constructive notice of the condition?

²⁴ *Arbegast v. Bd. of Educ.*, 65 N.Y.2d 161; 490 N.Y.S.2d 751 (1985).

²⁵ *Arbegast v. Bd. of Educ.*, 65 N.Y.2d 161; 490 N.Y.S.2d 751 (1985).

²⁶ *Schiff v. State of New York*, 31 A.D.3d 526; 818 N.Y.S.2d 597 (2nd Dept. 2006).

²⁷ *Rosati v. Hunt Racing, Inc.*, 13 A.D.3d 1129; 787 N.Y.S.2d 576 (4th Dept. 2004).

²⁸ *Rosati v. Hunt Racing, Inc., id.*; *Owen v. R.J.S. Safety Equip.*, 79 N.Y.2d 967, 582 N.Y.S.2d 998 (1992).

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.

A. “Slip and Fall” Type Cases

1. Snow and Ice – The “Storm in Progress” Doctrine

Perhaps the most common basis for negligence claims is that a parking lot was not properly plowed or salted following a snowfall.

It is well established under New York Law that a party cannot be held liable for a dangerous condition where the condition was caused by inclement weather and a party has not had an adequate time in which to correct the condition.²⁹ It is further well established that a person responsible for maintaining property is not under a duty to remove ice and snow until a reasonable time after the cessation of the storm.³⁰ The concept of a “storm in progress” may include temperature fluctuations creating dangerous conditions, such as ice patches.³¹

The law provides that the reasonable time to correct the condition is measured from the end of the storm, and liability may not be generally imposed for an accident which occurred while the storm was still in progress.³² This standard recognizes the realities of problems caused by winter weather.³³ In fact, even an allegation of a lull or break in the storm at or around the time of

²⁹ *Wood v. Schenectady Mun. Hous. Auth.*, 77 A.D.3d 1273, 909 N.Y.S.2d 587 (3d Dept. 2010); *Mazzella v. City of New York*, 72 A.D.3d 755, 899 N.Y.S.2d 291 (2d Dept. 2010); *Pippo v. City of New York*, 43 A.D.3d 303, 842 N.Y.S.2d 367 (1st Dept. 2007); *Warren v. Partnership Properties, Inc.*, 21 A.D.3d 1344, 801 N.Y.S.2d 854 (4th Dept. 2005).

³⁰ *Wood v. Schenectady Mun. Hous. Auth.*, 77 A.D.3d 1273, 909 N.Y.S.2d 587 (3d Dept. 2010); *Mazzella v. City of New York*, 72 A.D.3d 755, 899 N.Y.S.2d 291 (2d Dept. 2010); *Pippo v. City of New York*, 43 A.D.3d 303, 842 N.Y.S.2d 367 (1st Dept. 2007); *Warren v. Partnership Properties, Inc.*, 21 A.D.3d 1344, 801 N.Y.S.2d 854 (4th Dept. 2005).

³¹ *Cohen v. A.R. Fuel Inc.*, 290 A.D.2d 640, 736 N.Y.S.2d 143 (3d Dept. 2002); *Marcellus v. Nathan Littauer Hosp. Ass’n*, 145 A.D.2d 680, 535 N.Y.S.2d 224 (3d Dept. 1988).

³² *Wood v. Schenectady Mun. Hous. Auth.*, 77 A.D.3d 1273, 909 N.Y.S.2d 587 (3d Dept. 2010); *Mazzella v. City of New York*, 72 A.D.3d 755, 899 N.Y.S.2d 291 (2d Dept. 2010); *Pippo v. City of New York*, 43 A.D.3d 303, 842 N.Y.S.2d 367 (1st Dept. 2007); *Warren v. Partnership Properties, Inc.*, 21 A.D.3d 1344, 801 N.Y.S.2d 854 (4th Dept. 2005).

³³ *Fusco v. Stewart’s Ice Cream Company*, 203 A.D.2d 667, 610 N.Y.S.2d 642 (3d Dept. 1994); *Marcellus v. Nathan Littauer Hosp. Ass’n*, 145 A.D.2d 680, 535 N.Y.S.2d 224 (3d Dept. 1988).

an accident is not sufficient to establish that a defendant had reasonable time after the cessation of the storm to correct hazardous snow- or ice-related conditions.³⁴

The storm in progress doctrine is not limited to situations where blizzard conditions exist; it also applies in situations where there is some type of less severe, yet still inclement, winter weather.³⁵ Where a defendant has undertaken snow removal efforts while a storm is in progress and through its efforts neither created a hazardous condition nor exacerbated the natural hazard already created by the storm, the defendant is not liable for a slip and fall which occurred during the storm.³⁶

Absent evidence that the defendants' methods actually *increased* the natural hazards of the snow, ice, and/or storm, the defendants cannot be held liable for the plaintiff's accident.³⁷ Moreover, the failure to remove *all* snow and ice from a sidewalk or parking lot does not constitute negligence.³⁸

2. "Black Ice"

"Black ice" is a condition well known to people who live in cold weather areas. It is a thin layer of ice that forms on pavement or sidewalks and blends into the color of the surface upon which it rests. Courts recognize that "black ice" is very difficult to see. Although a plaintiff may claim that the icy condition was not readily apparent, courts have held that a lack of notice as to the presence of "black ice" may serve as the basis of a motion for summary judgment dismissing the plaintiff's complaint.³⁹

³⁴ *Baia v. Allright Parking Buffalo, Inc.*, 27 A.D.3d 1153, 811 N.Y.S.2d 843 (4th Dept. 2006); *Krutz v. Betz Funeral Home, Inc.*, 236 A.D.2d 704, 653 N.Y.S.2d 212 (3d Dept. 1997), *lv. denied*, 90 N.Y.2d 803, 661 N.Y.S.2d 179 (1997).

³⁵ *Camacho v. Garcia*, 273 A.D.2d 835, 709 N.Y.S.2d 738 (4th Dept. 2000); *see also Zima v. North Colonie Cent. Sch. Dist.*, 225 A.D.2d 993, 639 N.Y.S.2d 558 (3d Dept. 1996).

³⁶ *De Los Santos v. 4915 Broadway Realty LLC*, 58 A.D.3d 465, 869 N.Y.S.2d 905 (1st Dept. 2009); *Brierley v. Great Lakes Motor Corp.*, 41 A.D.3d 1159, 837 N.Y.S.2d 451 (4th Dept. 2007); *Wheeler v. Grande Vie Senior Living Community*, 31 A.D.3d 992, 819 N.Y.S.2d 188 (3d Dept. 2006); *Tillman v. J. DeBenedictis & Sons Building Corp.*, 237 A.D.2d 593, 655 N.Y.S.2d 1022 (2d Dept. 1997); *Zima v. North Colonie Cent. Sch. Dist.*, 225 A.D.2d 993, 639 N.Y.S.2d 558 (3d Dept. 1996).

³⁷ *Joseph v. Pitkin Carpet, Inc.*, 44 A.D.3d 462, 843 N.Y.S.2d 586 (1st Dept. 2007); *Washington v. Cmty. Mut. Sav. Bank*, 308 A.D.2d 444, 764 N.Y.S.2d 191 (2d Dept. 2003), *appeal denied* 1 N.Y.3d 504, 775 N.Y.S.2d 781 (2003); *Rodgers v. Earl*, 249 A.D.2d 990, 671 N.Y.S.2d 388 (4th Dept. 1998); *Zima v. North Colonie Cent. Sch. Dist.*, 225 A.D.2d 993, 639 N.Y.S.2d 558 (3d Dept. 1996); *Herrick v. Grand Union Co.*, 1 A.D.2d 911, 149 N.Y.S.2d 682 (3d Dept. 1996).

³⁸ *Wheeler v. Grande Vie Senior Living Community*, 31 A.D.3d 992, 819 N.Y.S.2d 188 (3d Dept. 2006); *Kennedy v. C & C New Main St. Corp.*, 269 A.D.2d 499, 703 N.Y.S.2d 235 (2d Dept. 2000); *see also Kay v. Flying Goose, Inc.*, 203 A.D.2d 332, 610 N.Y.S.2d 70 (2d Dept. 1994); *Spicehandler v. New York*, 279 App. Div. 755 (2d Dept. 1951), *aff'd* 303 N.Y. 946 (1952).

³⁹ *Stoddard v. G.E. Plastics Corp.*, 11 A.D.3d 862, 784 N.Y.S.2d 195 (3d Dept. 2004); *see also Mullaney v. Royalty Props., LLC*, 81 A.D.3d 1312, 916 N.Y.S.2d 545 (4th Dept. 2011); *Robinson v. Trade Link*

3. Snow Removal Contractors

Contrary to what would seem to be common sense, snow removal contractors generally owe no duty to a plaintiff to keep premises safe. Rather, the contractor's duty is to the party with whom it contracted. Generally, this will be the defendant who owns or controls the property where the plaintiff's accident occurred. As a result, plaintiffs will not have a cause of action directly against a snow removal contractor unless the contractor either created the dangerous condition or exacerbated a condition to such an extent that a dangerous condition resulted.⁴⁰

That does not mean, however, that a snow removal contractor does not owe a duty to the party with whom it contracted. The contracting party will often assert third-party claims against the snow removal contractor alleging causes of action for contribution, indemnification, and/or breach of contract.⁴¹

4. Slippery Surfaces – Cleaner, Polish, and Wax

Another common claim by a plaintiff is that the reason he or she fell was the nature of the tile or the application of some cleaner, polish, or wax. The mere fact that a floor is slippery due to the application of polish or wax does not give rise to a cause of action.⁴² To establish a cause of action, a plaintiff must prove that the wax or polish was applied in a negligent fashion.⁴³

5. Defenses

The mere fact that an accident occurred does not necessarily end in the result that a property owner or lessee is liable. Depending on the nature of the alleged defect, there are various defenses recognized by New York courts.

Am., 39 A.D.3d 616, 833 N.Y.S.2d 243 (2d Dept. 2007); *Killeen v. Our Lady of Mercy Med. Ctr.*, 35 A.D.3d 205, 827 N.Y.S.2d 19 (1st Dept. 2006).

⁴⁰ *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 746 N.Y.S.2d 120 (2002); see also *Fung v. Japan Airlines Co., Ltd.*, 9 N.Y.3d 351, 850 N.Y.S.2d 359 (2007).

⁴¹ See e.g. *McBride v. Stewart's Ice Cream Co.*, 262 A.D.2d 776, 691 N.Y.S.2d 630 (3d Dept. 1999); *Genen v. Metro-North Commuter R.R.*, 261 A.D.2d 211, 690 N.Y.S.2d 213 (1st Dept. 1999).

⁴² *Walsh v. Super Value, Inc.*, 76 A.D.3d 371, 904 N.Y.S.2d 121 (2d Dept. 2010); *Goldin v. Riverbay Corp.*, 67 A.D.3d 489, 889 N.Y.S.2d 557 (1st Dept. 2009); *Majchrzak v. Harry's Harbour Place Grille, Inc.*, 28 A.D.3d 1109, 814 N.Y.S.2d 424 (4th Dept. 2006); *Keller v. 800 North Pearl St. Assocs.*, 277 A.D.2d 775, 716 N.Y.S.2d 765 (3d Dept. 2000).

⁴³ *Murphy v. Conner*, 84 N.Y.2d 969, 622 N.Y.S.2d 494 (1994); *Walsh v. Super Value, Inc.*, 76 A.D.3d 371, 904 N.Y.S.2d 121 (2d Dept. 2010); *Majchrzak v. Harry's Harbour Place Grille, Inc.*, 28 A.D.3d 1109, 814 N.Y.S.2d 424 (4th Dept. 2006); *Keller v. 800 North Pearl St. Assocs.*, 277 A.D.2d 775, 716 N.Y.S.2d 765 (3d Dept. 2000).

a. Plaintiff Failed to Establish the Existence of a Defective Condition

In bringing forth his or her claim, a plaintiff must establish that there was a defect. If there was nothing wrong with the premises, there is no liability for injuries resulting from a fall.⁴⁴ At a bare minimum, a plaintiff is required to establish facts and conditions from which a defendant's negligence and an accident's causation may be reasonably inferred.⁴⁵ Where a plaintiff cannot specify what caused him or her to fall, summary judgment dismissing the plaintiff's complaint is warranted.⁴⁶

b. Trivial Defects

Not every arguably defective condition is sufficient to give rise to a claim of negligence. It has been recognized that the owner of a public passageway may not be cast in damages for negligent maintenance by reason of "trivial defects" on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection.⁴⁷

The issue of whether a defect is "trivial" is usually a question of fact for a jury. In determining whether a defect is trivial, a court must take into account the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect along with the time, place, and circumstances of the injury.⁴⁸

⁴⁴ *Burke v. Canyon Rd. Rest.*, 60 A.D.3d 558, 876 N.Y.S.2d 25 (1st Dept. 2009); *Ryan v. KRT Prop. Holdings, LLC*, 45 A.D.3d 663, 845 N.Y.S.2d 431 (2d Dept. 2007); *Tedesco v. Nowak*, 294 A.D.2d 911, 742 N.Y.S.2d 461 (4th Dept. 2002), *lv. denied* 98 N.Y.2d 610, 749 N.Y.S.2d 2 (2002).

⁴⁵ *See generally Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 501 N.Y.S.2d 646 (1986); *see also Schneider v. Kings Highway Hospital Center, Inc.*, 67 N.Y.2d 743, 500 N.Y.S.2d 95 (1986); *Atkinson v. Golub Corp. Co.*, 278 A.D.2d 905, 718 N.Y.S.2d 546 (4th Dept. 2000); *Bradish v. Tank Tech Corp.*, 216 A.D.2d 505, 628 N.Y.S.2d 807 (2d Dept. 2005).

⁴⁶ *Goldfischer v. Great Atl. & Pac. Tea Co., Inc.*, 63 A.D.3d 575, 880 N.Y.S.2d 485 (1st Dept. 2009); *Costantino v. Webel*, 57 A.D.3d 472, 869 N.Y.S.2d 179 (2d Dept. 2008); *McGill v. United Parcel Serv., Inc.*, 53 A.D.3d 1077, 861 N.Y.S.2d 887 (4th Dept. 2008); *Barnes v. Di Benedetto*, 294 A.D.2d 655, 741 N.Y.S.2d 607 (3d Dept. 2002).

⁴⁷ *See Trincere v. County of Suffolk*, 232 A.D.2d 400, 648 N.Y.S.2d 126 (2d Dept. 1996) *aff'd* 90 N.Y.2d 976, 665 N.Y.S.2d 615 (1997); *see also Lamarre v. Rensselaer County Plaza Assocs.*, 303 A.D.2d 914, 758 N.Y.S.2d 182 (3d Dept. 2003); *Neumann v. Senior Citizens Ctr., Inc.*, 273 A.D.2d 452, 710 N.Y.S.2d 382 (2d Dept. 2000); *Morales v. Riverbay Corp.*, 226 A.D.2d 271, 641 N.Y.S.2d 276 (1st Dept. 1996).

⁴⁸ *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 665 N.Y.S.2d 615 (1997); *see also Dery v. K Mart Corp.*, 84 A.D.3d 1303, 924 N.Y.S.2d 154 (2d Dept. 2011); *Castle v. Six Flags, Inc.*, 81 A.D.3d 1137, 917 N.Y.S.2d 386 (3d Dept. 2011); *Tese-Milner v. 30 E. 85th St. Co.*, 60 A.D.3d 458, 873 N.Y.S.2d 905 (1st Dept. 2009); *Sharpe v. Ulrich Dev. Co., LLC*, 52 A.D.3d 1319, 859 N.Y.S.2d 851 (4th Dept. 2004).

c. Open and Obvious Defects

Another defense to a claim of negligence is that the dangerous condition was there to be seen by the injured party. In New York, it is axiomatic that a premises owner has no duty to warn customers or visitors of potentially dangerous conditions that are open and obvious.⁴⁹ While it is true that landowners whose property is open to the public must maintain their property “in a reasonably safe condition to prevent foreseeable injuries” from conditions which are not readily observable, there is no duty to prevent or even to warn of conditions which can be readily perceived by the use of one’s senses.⁵⁰

⁴⁹ *Tagle v. Jakob*, 97 N.Y.2d 165, 737 N.Y.S.2d 331 (2001); *Grossman v. Target Corp.*, 84 A.D.3d 1164, 924 N.Y.S.2d 141 (2d Dept. 2011); *Sweeney v. Riverbay Corp.*, 76 A.D.3d 847, 907 N.Y.S.2d 214 (1st Dept. 2010); *Page v. State of New York*, 72 A.D.3d 1456, 902 N.Y.S.2d 199 (3d Dept. 2010); *Pelow v. Tri-Main Dev.*, 303 A.D.2d 940, 757 N.Y.S.2d 653 (4th Dept. 2003).

⁵⁰ *Tagle v. Jakob*, 97 N.Y.2d 165, 737 N.Y.S.2d 331 (2001); *Stewart v. Honeywell Int’l, Inc.*, 65 A.D.3d 864, 884 N.Y.S.2d 743 (1st Dept. 2009); *Casey v. Clemente*, 31 A.D.3d 361, 817 N.Y.S.2d 644 (2d Dept. 2006); *Leckanby v. Cohoes Cmty. Ctr., Inc.*, 299 A.D.2d 625, 749 N.Y.S.2d 336 (3d Dept. 2002).

Liability Checklist/Considerations for “Slip and Fall” Cases

1. Ice and snow

- “Storm in progress” — was it still snowing at the time of the accident?
- Was there reasonable time between the cessation of the inclement weather and plaintiff’s accident?
- “Black ice” — did defendant have notice?
- Third-party claim against snow removal contractor — contribution, indemnity, or breach of contract?

2. Slippery surfaces

- Was the cleaner, wax, or polish applied in a negligent fashion?

3. Defenses to “slip and fall” type cases

- Was there no defect or is plaintiff unable to specify the cause of his or her fall?
- Was the defect “trivial?”
- Was the defect “open and obvious?”

B. Liability for Violent Crime

Jury verdicts for liability arising from criminal acts perpetrated upon a shopper, restaurant, or hotel guest or visitor to a property can expose a business owner to significant damages. This exposure exists despite the fact that the criminal act is committed by someone over whom the defendant has little or no control. In addition to the damages for personal injury, the economic impact of a highly publicized trial can cause damage to a restaurant's, hotel's, retailer's, or retail center's reputation in the community.

Generally, an owner of property may be liable for the injuries inflicted by a trespasser who, while on the owner's property, commits a violent crime against a third person. Although owners, landlords, tenants, and "permittees" have a common law duty to minimize foreseeable dangers on their property, including the criminal acts of third parties, they are not the insurers of a visitor's safety.⁵¹

1. Control

In New York, a critical element of a cause of action premised on a defendant's alleged failure to protect a patron from foreseeable harm caused by third persons is an allegation that the plaintiff's injury occurred on defendant's property, or in an area under defendant's control. It is not enough to allege that the incident resulting in a plaintiff's injury was foreseeable where the defendant lacked the opportunity to supervise and control the assailant.⁵²

2. Foreseeability

Foreseeability is the critical point of analysis in claims for liability arising from criminal acts. Liability can arise only where the owner knew or should have known of the probability of conduct on the part of the trespasser which was likely to endanger the safety of those lawfully on the premises. In general, this notice can be established only by proof of a prior pattern of criminal

⁵¹ *Maheshwari v. City of New York*, 2 N.Y.3d 288, 778 N.Y.S.2d 442 (2004); *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 429 N.Y.S.2d 606 (1980); *see also Logan v. 530 W. 28th St., L.P.*, 48 A.D.3d 430, 849 N.Y.S.2d 804 (2d Dept. 2010); *Lomedico v. Cassillo* (Appeal No. 1), 56 A.D.3d 1271, 868 N.Y.S.2d 835 (4th Dept. 2008); *Martinez v. National Amusements, Inc.*, 50 A.D.3d 302, 855 N.Y.S.2d 82, 855 N.Y.S.2d 82 (1st Dept. 2008); *Polomie v. Golub Corp.*, 226 A.D.2d 979, 640 N.Y.S.2d 700 (3d Dept. 1996).

⁵² *Lomedico v. Cassillo* (Appeal No. 1), 56 A.D.3d 1271, 868 N.Y.S.2d 835 (4th Dept. 2008); *Urbano v. 710 Amsterdam Assoc., L.L.C.*, 39 A.D.3d 299, 835 N.Y.S.2d 35 (1st Dept. 2007); *Novikova v. Greenbriar Owners Corp.*, 258 A.D.2d 149, 694 N.Y.S.2d 445 (2d Dept. 1999); *Smith v. Fishkill Health-Related Center, Inc.*, 184 A.D.2d 963, 584 N.Y.S.2d 949 (3d Dept. 1992).

behavior.⁵³ Whether an injury was foreseeable depends on the “location, nature, and extent of ... previous criminal activities and similarity, proximity, or other relationship to the crime in question.”⁵⁴

To establish foreseeability, the criminal conduct at issue must be shown to be “reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location.”⁵⁵ Ambient neighborhood crime alone is insufficient to establish foreseeability.⁵⁶

There is no requirement that the past experience relied upon to establish foreseeability “be of the same type of criminal conduct to which plaintiff was subjected.”⁵⁷ Nonetheless, the inquiry must still be made as to the location, nature, and extent of those previous criminal acts and their similarity, proximity, or any other relationship to the crime in question. For example, in one case where it was claimed that a property owner failed to provide adequate security to prevent an attack in its parking lot, the court held that the “incidents that occurred in the parking lot and the store during the three years before plaintiff’s assault were so dissimilar in nature from the violent attack upon plaintiff as to be insufficient, as a matter of law, to raise a triable factual issue as to foreseeability.”⁵⁸

3. Joint and Several Liability

New York Civil Practice Law and Rules (CPLR) § 1601 modifies joint and several liability by providing that if a joint tortfeasor (or wrongdoer) is found to be 50 percent or less at

⁵³ *Ishmail v. ATM Three, LLC*, 77 A.D.3d 790, 909 N.Y.S.2d 540 (2d Dept. 2010); *Ortiz v. Wiis Realty Corp.*, 66 A.D.3d 429, 887 N.Y.S.2d 10 (1st Dept. 2009); *Lomedico v. Cassillo* (Appeal No. 1), 56 A.D.3d 1271, 868 N.Y.S.2d 835 (4th Dept. 2008); *Karp v. Saks Fifth Ave.*, 225 A.D.2d 1014, 639 N.Y.S.2d 575 (3d Dept. 1996).

⁵⁴ *Jacqueline S. v. City of New York*, 81 N.Y.2d 288, 598 N.Y.S.2d 160 (1993); see also *Browning v. James Props., Inc.*, 32 A.D.3d 1160, 821 N.Y.S.2d 696 (4th Dept. 2006); *Buckeridge v. Broadie*, 5 A.D.3d 298, 774 N.Y.S.2d 132 (1st Dept. 2004); *Novikova v. Greenbriar Owners Corp.*, 258 A.D.2d 149, 694 N.Y.S.2d 445 (2d Dept. 1999); *Karp v. Saks Fifth Ave.*, 225 A.D.2d 1014, 639 N.Y.S.2d 575 (3d Dept. 1996).

⁵⁵ *Novikova v. Greenbriar Owners Corp.*, 258 A.D.2d 149, 694 N.Y.S.2d 445 (2d Dept. 1999); see also *Six Anonymous Plaintiffs v. Gehres*, 68 A.D.3d 1177, 890 N.Y.S.2d 675 (3d Dept. 2009); *Maria T. v. New York Holding Co. Assoc.*, 52 A.D.3d 356, 862 N.Y.S.2d 16 (1st Dept. 2008), *lv. denied* 11 N.Y.3d 708, 868 N.Y.S.2d 600 (2008).

⁵⁶ *Six Anonymous Plaintiffs v. Gehres*, 68 A.D.3d 1177, 890 N.Y.S.2d 675 (3d Dept. 2009); *Browning v. James Props., Inc.*, 32 A.D.3d 1160, 821 N.Y.S.2d 696 (4th Dept. 2006); *Buckeridge v. Broadie*, 5 A.D.3d 298, 774 N.Y.S.2d 132 (1st Dept. 2004); *Novikova v. Greenbriar Owners Corp.*, 258 A.D.2d 149, 694 N.Y.S.2d 445 (2d Dept. 1999).

⁵⁷ *Jacqueline S. v. City of New York*, 81 N.Y.2d 288, 598 N.Y.S.2d 160 (1993); see also *Maria T. v. New York Holding Co. Assoc.*, 52 A.D.3d 356, 862 N.Y.S.2d 16 (1st Dept. 2008), *lv. denied* 11 N.Y.3d 708, 868 N.Y.S.2d 600 (2008); *Novikova v. Greenbriar Owners Corp.*, 258 A.D.2d 149, 694 N.Y.S.2d 445 (2d Dept. 1999); *Polomie v. Golub Corp.*, 226 A.D.2d 979, 640 N.Y.S.2d 700 (3d Dept. 1996).

⁵⁸ *Mulvihill v. Wegmans Food Mkts., Inc.*, 266 A.D.2d 851, 698 N.Y.S.2d 130 (4th Dept. 1999).

fault for the happening of an occurrence, then that tortfeasor's liability to the plaintiff is limited to his or her percentage of fault. CPLR § 1602 provides a list of exceptions to the limitation of liability in § 1601, one of which is that the limitation does not apply to actions requiring "proof of intent." While at first glance, this might appear to expose a landowner to liability for a portion of the plaintiff's injuries greater than the percentage for which a landowner was found liable by a jury, the Court of Appeals has held that the § 1602 exception is not applicable to cases where a defendant is alleged to have negligently provided security from a non-party assailant.⁵⁹ Therefore, if the landowner is found to be 50 percent or less liable for the happening of the criminal attack upon the plaintiff, the landowner will be entitled to the limitation of liability and will only be required to pay the percentage of damages for pain and suffering assigned to it by the jury.

4. Security Contractors

A plaintiff's claim against a company contracted to provide security services on the premises where his or her injury occurred is limited. Generally, a victim of violent crime does not have a claim against a security company retained by a property owner for the same reason discussed above on the liability of snow removal contractors — the security contractor generally only owes a duty to the landowner, the party with whom it contracted.⁶⁰

This is not to say, however, that a security contractor is free from liability with respect to a plaintiff's accident. As with snow removal contractors, the landowner who contracted for security services may be able to seek contribution or indemnity pursuant to its contract if the security contractor was negligent in the performance of its duties.⁶¹

5. Defenses

In cases where a plaintiff is injured by a criminal attack, a plaintiff's allegations of foreseeability and control may be negated where a defendant shows that it has undertaken security measures.⁶² For instance, where a defendant can show that it undertook affirmative steps

⁵⁹ *Chianese v. Meier*, 98 N.Y.2d 270, 746 N.Y.S.2d 657 (2002); *see also Roseboro v. N.Y. City Transit Auth.*, 10 A.D.3d 524, 782 N.Y.S.2d 23 (1st Dept. 2004).

⁶⁰ *Murshed v. New York Hotel Trades Council*, 71 A.D.3d 578, 898 N.Y.S.2d 25 (1st Dept. 2010); *Gerbino v. Tinseltown USA* (appeal no. 2), 13 A.D.3d 1068, 788 N.Y.S.2d 538 (4th Dept. 2004); *Dabbs v. Aron Security, Inc.*, 12 A.D.3d 396, 784 N.Y.S.2d 601 (2d Dept. 2004).

⁶¹ *Sprung v. Command Sec. Corp.*, 38 A.D.3d 478, 833 N.Y.S.2d 60 (1st Dept. 2007).

⁶² *Jacqueline S. v. City of New York*, 81 N.Y.2d 288, 598 N.Y.S.2d 160 (1993).

to prevent criminal attacks, such as the provision of security guards or operable locks that would have served to prevent the attack, a defendant may avoid liability for a plaintiff's injuries.⁶³

Further, while internal operating rules may provide some evidence of whether reasonable care has been taken and thus some evidence of the defendant's negligence or absence thereof, such rules must be excluded, as a matter of law, if they require a standard of care that transcends the area of reasonable care.⁶⁴ A defendant's internal operating rules will be admissible, however, to show the absence of any rules.⁶⁵

⁶³ *Maheshwari v. City of New York*, 2 N.Y.3d 288, 778 N.Y.S.2d 442 (2004); *Jacqueline S. v. City of New York*, 81 N.Y.2d 288, 598 N.Y.S.2d 160 (1993); *Browning v. James Props., Inc.*, 32 A.D.3d 1160, 821 N.Y.S.2d 696 (4th Dept. 2006); *M. D. v. Pasadena Realty Co.*, 300 A.D.2d 235, 753 N.Y.S.2d 457 (1st Dept. 2002); *Ragona v. Hamilton Hall Realty*, 251 A.D.2d 391, 674 N.Y.S.2d 113 (2d Dept. 1998); *Vangeli v. Schneider*, 194 A.D.2d 916, 598 N.Y.S.2d 837 (3d Dept. 1993).

⁶⁴ *See generally McCummings v. New York City Transit Auth.*, 177 A.D.2d 24, 580 N.Y.S.2d 931 (1st Dept. 1992); *Clarke v. New York City Transit Authority*, 174 A.D.2d 268, 580 N.Y.S.2d 221 (1st Dept. 1992).

⁶⁵ *See generally Banayan v. F.W. Woolworth Co.*, 211 A.D.2d 591, 622 N.Y.S.2d 24 (1st Dept. 1995).

Liability Checklist/Considerations for Criminal Activities

1. Control

- Did defendant have control over the premises where the criminal activity occurred?
- Did the assailant gain access to the premises in a foreseeable manner?
- Were there any broken or inoperable security devices?

2. Foreseeability

- Was defendant aware of prior criminal activity?
- Did the attack occur in a “high crime” neighborhood?
- Was the criminal activity at issue similar to prior criminal activities (i.e., shoplifting vs. violent crimes)?

3. Defenses

- Did defendant take reasonable measures pursuant to internal operating rules to protect the safety of the people on its premises, including functioning locks?
- Was the criminal activity at issue dissimilar to prior criminal activities?
- Was the criminal activity at issue far removed in time from prior criminal activities?
- Was the landowner less than 50 percent at fault for the criminal attack on plaintiff?
- Did defendant have a security contractor from whom contribution and/or indemnification may be sought?

C. Claims Arising From the Wrongful Prevention of Thefts

“Inventory shrinkage” is the phenomenon of the loss of retail inventory due to theft. It is a multi-billion-dollar problem faced by retailers worldwide. The biggest threat facing store owners is employee theft, which accounts for nearly half of all inventory shrinkage.⁶⁶ However, a substantial problem faced by retailers is shoplifting by non-employees. In addition to the financial impact of the loss of inventory and sales, the threat of shoplifting poses an additional problem when retailers attempt to thwart a perceived attempt to shoplift — i.e., lawsuits for assault, battery, wrongful detention, and negligence, along with claims for punitive damages. As one court stated:

“When one who operates a retail premises opens his doors to consumers and invites them in to inspect his wares and spend their funds, he has a duty to provide, at the very least, not only a physically safe place, but one in which they will not come to emotional harm, embarrassment, humiliation and mental anguish because of his negligent operation of the premises. Should a legitimate consumer have to assume a risk because there are others on the premises who may be a detriment to the vendor’s business? Must they assume the risk now of being stopped, being physically ‘pushed around’ to the accompaniment of bells and flashing lights, detention and possible arrest simply because the store and its employees are mindful only of the store’s own interests? The law has long required a property owner, a storekeeper, etc., to keep the physical premises in a reasonably safe condition without hidden ‘traps.’ Is this any less a trap? Should a lesser degree of care be required, when it is within the total control of the financially benefited defendant, to prevent harm of this kind to the consumer?”⁶⁷

1. False Arrest and Imprisonment

“False arrest is largely synonymous with false imprisonment. An action for false imprisonment lies against one who has unlawfully arrested or seized, and detained, another. The gist of the action is the unlawful detention.”⁶⁸ A plaintiff asserting a claim for false imprisonment must establish (1) that the defendant intended to confine the plaintiff, (2) that the plaintiff was conscious of the confinement and did not consent to the confinement, and (3) that the

⁶⁶ See *Retail Fraud, Shoplifting Rates Decrease, According to National Retail Security Survey*, June 15, 2010, (available at http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=945).

⁶⁷ *Keefe v. Gimbel’s*, 124 Misc. 2d 658, 478 N.Y.S.2d 745 (Civ. Ct. New York County, 1984).

⁶⁸ *Jacques v. Sears, Roebuck & Co.*, 30 N.Y.2d 466, 334 N.Y.S.2d 632 (1972).

confinement was not “otherwise privileged.”⁶⁹ As will be discussed in the section below addressing defenses of these types of claims, however, the existence of probable cause is a defense to a claim for false imprisonment. Further, where the defendant merely seeks the assistance of law enforcement authorities or provides them with information, and the police then use their own judgment to determine whether or not criminal charges should be filed without further affirmative steps by the defendant, no cause of action for false arrest or imprisonment will lie against the defendant.⁷⁰

2. Malicious Prosecution

Claims for wrongful detention that result in arrests by law enforcement personnel often also lead to claims for malicious prosecution. In order to establish a claim for malicious prosecution, a plaintiff must demonstrate that (1) a criminal proceeding was commenced, (2) that the proceeding was terminated in favor of the accused, (3) that the proceeding lacked probable cause, and (4) that the proceeding was brought out of actual malice.⁷¹

Two of these elements are susceptible to common defenses. In order to establish that the “proceeding was terminated in favor of the accused,” a plaintiff must show that the outcome of criminal proceeding was not “inconsistent” with his or her innocence. For example, where the criminal charges are where a prosecution ends because of a “compromise with the accused,” where the plaintiff’s own misconduct frustrates the prosecution’s ability to proceed with the case, or where the charges are dismissed due to defective warrants, a plaintiff’s claim for malicious prosecution may be defeated on this ground.⁷² With respect to element four in the paragraph above, malice is a difficult concept to define and is highly dependent upon the particular facts on

⁶⁹ *Martinez v. City of Schenectady*, 97 N.Y.2d 78, 735 N.Y.S.2d 868 (2001); *Burgio v. Ince*, 79 A.D.3d 1733, 913 N.Y.S.2d 864 (4th Dept. 2010); *Arrington v. Liz Claiborne, Inc.*, 260 A.D.2d 267, 688 N.Y.S.2d 544 (1st Dept. 1999); *Gordon v. May Dep’t Stores Co.*, 254 A.D.2d 327, 678 N.Y.S.2d 645 (2d Dept. 1998).

⁷⁰ *Conteh v. Sears, Roebuck & Co.*, 38 A.D.3d 314, 831 N.Y.S.2d 408 (1st Dept. 2007), *lv. denied* 9 N.Y.3d 814, 848 N.Y.S.2d 25 (2007); *Lupski v. County of Nassau*, 32 A.D.3d 997, 822 N.Y.S.2d 112 (2d Dept. 2006); *Ruggerio v. N.Y. Racing Ass’n*, 14 A.D.3d 976, 788 N.Y.S.2d 515 (3d Dept. 2005); *Lowmack v. Eckerd Corp.*, 303 A.D.2d 998, 757 N.Y.S.2d 406 (4th Dept. 2003).

⁷¹ *Martinez v. City of Schenectady*, 97 N.Y.2d 78, 735 N.Y.S.2d 868 (2001); *Diederich v. Nyack Hosp.*, 49 A.D.3d 491, 854 N.Y.S.2d 411 (2d Dept. 2008); *Weiss v. Hotung*, 26 A.D.3d 855, 809 N.Y.S.2d 376 (4th Dept. 2006).

⁷² *Martinez v. City of Schenectady*, 97 N.Y.2d 78, 735 N.Y.S.2d 868 (2001); *Breytman v. Olinville Realty, LLC*, 46 A.D.3d 484, 850 N.Y.S.2d 9 (1st Dept. 2007); *De Cicco v. Madison County*, 300 A.D.2d 706, 750 N.Y.S.2d 371 (3d Dept. 2002); *Ward v. Silverberg*, 206 A.D.2d 522, 614 N.Y.S.2d 757 (2d Dept. 1994).

the case. Generally, however, it requires a defendant to undertake some action with knowledge of the falsity of the accusation or with a motive other than seeing the interests of justice served.⁷³

3. Defamation

Claims of defamation may also arise where a shopper has been wrongfully accused of a crime. New York recognizes certain “qualified privileges” where communications are made in good faith in conjunction with the performance of security or operational functions in guarding against the theft of goods.

“A good-faith communication upon any subject matter in which the speaker has an interest, or in reference to which he has a duty, is qualifiedly privileged if made to a person having a corresponding interest or duty.”⁷⁴

4. Negligent Hiring, Retention, or Supervision of Employees

Another claim often raised by plaintiffs who claim to have been wrongfully accused of shoplifting is that the employee was improperly hired, trained, or supervised. A claim based on negligent hiring and supervision requires a showing that the defendant knew of the employee’s propensity to commit the alleged acts or that the defendant should have known of such propensity had they conducted an adequate hiring procedure. Conclusory statements in opposition to proof of pre-hiring investigation into an employee’s qualifications will be insufficient to overcome a motion for summary judgment.⁷⁵

5. Shopkeeper Immunity

Despite the many claims a wrongfully detained plaintiff may possibly bring against a defendant, New York provides some protection to retailers who attempt to detain suspected shoplifters.

⁷³ *Britt v. Monachino* (appeal no. 2), 73 A.D.3d 1462, 900 N.Y.S.2d 576 (4th Dept. 2010); *Baker v. City of New York*, 44 A.D.3d 977, 845 N.Y.S.2d 799 (2d Dept. 2007); *Weiss v. Hotung*, 26 A.D.3d 855, 809 N.Y.S.2d 376 (4th Dept. 2006); *Russ v. State Emples. Fed. Credit Union*, 298 A.D.2d 791, 750 N.Y.S.2d 658 (3d Dept. 2002).

⁷⁴ *Conteh v. Sears, Roebuck & Co.*, 38 A.D.3d 314, 831 N.Y.S.2d 408 (1st Dept. 2007), *lv. denied* 9 N.Y.3d 814, 848 N.Y.S.2d 25 (2007); *Present v. Avon Prods., Inc.*, 253 A.D.2d 183, 687 N.Y.S.2d 330 (1st Dept. 1999), *lv. dismissed* 93 N.Y.2d 1032, 697 N.Y.S.2d 555 (1999); *see, generally, Foster v. Church* 87 N.Y.2d 744, 642 N.Y.S.2d 583 (1996).

⁷⁵ *Honohan v. Martin’s Food of S. Burlington, Inc.*, 255 A.D.2d 627, 679 N.Y.S. 2d 478 (3d Dept. 1998).

a. General Business Law § 218

Under the provisions of the General Business Law §§ 217, 218, it is a defense to the claims of false arrest, defamation, assault, trespass, or invasion of civil rights where:

“the person was detained in a reasonable manner and for not more than a reasonable time to permit such investigation or questioning by a peace officer acting pursuant to his special duties, police officer or by the owner of the retail mercantile establishment . . . [or] his authorized employee or agent, and that such officer, owner, employee or agent had reasonable grounds to believe that the person so detained was ... committing or attempting to commit larceny on such premises of such merchandise.”⁷⁶

The defense is available even if the charge of larceny lodged against the plaintiff was later dismissed.⁷⁷ The party invoking the defense of General Business Law § 218, however, is required to establish the reasonableness of both the manner and length of the detainment of plaintiff and the reasonableness of his or her grounds in believing that a larceny was either attempted or committed.⁷⁸ It should be noted, however, that this defense is not available in claims for malicious prosecution or the negligent hiring, retention, or supervision of employees.⁷⁹

⁷⁶ General Business Law § 218.

⁷⁷ *Jacques v. Sears, Roebuck & Co.*, 30 N.Y.2d 466, 334 N.Y.S.2d 632 (1972).

⁷⁸ *Mullen v. Sibley, Lindsay & Curr Co.*, 51 N.Y.2d 924, 434 N.Y.S.2d 982 (1980); *Sada v. Kohl's Dept. Stores, Inc.*, 79 A.D.3d 1121, 913 N.Y.S.2d 567 (2d Dept. 2010); *Conteh v. Sears, Roebuck & Co.*, 38 A.D.3d 314, 831 N.Y.S.2d 408 (1st Dept. 2007), *lv. denied* 9 N.Y.3d 814, 848 N.Y.S.2d 25 (2007).

⁷⁹ *Sada v. Kohl's Dept. Stores, Inc.*, 79 A.D.3d 1121, 913 N.Y.S.2d 567 (2d Dept. 2010); *Conteh v. Sears, Roebuck & Co.*, 38 A.D.3d 314, 831 N.Y.S.2d 408 (1st Dept. 2007), *lv. denied* 9 N.Y.3d 814, 848 N.Y.S.2d 25 (2007).

Liability Checklist/Considerations for Wrongful Attempts to Stop Thefts

1. False arrest/imprisonment

- Intent to confine plaintiff?
- Plaintiff conscious of the confinement?
- Applicable privilege?
(i.e., General Business Law § 218, Probable Cause)
- Did defendant merely report the facts to the authorities?

2. Malicious prosecution

- Criminal proceeding commenced?
- Proceeding terminated in favor of accused?
(i.e., not a plea or defective warrant)
- Absence of probable cause?
- Existence of actual malice?

D. Food Poisoning

Food poisoning and contamination claims are often brought under a variety of theories including negligence, product liability, and breach of warranty. A negligence cause of action against a restaurateur is predicated upon its duty to exercise care and prudence respecting the fitness of the food it furnishes for consumption. A defendant will be held liable if a plaintiff can show that it is reasonably certain that the product, when put to normal use, would be dangerous if it were defective.⁸⁰ As in any personal injury action, a plaintiff must show a causal relationship between the contaminated product and their illness. That evidence must be in the form of competent medical proof.⁸¹

E. Construction-Related Accidents (New York Labor Law)

Liability for accidents arising from the construction, demolition, alteration, and repair of “structures” are governed under the Safe Place to Work sections of the New York Labor Law. The scope and extent of the liabilities imposed by these sections have been the subject of great debate over the years. Property owners and tenants in New York, as well as their contractors, are well-advised to have a working knowledge of the provisions of Labor Law §§ 200, 240 (1), and 241 (6). Jury verdicts in New York are frequently the highest in the context of construction site accident cases.

Sections 240 (1) and 241 (6) do not apply to injuries that occur during the course of routine “maintenance.” For example, while replacing a light bulb may not be a covered activity, anything of a structural nature — for example, the installation of a new fixture — may fall within the protections of the Labor Law.

1. Labor Law § 200

Section 200 of the Labor Law is the “codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work.”⁸² As such, claims arising under this section are evaluated according to the general negligence principles previously discussed. Before the duty to provide a safe place to work may be imposed,

⁸⁰ *Luna v. Am. Airlines*, 676 F. Supp. 2d 192 (S.D.N.Y. 2010); *Reinman v. T.G.I. Friday, Inc.*, 2011 N.Y. Misc. LEXIS 1465; 2011 NY Slip Op 30848U (S. Ct. Nassau County, 2011).

⁸¹ *Williams v. White Castle Systems, Inc.*, 4 A.D.3d 161, 162, 772 N.Y.S.2d 35 (1st Dept. 2004)H; *Valenti v. Great Atlantic & Pacific Tea Co.*, 207 A.D.2d 340, 615 N.Y.S.2d 84 (2d Dept. 1994); *Luna v. Am. Airlines*, 676 F. Supp. 2d 192 (S.D.N.Y. 2010).

⁸² *Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 445 N.Y.S.2d 127 (1981).

however, the defendant must be shown to “have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition.”⁸³ Where the alleged defect or dangerous condition that caused the plaintiff’s accident arises from the contractor’s methods and the owner exercises no supervisory control over the construction operation, no liability attaches to the owner under either the common law or Labor Law § 200.⁸⁴ Further, a plaintiff’s own culpable conduct is a defense to a claim under this section of the Labor Law.⁸⁵

2. Labor Law § 240 (1)

This section of the Labor Law is often referred to as the “Scaffold Law” because many of the claims brought under this section involve falls from scaffolds, ladders, and other work surfaces. Under this section, “absolute” liability is imposed for injuries suffered by workers due to falls from elevated work sites resulting from a failure of the defendant to provide the injured party with the tools and equipment to safely do the work (“falling worker cases”) or for injuries suffered where the plaintiff is struck by objects that fall due to the effects of gravity (“falling object cases”). “Absolute” liability means just that — liability is imposed regardless of fault or notice. Notably, cases in this area of law are highly dependent upon the facts of that particular matter and the mere happening of an accident, by itself, is not enough to impose liability.⁸⁶

a. Parties Liable Under § 240 (1)

Liability under Labor Law § 240 (1) (and § 241 [6], discussed below) is imposed upon owners and contractors for accidents arising in the context of erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure.⁸⁷

The mere fact of ownership is sufficient to create a non-delegable duty, regardless of whether the owner contracted for the performance of the work.⁸⁸ For the purposes of this statute,

⁸³ *Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 445 N.Y.S.2d 127 (1981); *see also Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993).

⁸⁴ *Lombardi v. Stout*, 80 N.Y.2d 290, 590 N.Y.S.2d 55 (1992); *see also Morris v. C & F Bldrs., Inc.*, 87 A.D.3d 792, 928 N.Y.S.2d 154 (3d Dept. 2011); *Timmons v. Barrett Paving Materials, Inc.*, 83 A.D.3d 1473, 920 N.Y.S.2d 545 (4th Dept. 2011), *lv. dismissed in part and denied in part*, 17 N.Y.3d 843, 930 N.Y.S.2d 538 (2011); *Austin v. Consolidated Edison, Inc.*, 79 A.D.3d 682, 913 N.Y.S.2d 684 (2d Dept. 2010); *Coyago v. Mapa Props., Inc.*, 73 A.D.3d 664, 901 N.Y.S.2d 616 (1st Dept. 2010).

⁸⁵ *Maza v. Univ. Ave. Dev. Corp.*, 13 A.D.3d 65, 786 N.Y.S.2d 149 (1st Dept. 2004); *Walter v. White-Bonn, Inc.*, 8 A.D.3d 715, 777 N.Y.S.2d 780 (3d Dept. 2004); *Waszak v. State*, 275 A.D.2d 916, 713 N.Y.S.2d 397 (4th Dept. 2000); *Posillico v. Laquila Constr.*, 265 A.D.2d 394, 696 N.Y.S.2d 507 (2d Dept. 1999).

⁸⁶ *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003).

⁸⁷ Labor Law § 240 (1).

⁸⁸ *McCarthy v. Turner Constr., Inc.*, 17 N.Y.3d 369, 929 N.Y.S.2d 556 (2011); *Bruce v. 182 Main St. Realty Corp.*, 83 A.D.3d 433, 921 N.Y.S.2d 42 (1st Dept. 2011); *Grochowski v. Ben Rubins, LLC*, 81

the owner of a construction, excavation, or demolition work site is one who has an interest in the property and who fulfilled the role of an owner by contracting to have the work performed for his or her benefit.⁸⁹

However, the status of “owner” is not limited to the persons who hold the title to the property and contract for work. Although the Court of Appeals has not expressly ruled on this matter, non-fee title owners, such as tenants, have often been deemed “owners” for the purposes of Labor Law 240 (1) (and § 241 [6]), particularly where the lessee or tenant hires the contractor to perform the work that led to the plaintiff’s injury.⁹⁰ Liability under § 240 (1) (and § 241 [6]) also applies to lessees who had the right or authority to control the work site.⁹¹

Therefore, in short, even where the owner or tenant/lessee has contracted the responsibility for work site safety to another party, the owner or tenant remains absolutely liable under both §§ 240 (1) and 241 (6).

b. “Sole Proximate Cause” Defense

Unlike Labor Law § 200, a plaintiff’s culpable conduct is not a defense to a claim under § 240 (1) unless the plaintiff’s conduct was the “sole proximate cause” of the accident and injury.⁹² As discussed above, liability under § 240 (1) is contingent upon a plaintiff proving that the accident was the result of the failure of the owner to provide the appropriate tools and equipment for the performance of the work. If the plaintiff cannot make this showing and the plaintiff’s actions were the only cause of his or her accident, liability will not be imposed under § 240 (1). For example, where a plaintiff is provided with the appropriate tools or they were readily

A.D.3d 589, 916 N.Y.S.2d 171 (2d Dept. 2011); *Arey v. M. Dunn, Inc.*, 29 A.D.3d 1137, 816 N.Y.S.2d 197 (3d Dept. 2006); *Swedenhjelm v. Safway Steel Prods.*, 19 A.D.3d 1004, 796 N.Y.S.2d 800 (4th Dept. 2005), *rearg. denied and lv. denied* 21 A.D.3d 1442, 801 N.Y.S.2d 556 (4th Dept. 2005).

⁸⁹ *Scaparo v. Village of Ilion*, 13 N.Y.3d 864, 893 N.Y.S.2d 823 (2009); *Alexander v. Hart*, 64 A.D.3d 940, 884 N.Y.S.2d 181 (3d Dept. 2009); *Kwang Ho Kim v. D & W Shin Realty Corp.*, 47 A.D.3d 616, 852 N.Y.S.2d 138 (2d Dept. 2008); *Zaher v. Shopwell, Inc.*, 18 A.D.3d 339, 795 N.Y.S.2d 223 (1st Dept. 2005); *Cornacchione v. Clark Concrete Co.*, 278 A.D.2d 800, 723 N.Y.S.2d 572 (4th Dept. 2000).

⁹⁰ See *Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y.3d 316, 880 N.Y.S.2d 879 (2009); see also *Walp v. ACTS Testing Labs, Inc./Div. of Bur. Veritas*, 28 A.D.3d 1104, 817 N.Y.S.2d 458 (4th Dept. 2006); *Beamon v. Agar Truck Sales, Inc.*, 24 A.D.3d 481, 808 N.Y.S.2d 232 (2d Dept. 2005); *Zaher v. Shopwell, Inc.*, 18 A.D.3d 339, 795 N.Y.S.2d 223 (1st Dept. 2005).

⁹¹ *Riordan v. BOCES of Rochester*, 4 A.D.3d 869, 772 N.Y.S.2d 428 (4th Dept. 2004); *Bart v. Universal Pictures*, 277 A.D.2d 4, 715 N.Y.S.2d 240 (1st Dept. 2000); see also *Guclu v. 900 Eighth Ave. Condominium, LLC*, 81 A.D.3d 592, 916 N.Y.S.2d 147 (2d Dept. 2011).

⁹² *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003).

available, but he or she chooses not to use them or misuses them, there will be no liability under this section.⁹³

3. Labor Law § 241 (6)

In relevant part, Labor Law § 241 (6) provides:

“All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision”

In order to prove liability under this section, a plaintiff must establish both an owner’s or contractor’s violation of a specific section of the New York State Industrial Code (12 N.Y.C.R.R. Part 23) and that the violation was a proximate cause of the accident and plaintiff’s injury.⁹⁴ A violation of Occupational Health and Safety Act (OSHA) standards, however, will not support a cause of action arising under § 241 (6).⁹⁵ As with Labor Law § 200, a plaintiff’s own culpable conduct or comparative negligence may be considered in the defense of a claim arising under § 241 (6).⁹⁶

⁹³ *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 790 N.Y.S.2d 74 (2004); *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003); *Torres v. Mazzone Admin. Group, Inc.*, 46 A.D.3d 1040, 848 N.Y.S.2d 381 (3d Dept. 2007), *lv. denied* 10 N.Y.3d 706, 857 N.Y.S.2d 39 (2008); *Arnold v. Barry S. Barone Constr. Corp.*, 46 A.D.3d 1390, 848 N.Y.S.2d 483 (4th Dept. 2007); *Rukaj v. Eastview Holdings, LLC*, 36 A.D.3d 519, 828 N.Y.S.2d 358 (1st Dept. 2007); *Plass v. Solotoff*, 5 A.D.3d 365, 773 N.Y.S.2d 84 (2d Dept. 2004), *lv. denied* 2 N.Y.3d 705, 780 N.Y.S.2d 310 (2004).

⁹⁴ *Toefer v. Long Island R.R.*, 4 N.Y.3d 399, 795 N.Y.S.2d 511 (2005); *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993).

⁹⁵ *Cun-En Lin v. Holy Family Monuments*, 18 A.D.3d 800, 796 N.Y.S.2d 684 (2d Dept. 2005); *Millard v. City of Ogdensburg*, 274 A.D.2d 953, 710 N.Y.S.2d 507 (4th Dept. 2000); *Schiulaz v. Arnell Constr. Corp.*, 261 A.D.2d 247, 690 N.Y.S.2d 226 (1st Dept. 1999).

⁹⁶ *Long v. Forest-Fehlhaber*, 55 N.Y.2d 154, 448 N.Y.S.2d 132 (1982); *Fusca v. A & S Constr., LLC*, 84 A.D.3d 1155, 924 N.Y.S.2d 463 (2d Dept. 2011); *Copp v. City of Elmira*, 31 A.D.3d 899, 819 N.Y.S.2d 167 (3d Dept. 2006); *Spages v. Gary Null Assocs.*, 14 A.D.3d 425, 788 N.Y.S.2d 355 (1st Dept. 2005); *Fisher v. Brown Group, Inc.*, 256 A.D.2d 1069, 683 N.Y.S.2d 773 (4th Dept. 1998), *lv. denied* 688 N.Y.S.2d 372, 1999 N.Y. App. Div. LEXIS 3095 (4th Dept. 1999).

**Liability Checklist/Considerations for
Construction-Related Accidents
(New York Labor Law)**

1. Determine status

- Owner?
- Lessee/tenant with control over the work being performed?

2. Labor Law § 200

- Did a worker suffer a gravity-related accident (i.e., “falling worker” or “falling object”)?
- Did the worker’s actions constitute comparative negligence?

3. Labor Law § 240 (1)

- Did a worker suffer an injury during the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure?
- Were the worker’s actions the “sole proximate cause” of his or her injuries?

4. Labor Law § 241 (6)

- Was a worker injured due to a violation of the New York State Industrial Code (12 N.Y.C.R.R. Part 23)?
- Was the violation a proximate cause of the worker’s injury?

Indemnification and Insurance-Procurement Agreements

Parties often attempt to shift the risk of loss stemming from a plaintiffs' claims by entering into agreements that contain indemnification provisions and require that insurance be purchased for the benefit of one or more parties. While the ability to shift losses may vary with the particular circumstances involved and the language of the agreement at issue, the following is an overview of the law covering indemnification and insurance-procurement agreements.

A. Indemnification

Where sophisticated parties negotiate at arm's length to enter into agreements containing an indemnification clause, such a clause is valid and enforceable inasmuch as the parties have allocated the risk of liability to third parties between themselves.⁹⁷ Further, it is a basic premise of contract law that an agreement will be interpreted so as to carry out the intentions of the parties involved.⁹⁸

Indemnification agreements commonly impose a duty to defend (discussed below) and indemnify. As a general rule, indemnification agreements will require the indemnitor (the party paying indemnity) to "defend, indemnify, and hold harmless" the indemnitee (the party receiving indemnity) from claims made against the indemnitee arising out of the acts or business of the indemnitor. For example, an owner may require a contractor to indemnify the owner for accidents arising from the contractor's work.

1. Statutory Limitations on Indemnification

Often, particularly in situations where the parties have unequal bargaining power, the proposed indemnitee will seek full indemnification for all claims, including claims resulting from the indemnitee's own negligence. As a matter of public policy, due to possible unfair bargaining power, New York makes void certain contracts that require the indemnitor to indemnify the

⁹⁷ *Hogeland v. Sibley, Lindsay & Curr Co.*, 42 N.Y.2d 153, 397 N.Y.S.2d 602 (1977); *Wagner v. Ploch*, 85 A.D.3d 1547, 925 N.Y.S.2d 273 (4th Dept. 2011); *Berger v. 292 Pater Inc.*, 84 A.D.3d 461, 922 N.Y.S.2d 346 (1st Dept. 2011); *DiBuono v. Abbey, LLC*, 83 A.D.3d 650, 922 N.Y.S.2d 101 (2d Dept. 2011); *La Vack v. National Shoes, Inc.*, 124 A.D.2d 352, 507 N.Y.S.2d 293 (3d Dept. 1986).

⁹⁸ *Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 634 N.Y.S.2d 669 (1995); *Westport Ins. Co. v. Altertec Energy Conservation, LLC*, 82 A.D.3d 1207, 921 N.Y.S.2d 90 (2d Dept. 2011); *Diaz v. Lexington Exclusive Corp.*, 59 A.D.3d 341, 874 N.Y.S.2d 77 (1st Dept. 2009); *Manns v. Norstar Bldg. Corp.*, 4 A.D.3d 799, 771 N.Y.S.2d 438 (4th Dept. 2004).

indemnitor for the indemnitor's own negligence. New York General Obligations Law § 5-321 voids any lease that requires a tenant to indemnify a landlord for the landlord's own negligence.⁹⁹ Similarly, General Obligations Law § 5-322.1 invalidates any construction contracts that require the contractor to indemnify an owner for the owner's own negligence.¹⁰⁰

2. Partial Indemnification

To avoid having an entire indemnification provision or agreement voided, New York courts recognize "partial indemnification."¹⁰¹ Under this concept, indemnification provisions are drafted so as to avoid a contractual requirement that the indemnitor indemnify the indemnitor for the indemnitor's own negligence. To avoid problems with the enforcement of a contractual indemnification provision, the phrase "To the fullest extent permitted by law" has been held to satisfy the requirements of the statutes.¹⁰²

B. Insurance Procurement Agreements

To avoid problems with indemnification provisions and to make sure that there is a financially responsible entity to satisfy claims, contracts and leases frequently contain insurance procurement provisions. It is well-established law that a contract to procure or provide insurance coverage is distinct from and treated differently than an agreement to indemnify.¹⁰³ In addition, a provision in a contract requiring that a party be named as an additional insured has been interpreted as meaning that the additional insured is insured for "all liability arising out of the

⁹⁹ N.Y. Gen. Oblig. Law § 5-321.

¹⁰⁰ N.Y. Gen. Oblig. Law § 5-322.1.

¹⁰¹ *Brooks v. Judlau Contr., Inc.*, 11 N.Y.3d 204, 869 N.Y.S.2d 366 (2008); *Miranda v. Norstar Bldg. Corp.*, 79 A.D.3d 42, 909 N.Y.S.2d 802 (3d Dept. 2010); *Williams v. City of New York*, 74 A.D.3d 479, 907 N.Y.S.2d 1 (1st Dept. 2010); *Mendieta v. 333 Fifth Ave. Assn.*, 65 A.D.3d 1097, 885 N.Y.S.2d 350 (2d Dept. 2009).

¹⁰² *Brooks v. Judlau Contr., Inc.*, 11 N.Y.3d 204, 869 N.Y.S.2d 366 (2008); *Charney v. Lechase Constr.*, 2011 NY Slip Op 9365, 2011 N.Y. App. Div. LEXIS 9196 (4th Dept. 2011); *Miranda v. Norstar Bldg. Corp.*, 79 A.D.3d 42, 909 N.Y.S.2d 802 (3d Dept. 2010); *Williams v. City of New York*, 74 A.D.3d 479, 907 N.Y.S.2d 1 (1st Dept. 2010); *Mendieta v. 333 Fifth Ave. Assn.*, 65 A.D.3d 1097, 885 N.Y.S.2d 350 (2d Dept. 2009).

¹⁰³ *Kinney v. G. W. Lisk Co.*, 76 N.Y.2d 215, 557 N.Y.S.2d 283 (1990); *Kwang Ho Kim v. D & W Shin Realty Corp.*, 47 A.D.3d 616, 852 N.Y.S.2d 138 (2d Dept. 2008); *Cavanaugh v. 4518 Assocs.*, 9 A.D.3d 14, 776 N.Y.S.2d 260 (1st Dept. 2004); *Moll v. Wegmans Food Mkts., Inc.*, 300 A.D.2d 1041, 755 N.Y.S.2d 131 (4th Dept. 2002); *Roblee v. Corning Community College*, 134 A.D.2d 803, 521 N.Y.S.2d 861 (3d Dept. 1987), *appeal denied* 72 N.Y.2d 803, 532 N.Y.S.2d 369 (1988).

activities covered by the agreement.”¹⁰⁴ Furthermore, it is equally settled that a party who breaches its contractual obligation to obtain insurance coverage for the benefit of another party is liable to that other party for the resulting damages.¹⁰⁵

As discussed above, while ordinary contractual indemnification clauses may be found to be in violation of the public policies underlying the General Obligations Law by purporting to hold a landlord, owner, or general contractor free from liability for its own negligence, the same is not true for insurance procurement agreements.¹⁰⁶ An agreement to procure insurance for another party cannot be invalidated by alleged negligence of the party who is added, or should have been added, as an additional insured on the indemnitor’s insurance policy.¹⁰⁷

C. The Duty to Defend

The duty to provide a defense to another party can arise in the context of a lease or other agreement and in the context of an insurance policy. Under both, the duty to defend is broader than the duty to indemnify, and will often require the indemnitor to pay for all costs associated with the defense of a plaintiff’s action.

Under an insurance policy, “a duty to defend is triggered by the allegations contained in the underlying complaint. The inquiry is whether the allegations fall within the risk of loss undertaken by the insured “[and, it is immaterial] that the complaint against the insured asserts additional claims which fall outside the policy’s general coverage or within its exclusory provisions.”¹⁰⁸ Generally, the fact that a plaintiff’s action has no merit is irrelevant to the issue of whether the indemnitee is entitled to a defense.

Moreover, it is widely established law that a “contract to procure or provide insurance coverage is clearly distinct from and treated differently than an agreement to indemnify.”¹⁰⁹ In

¹⁰⁴ *Pecker Iron Works of N.Y., Inc. v. Traveler’s Ins. Co.*, 290 A.D.2d 426, 736 N.Y.S.2d 103 (2d Dept. 2002); *Clapper v. County of Albany*, 188 A.D.2d 774, 591 N.Y.S.2d 258 (3d Dept. 1992); *but see Nuzzo v. Griffin Tech.*, 212 A.D.2d 980, 624 N.Y.S.2d 703 (4th Dept. 1995).

¹⁰⁵ *Kinney v. G. W. Lisk Co.*, 76 N.Y.2d 215, 557 N.Y.S.2d 283 (1990); *Boxer v. Metro. Transp. Auth.*, 52 A.D.3d 447, 859 N.Y.S.2d 709 (2d Dept. 2008); *Antinello v. Young Men’s Christian Assn.*, 42 A.D.3d 851, 841 N.Y.S.2d 150 (3d Dept. 2007); *Moll v. Wegmans Food Mkts., Inc.*, 300 A.D.2d 1041, 755 N.Y.S.2d 131 (4th Dept. 2002); *Trokie v. York Preparatory Sch., Inc.*, 284 A.D.2d 129, 726 N.Y.S.2d 37 (1st Dept. 2001).

¹⁰⁶ *Kinney v. G. W. Lisk Co.*, 76 N.Y.2d 215, 557 N.Y.S.2d 283 (1990); *East Midwood Jewish Ctr. v. CNA Ins. Co.*, 72 A.D.3d 877, 898 N.Y.S.2d 662 (2d Dept. 2010); *ADF Constr. Corp. v. Premier Drywall, Inc.*, 295 A.D.2d 965, 743 N.Y.S.2d 350 (4th Dept. 2002).

¹⁰⁷ *Kinney v. G. W. Lisk Co.*, 76 N.Y.2d 215, 557 N.Y.S.2d 283 (1990).

¹⁰⁸ *BP A.C. Corp. v. One Beacon Ins. Group*, 8 N.Y.3d 708.

¹⁰⁹ *Roble v. Corning Community College and Deru Food Management Services, Inc.*, 134 A.D.2d 803, 804, 521 N.Y.S.2d 861 (3d Dept. 1987).

addition, a provision in a contract requiring that a party be named as an additional insured has been interpreted as meaning that the additional insured is insured for “all liability arising out of the activities covered by the agreement.”¹¹⁰ Furthermore, it is equally settled that “a party who breaches its contractual obligation to obtain insurance coverage for the benefit of another party is liable to that other party for the resulting damages.”¹¹¹ While ordinary contractual indemnification claims may be rendered volative of the public policies underlying General Obligations Law § 5-322.1 by purporting to hold an owner or general contractor free from liability for its own negligence, the same is not true for insurance procurement agreements.¹¹² An agreement to procure insurance for another party cannot be invalidated by alleged negligence of the other party.¹¹³

¹¹⁰ *Ceron v. Rector, Church Wardens & Vestry Members of Trinity Church et al.*, 224 A.D.2d 475, 476, 638 N.Y.S.2d 476 (2d Dept. 1996).

¹¹¹ *Clapper v. County of Albany, et al.*, 188 A.D.2d 774, 775, 591 N.Y.S.2d 258 (3d Dept. 1992).

¹¹² *See, Kinney v. Lisk*, 76 N.Y.2d 215, 557 N.Y.S.2d 283 (1990).

¹¹³ *See, Id.*

Damages in Premises Liability Cases

A. The Importance of Understanding Damages

At the conclusion of a trial, New York juries are presented with Special Verdict sheets. In the event of a verdict in favor of a plaintiff, the jury is asked to specify amounts for each component of damages. The components of damages concern 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.

B. Compensatory Damages

Compensatory, or “actual,” damages are intended to compensate one party after a loss or injury caused by another party.¹¹⁴ In order to warrant an award of compensatory damages, the injured party must have suffered a wrong through an invasion of a legally protected interest or right.¹¹⁵ Compensatory damages can be further divided into two subgroups: general and special damages. General damages, also known as “non-economic” or “non-pecuniary” damages, are those damages that can naturally be considered to result from the injury sustained by the party.¹¹⁶ Special damages, on the other hand, are those damages that accrue in addition to the harm that directly flowed from the primary injury suffered by the party.¹¹⁷ Special damages refer to actual costs incurred due to the underlying injury. For this reason, special damages are also referred to as “economic” or “pecuniary” damages.¹¹⁸

¹¹⁴ *Sharapata v. Town of Islip*, 56 N.Y.2d 332, 452 N.Y.S.2d 347 (NY 1982); *Sanders v. Rolnick*, 188 Misc. 627, 67 N.Y.S.2d 652 (App. Term 1947), judgment aff’d, 272 A.D. 803 71 N.Y.S.2d 896 (1st Dept. 1947).

¹¹⁵ *Palsgraff v. LIRR.*, 248 N.Y. 339, 162 N.E. 99 (NY 1928).

¹¹⁶ *Morrison v. National Broadcasting Co.*, 24 A.D.2d 284, 266 N.Y.S.2d 406 (1st Dept. 1965).

¹¹⁷ *Spewell v. NYP Holdings, Inc.*, 1 Misc.3d 847, 772 N.Y.S.2d 188 (NY Sup., 2003).

¹¹⁸ *Classen v. Ashkinazy.*, 258 A.D.2d 863, 686 N.Y.S.2d 164 (3d Dept. 1999).

1. General Damages

General damages, or non-economic losses, are the typical monetary award for all types of “pain and suffering” experienced by a party due to another’s conduct.¹¹⁹ General damages are meant to compensate a party for the many intangible and not easily quantifiable aspects of injuries, including the trauma of the harm itself, recovery time, and the lasting effects on a person’s future daily existence. This theory of damages stems from the idea that money can once again make a person whole after they have suffered a loss or injury.¹²⁰ This theory is, of course, not true, as no amount of money will repair a limb that has been broken or replace time spent in a hospital recovering from surgery. Nevertheless, the idea that money can compensate an individual for their loss is as close as our legal system can practically get to making a person whole again after being injured.¹²¹

Rather than award an injured party separately for all of the intangible elements associated with injury, a single pain and suffering award is given to compensate for all the physical and mental consequences of the underlying harm.¹²² Present and future physical pain and suffering that result from the initial injury are a main factor.¹²³ Mental anguish and the loss of enjoyment of life, if proven attributable to the underlying injury, can also be an element of an award for pain and suffering.¹²⁴ These factors can only be taken into consideration, however, if the injured party was aware of the loss he or she suffered.¹²⁵ The exact degree of awareness necessary to allow for an award has not been determined. So long as the injured party maintained at least some level of awareness of the loss of enjoyment of their life, it can be considered in the damages calculation.¹²⁶

Due to the unquantifiable nature of general damages, the calculation of the award is left in the hands of the jury. Courts are typically hesitant to overturn a jury’s

¹¹⁹ *McDougald v. Garber.*, 73 N.Y.2d 246, 538 N.Y.S.2d 937 (NY 1989).

¹²⁰ *McDougald v. Garber.*, (supra).

¹²¹ *Howard v. Lecher*, 42 N.Y.2d 109, 397 N.Y.S.2d 363 (NY 1977).

¹²² *Messina v. Basso*, 170 A.D.2d 656, 567 N.Y.S.2d 77 (2d Dept 1991).

¹²³ *Gallagher v. Samples*, 6 A.D.3d 659, 776 N.Y.S.2d 585 (2d Dept. 2004).

¹²⁴ *McDougald v. Garber* (supra); *Lamot v. Gondek*, 163 A.D.2d 678, 558 N.Y.S.2d 284 (3d Dept. 1990); *Golden v. Manhasset Condominium*, 2 A.D. 3d 345, 770 N.Y.S.2d 55 (1st Dept. 2003); NY PJI 2:280.

¹²⁵ *McDougald v. Garber* (supra).

¹²⁶ *McDougald v. Garber* (supra); *Ramos v. Shah*, 293 A.D.2d 459, 740 N.Y.S.2d 376 (2d Dept. 2002).

determination unless it is plainly excessive and flies in the face of reason or the evidence.¹²⁷

2. Special Damages

Where general damages refer to those intangible aspects of injury that are not easily quantifiable, special damages directly relate to an economic loss.¹²⁸ Special damages can only be awarded for costs incurred as a result of injury.¹²⁹ Because special damages are quantifiable, they must be specifically pled and proven by the injured party.¹³⁰ Special damages include the expenses for any medical, hospital, nursing, or therapeutic care, as well as the purchase of any supplies or equipment necessary to treat and rehabilitate the injury.¹³¹

Aside from the above expenses, lost past earnings and the impairment of future earnings as a result of injury are another form of special damages.¹³² The injured party has the burden to prove lost earnings with reasonable certainty.¹³³ Past lost earnings are usually established through tax returns or other similar documents.¹³⁴ A calculation of lost future earnings may be established by comparing the injured party's earning capacity both before and after the injury occurred.¹³⁵ In the alternative, the injured party's income post-injury can be compared with other similarly situated employees under the same employer.¹³⁶ It is also possible for a qualified expert witness, such as an economist, to provide expert testimony as to the injured party's earning potential as measured with his or her life expectancy and other circumstances.¹³⁷

¹²⁷ *Rice v. Ninacs*, 34 A.D.2d 388, 312 N.Y.S.2d 246 (4th Dept. 1970); *Calderon v. City of New York*, 184 Misc. 1057, 55 N.Y.S. 2d 416 (Sup. 1946).

¹²⁸ *Sprewell v. NYP Holdings, Inc.*, 1 Misc.3d 847, 772 N.Y.S.2d 188 (NY Sup., 2003).

¹²⁹ *Classen v. Ashkinazy*, 258 A.D.2d 863, 686 N.Y.S.2d 164 (3d Dept. 1999).

¹³⁰ *Matherson v. Marchello*, 100 A.D.2d 233, 473 N.Y.S.2d 998 (2d Dept. 1984).

¹³¹ CPLR § 3043(a)(9).

¹³² *Kozlowski v. Briggs Leasing Corp.*, 96 Misc.2d 337, 408 N.Y.S.2d 1001 (NY Sup., 1978) (past earnings); *Doe. v. State*, 189 A.D.2d 199, 595 N.Y.S.2d 592 (4th Dept. 1993) (future earnings).

¹³³ *Vasquez v. County of Nassau*, 91 A.D.3d 855, 938 N.Y.S.2d 109 (2d Dept. 2012); *Calo v. Perez*, 211 A.D.2d 607, 621 N.Y.S.2d 370 (2d Dept. 1995).

¹³⁴ *Papa v. City of New York*, 194 A.D.2d 527, 598 N.Y.S.2d 558 (2d Dept. 1993).

¹³⁵ *Butts v. Braun*, 204 A.D.2d 1069, 612 N.Y.S.2d 520 (4th Dept. 1994); *Johnston v. Colvin*, 145 A.D.2d 846, 535 N.Y.S.2d 833 (3d Dept. 1988).

¹³⁶ *Shubbuck v. Connors*, 15 N.Y.3d 871, 913 N.Y.S.2d 120 (NY 2010).

¹³⁷ *Vukovich v. 1345 Fee LLC*, 72 A.D.3d 496, 899 N.Y.S.2d 173 (1st Dept. 2010).

C. Nominal Damages

Nominal damages arise in cases where an individual has been wronged, but has not suffered any damage or harm as a result.¹³⁸ Where compensatory damages are awarded to make an injured party whole, nominal damages exist to vindicate a legal right where there has been no actual harm caused.¹³⁹ Nominal damages usually take the form of miniscule awards, such as one dollar, or at times even less. Although legally permissible, nominal damages are not generally awarded in negligence cases because proving loss or damages is an essential element of the cause of action.¹⁴⁰

D. Punitive Damages

Punitive, or “exemplary,” damages differ from compensatory damages in that where the latter exist to make an injured party whole, the former exist solely to punish the wrongdoer for egregious conduct and deter others from repeating it in the future.¹⁴¹ While the exact standard for punitive damages can vary among courts, it is clear they are awarded only in cases involving a high degree of moral culpability. Punitive damages are not allowed in cases involving ordinary negligence.¹⁴² Some courts have stated that for conduct to rise to the level of warranting punitive damages it must be “willful or wanton” or show extreme recklessness.¹⁴³ Others have stated that the conduct must be intentional or display an indifference to the rights of others.¹⁴⁴ To this extent, courts have frequently stated that punitive damages exist to protect the interests of society as a whole rather than

¹³⁸ *Mann v. Groom*, 133 Misc. 260, 231 N.Y.S. 342 (County Ct. 1927); *Curtis v. Ritzman* 7 Misc. 254, 27 N.Y.S. 259 (City Ct. 1894).

¹³⁹ *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 595 N.Y.S.2d 931 (NY 2010).

¹⁴⁰ *Kronos, Inc. v. AVX Corp.*, (supra); See generally: *Am. Jur.2d Damages §16*.

¹⁴¹ *Marinaccio v. Town of Clarence*, 20 N.Y.3d 506, 964 N.Y.S.2d 69 (NY 2013); *Airey v. Remmele*, 38 Misc. 3d 420, 953 N.Y.S.2d 822 (NY Sup 2012).

¹⁴² *Rice v. University of Rochester Medical Center*, 46 A.D.3d 1421, 849 N.Y.S.2d 134 (4th Dept. 2007).

¹⁴³ *Bixler v. Buckeye Pipe Lines Co.*, 309 A.D.2d 1285 (4th Dept. 2003).

¹⁴⁴ *Kopec v. Hempstead Gardens, Inc.*, 264 A.D.2d 714, 696 N.Y.S.2d 53 (2d Dept. 1999).

solely a private individual.¹⁴⁵ Like compensatory damages, punitive damages are usually decided by a jury, and courts give great deference to their decisions.¹⁴⁶

While the vast majority of premises liability matters will never rise beyond mere negligence, punitive damages may be found appropriate depending on the severity of the circumstances. If a property owner's conduct goes beyond simple negligence into something more willful or wanton, a claim for punitive damages may be sustained. Punitive damages have been most often seen in premises liability cases where it was established that the property owner had noticed a dangerous condition on their premises, knew the condition could harm others, and knew that people would be within the vicinity of the condition while it remained hazardous, yet still failed to act to remedy the condition.¹⁴⁷

E. Wrongful Death

There are two components to the damages resulting from a wrongful death: the damages suffered by the heirs of the decedent and the damages suffered by the decedent prior to his or her death. The calculation of the damages available to the distributees of the decedent's estate, the "wrongful death" damages, is codified under Section 5-4.3 of the Estate Powers and Trust Law.

1. Pecuniary Loss

Damages for wrongful death are limited to the "pecuniary losses" suffered by the distributees. Those losses include the reasonable medical expenses incurred in treating the decedent before his or her death and funeral expenses.¹⁴⁸ Damages for loss of consortium and society and companionship are not recoverable.¹⁴⁹

¹⁴⁵ *Laurie Marie M. v. Jeffrey T.M.*, 159 A.D.2d 52, 559 N.Y.S.2d 336 (2d Dept. 1990) *aff'd*, 77 N.Y.2d 981, 571 N.Y.S.2d 907; *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 386 N.Y.S.2d 831 (NY 1976).

¹⁴⁶ *Ferguson v. City of New York*, 73 A.D.3d 649, 901 N.Y.S.2d 609 (1st Dept. 2010); *Randi A.J. v. Long Island Surgi-Center*, 46 A.D.3d 74, 842 N.Y.S.2d 558 (2d Dept. 2007).

¹⁴⁷ See: *Solis-Vicuna v. Notias*, 71 A.D.3d 868, 898 N.Y.S.2d 45 (2d Dept. 2010); *Santiago v. Pyramid Crossgates Company*, 294 A.D.2d 789, 742 N.Y.S.2d 448 (3d Dept. 2002).

¹⁴⁸ EPTL §5-4.3(a).

¹⁴⁹ *Hinckley v. CSX Transp. Inc.*, 59 A.D.3d 969, 872 N.Y.S.2d 820 (4th Dept. 2009); *Gonzales v. New York City Housing Auth.*, 77 N.Y.2d 663, 569 N.Y.S.2d 915 (1991).

In determining what is fair and just compensation, factors that have traditionally been considered include: the age, health, and life expectancy of the decedent at the time of the injury; the decedent's future earning capacity and potential for career advancement; and the number, age, and health of the decedent's distributees. Generally, evidence of a decedent's gross income at the time of death is the standard to measure the value of income already lost and to measure the loss of future earnings.¹⁵⁰ Also included in the calculation of wrongful death damages are the loss of household services and possible inheritance.¹⁵¹

The loss of parental guidance and support of a child due to the death of a parent is considered to be an item of pecuniary loss. The losses of a child due to the death of a parent include the damages from the deprivation of the intellectual, moral, and physical training that the parent would have provided.¹⁵² A parent may also recover for the pecuniary losses resulting from the death of a child if there is evidence that the decedent-child was legally obligated to provide services to the parent or there is evidence that the decedent would have volunteered to do so.¹⁵³

2. Survivor Action

The pain and suffering of the decedent prior to his or her death is an element of damages. In order to recover damages for a decedent's pain and suffering following an accident, the plaintiff has the burden of proving that the decedent suffered some level of cognitive awareness of pain following the injury that led to his death.¹⁵⁴

Even if there is evidence that a decedent was moving or responding after an accident, the pain and suffering claim should still be dismissed unless there is also

¹⁵⁰ *Johnson v. Manhattan & Bronx Surface Transit Oper. Auth.*, 71 N.Y.2d 198, 524 N.Y.S.2d 415 (1987).

¹⁵¹ *Motelson v. Ford Motor Co.*, 101 A.D.3d 957, 957 N.Y.S.2d 341 (2d Dept. 2012).

¹⁵² *Kenavan v. New York*, 120 A.D.2d 24, 507 N.Y.S.2d 193 *aff'd* 70 N.Y.2d 558 (1987); *Zygmunt v. Berkowitz*, 301 A.D.3d 593, 754 N.Y.S.2d 313 (2d Dept. 2003).

¹⁵³ *Public Admin. of Kings County v. U.S. Fleet Leasing, Inc.*, 159 A.D.2d 331, 552 N.Y.S.2d 608(1st Dept. 1990).

¹⁵⁴ *Cummins v. County of Onondaga*, 84 N.Y.2d 322, 324-325 (1994); *McDougal v. Garber*, 73 N.Y.2d 246, 538 N.Y.S.2d 937 (1989).

evidence that the decedent was aware and experiencing pain, such as crying out or seeking aid.¹⁵⁵

¹⁵⁵ *Williams v. New York*, 169 A.D.2d 713, 714-715 (2d Dept. 1991); *Parker v. McConnell Manuf.*, 40 A.D.2d 587; 335 N.Y.S.2d 374 (4th Dept. 1972); *see also, Smith v. Hub Manuf.*, 634 F. Supp. 1505 (NDNY 1986).

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