STATE OF CONNECTICUT RETAIL COMPENDIUM OF LAW

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THE FOLLOWING IS A SYNOPSIS OF CERTAIN AREAS OF CONNECTICUT LAW. IT IS DESIGNED TO PROVIDE A BRIEF REFERENCE OF SOME BASIC LEGAL PRINCIPLES AND FOR USE AS A STARTING POINT FOR FURTHER RESEARCH. IT IS NOT INTENDED TO AND DOES NOT PROVIDE A COMPLETE OR COMPREHENSIVE DESCRIPTION AND SHOULD NOT BE CONSTRUED AS PROVIDING LEGAL ADVICE TO THE READER. FURTHER, AS THE LEGAL LANDSCAPE IN CONNECTICUT CHANGES OFTEN, THE CITATIONS CONTAINED IN THIS COMPENDIUM WILL COMMAND FURTHER RESEARCH FROM TIME TO TIME.

Retail, Restaurant, and Hospitality Guide to Connecticut Premises Liability

I. Introduction

A. The Connecticut State Court System

The Connecticut state court system consists of four courts: the Supreme Court, the Appellate Court, the Superior Court, and the Probate Court. The trial-level court in Connecticut is the Superior Court. Each county in the state has a Supreme Court that hears all manners of civil disputes. The state is divided into 13 judicial districts, 20 geographical areas, and 12 juvenile districts. The Superior Court also has housing courts in six of the judicial districts (Hartford, New Britain, Bridgeport, Norwalk, and Waterbury) dedicated to residential and commercial landlord-tenant disputes. Connecticut also has a Complex Litigation Docket in Stamford, Hartford, and Waterbury. The Complex Litigation Docket is generally comprised of complex civil litigation involving multiple litigants and legally intricate issues. An individual judge presides over all aspects of the litigation, including trial.

The intermediate court is the Appellate Court. There are nine Appellate Court judges, one of whom is designated by the Chief Justice to be Chief Judge. Generally, three judges hear and divide each case, although they may also sit *en banc*, in which all members hear the case.

The Supreme Court is the highest appellate court in the state. It consists of the Chief Justice and six associate justices. Generally, a panel of five justices hears and decides each case, but on occasion the court may sit *en banc* as a full court of seven.

Connecticut has a merit plan for selecting judges. The judicial selection commission recommends qualified candidate to the governor for nomination. The governor's nominee must them be appointed by the general assembly. Judges serve eight-year terms and must be re-nominated and reappointed. The judicial selection commission also evaluates incumbent judges who seek reappointment. Judges in the probate system, however, are elected.

Connecticut has its own code of civil procedure, which is markedly different from the Federal Rules of Civil Procedure. The Connecticut Practice Book is divided into 84 chapters that articulate the rules of practice and procedure in the superior court in all civil and family actions whether at law, in equity, or otherwise, in all criminal proceedings,

juvenile matters and appellate proceedings. Connecticut, unlike the Federal Rules, is a fact pleading state, requiring a plain and concise statement of the material facts on which the pleader relies.

Connecticut does not have a comprehensive statewide statute for all methods of alternative dispute resolution ("ADR"). In general, state statutes and Connecticut Rules of Civil Procedure make ADR optional for civil cases pending in the Superior Court. Arbitration is available for any civil case where the judgment is expected to be less than $50,000 and a claim for a trial by jury and a certificate of closed pleadings has been filed. Arbitration is authorized pursuant to Conn. Gen. Stat. §§ 52-549u to 52-549aa and the parties have a right to a trial *de novo*.

Court annexed mediation, pursuant to Conn. Gen. Stat. § 51-5a is available to civil and family cases which will require more than a half-day pretrial conference to settle. Referral may be made by a judge or by request of the parties at any time, subject to the approval of the Presiding Judge or his or her designee. Family service mediation to address dissolution cases on the limited contested and contested case lists may address child custody, visitation, property and financial issues.

B. Connecticut Federal Courts

Connecticut contains one federal court district with three locations across the state: Bridgeport, Hartford, and New Haven. The District of Connecticut has eight active judges, six senior judges, and five magistrate judges.

II. Negligence

A. General Negligence Principles

By definition, negligence is the "violation of a legal duty which one person owes to another."[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.

Premises liability claims arising out of personal injuries to individuals are governed by the negligence statutes of limitation under Conn. Gen. Stat. § 52-584 (2012): the action shall be brought within two years from the date the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, excepting no such action may be brought more than three years from the date of the act or omission complained of.

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. For a breach of duty to be found and liability to arise, the harm created must be foreseeable to the landowner.

> It is, of course, the duty of a landlord to use reasonable care to keep in a reasonably safe condition the parts of the premises over which he reserves control. The burden was on the plaintiff to prove a breach of this duty by the defendants in order to establish a basis for her recovery. The ultimate test of the duty is to be found in the reasonable foreseeability of harm resulting from a failure to exercise reasonable care to keep the premises reasonably safe.[2]

Connecticut generally recognizes various categories of invitees: (1) public invitee – one invited to enter or remain on the premises as a member of the public for public purposes; (2) business/social invitee – one who is invited onto a property for the direct or indirect purpose of a business or social dealing with the possessor of the land.[3] Under Conn. Gen. Stat. § 52-557a, "the standard of care owed to a social invitee shall be the same as the standard of care owed to a business invitee."[4] The possessor of land owes an invitee the

[1] Connecticut Pattern Jury Instructions, 3.6-1 (2013); *Phaneuf v. Berselli*, 119 Conn. App. 330, 336, 988 A.2d 344 (2010).
[2] *Noebel v. Housing Authority of New Haven*, 146 Conn. 197, 200 (1959).
[3] *Sevigny v. Dibble Hollow Condo Ass'n*, 76 Conn. App. 306, 320 (2003).
[4] *Id.*

duty to inspect the premises and install safeguards to render the premises "reasonably safe."[5]

B. Elements of a Negligence Cause of Action

To receive damages for negligence, a plaintiff must show, "by a fair preponderance of the evidence that the actor owed a duty of care to the victim, which was breached by the actor's failure to meet the standard of care arising therefrom and that the breach was the proximate cause of actual harm suffered by the victim."[6]

1. Duty

While there is no clear test for when a defendant owes a duty to a plaintiff, Connecticut courts use the following, two-pronged test: (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case.[7] Thus, "[t]he test for determining legal duty is a two-pronged analysis that includes: (1) a determination of foreseeability; and (2) public policy analysis."[8]

2. Notice

For a plaintiff to recover for the breach of a duty owed to him as a business invitee, he must allege and prove that the defendant either had actual notice of the presence of the specific unsafe condition which caused [his injury] or constructive notice of it. The notice, whether actual or constructive, must be notice of the very defect which occasioned the injury and not merely of conditions naturally productive of that defect even though subsequently in fact producing it. In the absence of allegations and proof of any facts that

[5] *Warren v. Stancliff*, 157 Conn. 216, 218 (1968).
[6] *Coburn v. Lenox Homes, Inc.*, 186 Conn. 370, 372 (1982).
[7] *Lodge v. Arett Sales Corporation*, 246 Conn. 563, 572, 717 A.2d 215 (1998).
[8] *Monk v. Temple George Associates, LLC*, 273 Conn. 108, 114, 869 A.2d 179 (2005).

would give rise to an enhanced duty, a defendant is held to the duty of protecting its business invitees from known, foreseeable dangers.[9]

a. Actual Notice

Liability for a dangerous condition may be imposed where there is evidence that the property owner was aware of the dangerous condition prior to the plaintiff's injury.[10] Actual notice may be implied when the landowner or one of its agents created the dangerous situation.[11] 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.

b. Constructive Notice

A property owner will be held liable for defects which should have been discovered through reasonable inspection, that is, it will be imputed with constructive notice.[12] Constructive notice is triggered by a general duty of inspection or, when the dangerous condition is not apparent to the human eye, some other factor that would alert a reasonable person to the hazard.[13]

To establish constructive notice, the determinative question is whether the defective condition existed for such a length of time that the defendant, in the exercise of reasonable care, should have discovered it and remedied it.[14] Circumstantial evidence can establish constructive notice by leading a jury to infer that the defendant should have detected and remedied the condition.[15] For example, the Appellate Court upheld a finding of constructive notice when spilled aftershave lotion had remained on the floor of a store for more than fifteen minutes.[16]

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[9] *DiPietro v. Farmington Sports Arena, LLC*, 306 Conn. 107, 117, 49 A.3d 951, 957 (2012); *Baptiste v. Better Val–U Supermarket, Inc.*, 262 Conn 135, 140, 811 A.2d 687 (2002).
[10] *DiPietro,* 106 Conn. at 117;.
[11] *Fuller v. First Nat'l Supermarkets, Inc.* 38 Conn. App. 299, 301 (1995);.
[12] *Sokolowski v. Medi-Mart, Inc.*, 24 Conn. App. 276 (1991).
[13] *DiPietro*, 306 Conn. at 118.
[14] *Morris v. King Cole Stores, Inc.*, 132 Conn. 489, 492-93, 45 A.2d 710 (1946).
[15] *Id.*
[16] *Sokolowski*, 24 Conn. App. At 287.

c. "Mode of Operation" Rule

A plaintiff may sometimes recover without having to show any actual or constructive knowledge on the part of the defendant. Connecticut follows the "mode of operation" rule, under which a business invitee may recover for an injury sustained as a result of a dangerous condition on the premises of a business without a showing that the business had actual or constructive notice of that condition, if the condition was reasonably foreseeable and the business failed to take reasonable measures to discover and remove it.[17]

C. The "Out-of-Possession Landlord"

Under most commercial leases, responsibility for the interior of a leased space is the responsibility of the tenant. Since possession or control for premises is the legal basis for premises liability, a landlord who is not in possession is usually not liable to persons injured on the leased property—the tenant, who is in possession, would be liable.[18]

But, an "out of possession landlord" can be found liable for injury caused by negligently created conditions on a portion of the premises if there is a written lease and the intent of the parties as reflected in the lease indicates that the landlord has reserved control on that portion of the premises.[19]

D. Negligence Per Se

Connecticut recognizes the doctrine of negligence per se. "Negligence per se operates to engraft a particular legislative standard onto the general standard of care imposed by traditional tort law principles, *i.e.*, that standard of care to which an ordinarily prudent person would conform his conduct. To establish negligence, the jury in a negligence per se case need not decide whether the defendant acted as an ordinarily prudent person would have acted under the circumstances. They merely decide whether the relevant statute or regulation has been violated. If it has, the defendant was negligent as a matter of law."[20]

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[17] *Kelly v. Stop & Shop, Inc.*, 281 Conn. 768, 775, 918 A.2d 249, 255 (2007).
[18] *See Smith v. Housing Authority*, 144 Conn. 13, 16-17, 127 A.2d 45 (1956); see generally *Connecticut Law of Torts*, Wright, Fitzgerald, Ankerman, §46, p. 108, §54, p. 139.
[19] *Martel v. Malone*, 138 Conn. 385, 388-89 (1951).
[20] *Gore v. People's Savings Bank*, 235 Conn. 360, 376 (1995) (internal quotation marks omitted).

E. Assumption of Risk

Pursuant to Conn. Gen. Stat. § 52-572h(l) (2012), the doctrine of assumption of risk was abolished in negligence actions.

III. 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

It is well established under Connecticut Law that, absent unusual circumstances, 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.[21] The concept of a "storm in progress" may include snow and freezing rain, but likely does not include "weather events" such as fog and mist, sub-zero temperatures causing water to freeze, or "light snow" has not been held sufficient to warrant application of this doctrine.[22]

Kraus v. Newton, which established this doctrine in Connecticut, did not specify what it meant by "unusual circumstances" that would bar application of the storm in progress doctrine. However, Connecticut courts have suggested that some considerations that may constitute "unusual circumstances" may include the fact that there is only one entry to a particular property, or if heavy accumulation of snow had ceased and only light snow continued.[23] The Appellate Court has held that a property owner had constructive notice of ice patches on his driveway when the temperature dropped below freezing for at least three hours before the plaintiff's injury, allowing the owner reasonable time to inspect his property.[24]

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

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[21] *Kraus v. Newton*, 211 Conn. 191, 197-98 (1989); *Umsteadt v. GR Realty*, 123 Conn. App. 73, 79 (2010).
[22] *Khan v. Quinnipiac University*, Superior CV085022873S, 2010 Conn. Super. LEXIS 2323 at *3 (Conn. Super. Ct. Sept. 10, 2010), *Powell v. Ansonia Acquisitions I, LLC*, KNLCV126011554S, 2013 Conn. Super. LEXIS 2606 (Conn. Super. Ct. Nov. 14, 2013).
[23] *Cooks v. O'Brien Properties, Inc*., 48 Conn. App. 339, 344 (1998); *see also Sinert v. Olympia & York Development Co.*, 38 Conn. App. 844, 847-50, 664 A.2d 791,cert. denied, 235 Conn. 927, 667 A.2d 553 (1995) (holding that defendant's status as a commercial property owner does not constitute an unusual circumstance within the decisional parameters of *Kraus*).
[24] *Kurti v. Becker*, 54 Conn. App. 335, 339 (1999).

occurred while the storm was still in progress.[25] This standard recognizes the realities of problems caused by winter weather, specifically that removal while a storm was ongoing would be "inexpedient and impractical."[26]

A defendant may be found liable if the plaintiff's injuries are found to be the result of a previous storm, and not the ongoing storm.[27]

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. Connecticut courts recognize that "black ice" is very difficult to see, but a property owner can be found to have had constructive knowledge of the black ice, based on the surrounding conditions, for instance, the ambient air temperature.[28]

3. Snow Removal Contractors

Under some circumstances, a plaintiff claiming injuries resulting from a slip and fall on icy and snowy property is owed a duty of care by an independent contractor hired by the possessor of the property to maintain the property in a safe condition.[29] A contractor may be directly liable to the plaintiff if he is found to have breached a contract "to render services to another which he should recognize as necessary for the protection of a third person."[30]

However, a defendant that owns or controls property may not bring an apportionment claim against a contractor hired to carry out the defendant's nondelegable duties.[31] Connecticut courts have held that a property owner has a non-delegable duty to keep his property safe from foreseeable slip and fall injuries, and cannot bring an apportionment claim against an independent snow removal contractor. Should the owner or occupier of the premises hire a contractor to maintain the property, the owner or occupier is vicariously liable for the consequences arising from that contractor's tortious conduct.

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[25] *Kraus,* 211 Conn. 191.
[26] *Id.* at 198.
[27] *Cooks*, 48 Conn. App. at 347.
[28] *Riccio v. Harbour Vill. Condo. Ass'n, Inc.*, 281 Conn. 160, 165, 914 A.2d 529, 533 (2007).
[29] *Gazo v. City of Stamford,* 255 Conn. 245, 246, 765 A.2d 505, 507 (2001).
[30] *Id.* at 253.
[31] *Smith v. Town of Greenwich*, 278 Conn. 428, 460, 899 A.2d 563, 583 (2006)

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. To establish a cause of action, a plaintiff must prove that the wax or polish was applied in a negligent fashion.[32] As with other premises liability claims, the person who fell on the slippery surface must also show that the property owner had actual or constructive knowledge of the slippery conditions.[33]

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 Connecticut courts.

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

In bringing a negligence claim against a property owner, a plaintiff must establish: "(1) the existence of a defect, (2) that the defendant knew or in the exercise of reasonable care should have known about the defect; and (3) that such defect had existed for such a length of time that the [defendant] should, in the exercise of reasonable care, have discovered it in time to remedy it."[34]

If there was nothing wrong with the premises, there is no liability for injuries resulting from a fall.[35] Where a plaintiff cannot specify what caused him or her to fall, summary judgment dismissing the plaintiff's complaint is warranted.[36]

b. Slight Defects

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[32] *Hendsey v Southern New England Telephone Co.*, 128 Conn. 132, 134 (1941); *Gray v. Fitzgerald & Platt, Inc.*, 144 Conn. 57, 58 (1956).
[33] *Jordan v. Realogy Franchise Group LLC*, CV116008264, 2013 Conn. Super. LEXIS 974, at *3-4 (Conn. Super. Ct. Apr. 25, 2013).
[34] *Martin v. Stop & Shop Supermarket Cos.*, 70 Conn. App. 250, 251, 796 A.2d 1277 (2002), citing *Cruz v. Drezek*, 175 Conn. 230, 238-39, 397 A.2d 1335 (1978).
[35] *Breton v. Tulsi, LLC*, CV116009061S, 2012 Conn. Super. LEXIS 2991, at *7-8 (Conn. Super. Ct. Dec. 7, 2012).
[36] *Id.*

Not every arguably defective condition is sufficient to give rise to a claim of negligence. Connecticut law recognizes that some defects are so slight as to not give rise to any liability on the part of the property owner.[37] For example, the rationale that a municipality is not bound to keep its streets and sidewalks absolutely safe for persons passing over them; that its duty is only to exercise ordinary care to keep the sidewalks reasonably safe for persons exercising ordinary care. The issue of whether a defect is "trivial" is usually a question of fact for a jury, though in very rare circumstances a defect can be held to be too slight as a matter of law.[38]

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. A premises owner has no duty to warn customers or visitors of potentially dangerous conditions that are open and obvious.[39] However, a property owner may still be held liable even if the defect is obvious, if the court finds the owner breached its duty to maintain his property.[40] Under Connecticut law, a property owner always has a duty to inspect and maintain his premises to keep them reasonably safe. However, his duty to warn others of potentially dangerous conditions on the property is obviated when the condition is open and obvious.[41]

d. Comparative Fault/Contributory Negligence

Connecticut is a comparative fault state. As such, contributory negligence is not a bar to recovery. If the plaintiff's negligence is not greater than the combined negligence of all the defendants, he or she will not be barred from recovery; rather, the damages will be diminished in proportion to the percentage of the plaintiff's negligence.[42]

e. Sole Proximate Cause

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[37] *Alston v. City of New Haven*, 134 Conn. 686, 688 (1948).
[38] *Id.*; *Older v. Town of Old Lyme*, 124 Conn. 283 (1938).
[39] *Gargano v. Azpiri*, 110 Conn. App. 502, 509 (2008); *Warren v. Stancliff*, 157 Conn. 216 (1986).
[40] *Gargano*, 110 Conn. App. at 510.
[41] *Id.*; *Fleming v. Garnett*, 231 Conn. 77, 84 (1997).
[42] Conn. Gen. Stat. § 52-572h (2012).

In refuting that the defendant's conduct was the proximate cause of the plaintiff's injuries, the defendant in a negligence action may introduce evidence that the conduct of another, even if not a party in the case, was the sole proximate cause of the injury.[43]

f. Contribution

There is no common law right of contribution among joint tortfeasors in Connecticut. There are, however, certain exceptions. One of the exceptions is provided by Conn. Gen. Stat. § 52-572h (2012). In actions based on negligence, § 52-572h (g) (2012) provides a right of contribution but only after a judgment has been rendered. The right of contribution arises only after (1) the claimant has gone to final judgment, (2) the claimant has failed to collect from one or more liable defendants after making good faith efforts to do so, (3) the claimant has moved to open the judgment within one year after it becomes final for purposes of reallocation, (4) a reallocation is made by the court, and (5) a defendant is actually required to pay an amount in excess of his share of the original judgment. Conn. Gen. Stat. § 52-572(g), (h) (2012) indicate that a right of contribution does not arise until a party pays more than its proportionate share of a judgment. The right of action for contribution, which is equitable in origin, arises when, as between multiple parties jointly bound to pay a sum of money, one party is compelled to pay the entire sum. That party may then assert a right of contribution against the others for their proportionate share of the common obligation.

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

[43] *See, e.g., Wagner v. Clark Equip. Co.,* 243 Conn. 168, 177-84 (1997).

person. However, a property owner only has a duty to exercise reasonable care to those on his property. The *absolute prevention* of crime on the premises is not a necessary condition to satisfying a duty of care; that obligation is fulfilled by exercising reasonable care.[44]

1. Foreseeability

Foreseeability is the critical point of analysis in claims for liability arising from criminal acts. Liability can arise only where the property owner " knowing what he knew or should have known, [can] anticipate that harm of the general nature of that suffered was likely to result."[45] The focus of this inquiry is not on the specific manner in which the harm occurred but instead on whether the general nature of the harm which Ruiz suffered was foreseeable. "[S]o long as harm of the general nature as that which occurred is foreseeable there is a basis for liability even though the manner in which the accident happens is unusual, bizarre. . . ."[46]

The primary way in which this notice is established is by proof of a prior pattern of criminal behavior.[47] To establish foreseeability, Connecticut courts have adopted a "totality of the circumstances" rule, in which they look to evidence of the location, nature, and extent of any previous criminal acts and their similarity, proximity, or any other relationship to the crime in question.[48] Under this rule, the fact, therefore, that there is no evidence of a prior similar incident on the defendants' premises, although significant to foreseeability, is not dispositive.[49] Similarly, under the totality of the circumstances approach, a history of non-violent crime on the defendant's premises like vagrancy and public consumption of alcohol does not necessarily lead to the foreseeability of violent crimes.[50]

2. Control

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[44] *Monk v. Temple George Associates, LLC*, 273 Conn. 108, 118 (2005).
[45] *See Monk*, 273 Conn. at 115, citing *Jaworski v. Kiernan*, 241 Conn. 399, 406-07 (1999).
[46] *Ruiz v. Victory Properties, LLC*, 135 Conn. App. 119, 126, 43 A.3d 186, 191 (2012) quoting *Pisel v. Stamford Hospital*, 180 Conn. 314, 333, 430 A.2d 1 (1980).
[47] *Id.*
[48] *Monk*, 273 Conn. at 121.
[49] *Id.*
[50] *Doe v. Manheimer*, 212 Conn. 748, 762 (1989). (But see, Stewart v. Federated Dep't Stores, 234 Conn. 597, 608 (1995)).

In Connecticut, a property owner cannot be held liable for harm resulting from circumstances over which he has no control. In other words, 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.[51] For example, a landlord has control over the premises, but does not have control over the behavior and actions of his individual tenants.[52]

3. Joint and Several Liability

The common law rule of joint and several liability among joint tortfeasors was abolished by statute.[53] Consequently, a defendant is liable only for the portion of damages for which he is responsible.[54] Conn. Gen. Stat. § 52-572h, however, proceeds on the premise that the defendants, between or among any of whom liability is apportioned, are at least potentially liable in differing proportions.[55]

4. 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.[56] Further, a defendant can be relieved of liability by showing that its failure to provide adequate security measures was not a cause in bringing about the plaintiff's harm – in other words, that the plaintiff would still have been harmed even if the defendant had provided additional security.[57]

A defendant can also avoid liability by proving that there was a superseding or intervening cause that led to the plaintiff's injuries.[58]

Finally, Connecticut courts are sometimes receptive to the argument that imposing a duty of care upon the defendant would violate public policy. Connecticut courts will not

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[51] *Spencer v. Nesto,* 46 Conn. Supp. 566, 576 (Conn. Super. Ct. 2000).
[52] *Id.* at 574.
[53] *See* Conn. Gen. Stat. § 52-572h (2012).
[54] *See, e.g.*, *Collins v. Colonial Penn. Ins. Co.*, 257 Conn. 718, 730 (2001).
[55] *Gazo v. City of Stamford*, 255 Conn. 245, 258 (2001).
[56] *See e.g. Stewart,* 234 Conn. at 612 (holding the owner and operator of a garage was liable for holding open to the public defective premises by not providing adequate security and lighting, despite his knowledge of previous robberies).
[57] *Gonzalez v. Martinez*, CV085019323, 2010 Conn. Super. LEXIS 547, *14 (Conn. Super. Ct. Mar. 8, 2010).
[58] *Stewart,* 234 Conn. at 610-12.

find that a property owner owes a duty of care to an injured or potentially injured party if it is against public policy. For example, it is against public policy for a hospital to owe a duty of care to a bystander who fainted after observing a medical procedure.[59] In determining whether finding a duty of care is against public policy, Connecticut courts will consider: (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions.[60]

C. Claims Arising From the Wrongful Prevention of Thefts

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.

1. False Arrest and Imprisonment

False imprisonment, or false arrest, is the unlawful restraint by one person of the physical liberty of another.[61] Any period of such restraint, however brief in duration, is sufficient to constitute a basis for liability. The fact that there was no formal arrest of the plaintiff in this case and that he remained in the custody of the police for only ten minutes would not necessarily defeat his cause of action for false imprisonment.[62] To prevail on a claim of false imprisonment, the plaintiff must prove that his physical liberty has been restrained by the defendant and that the restraint was against his will, that is, that he did not consent to the restraint or acquiesce in it willingly.[63]

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[59] *Murillo v. Seymour Ambulance Ass'n, Inc.*, 264 Conn. 474, 480, 823 A.2d 1202, 1205 (2003).
[60] *Murillo*, 264 Conn. at 480; *Perodeau v. Hartford*, 259 Conn. 729, 756-57, 792 A.2d 752 (2002); *Jaworski v. Kiernan*, 241 Conn. 399, 407, 696 A.2d 332 (1997).
[61] *Green v. Donroe*, 186 Conn. 265, 267, 440 A.2d 973, 974 (1982); *Felix v. Hall-Brooke Sanitarium*, 140 Conn. 496, 499, 101 A.2d 500 (1953).
[62] *Green*, 186 Conn. at 267.
[63] *Lo Sacco v. Young*, 20 Conn. App. 6, 19, 564 A.2d 610, 617 (1989).

Proof that there was probable cause for the underlying arrest is a defense to a claim for false imprisonment.[64] Generally, a defendant must have an intent to bring about an arrest, to constitute a claim for false arrest. The Supreme Court of Connecticut has held that a defendant was not liable for false arrest when he furnished false information to the police, which led to the plaintiff's arrest, even if he did so recklessly, because recklessness does not imply the requisite level of intent.[65] "It is not enough that the actor realizes or should realize that his actions involve a risk of causing a confinement, so long as the likelihood that it will do so falls short of a substantial certainty."[66]

2. Malicious Prosecution

In Connecticut, the causes of action for malicious prosecution and vexatious suit are essentially identical with reference to claims arising from prior civil lawsuits. The essential elements of the common law tort are: (1) want of probable cause, (2) malice, and (3) a termination of the suit in the new plaintiff's favor.[67] A withdrawal of the prior action without consideration or settlement is a termination in favor of the new plaintiff.[68]

The statutory claim for vexatious litigation is set forth in § 52-568 and provides for double damages if the prior action was without probable cause or treble damages if carried out with malicious intent to unjustly vex and trouble another person. Accordingly, the elements of common law claims of vexatious suit and statutory actions are nearly identical. An action for vexatious suit may be based on a prior administrative action or complaint terminated in favor of the new plaintiff. A separate statute, § 52-568a, allows an action for damages for a groundless suit against an owner or operator of a pick or cut-your-own agricultural operation.

An action for malicious prosecution ordinarily implies a prior criminal complaint and requires proof of want of probable cause, malice, and termination of the underlying matter in the plaintiff's favor. A plea or agreement to a program of pretrial relief, such as accelerated rehabilitation, is not a termination in favor of the new plaintiff.

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[64] *Beinhorn v. Saraceno*, 23 Conn. App. 487, 491 (1990).
[65] *Green*, 186 Conn. at 270.
[66] *Id.* at 269, quoting the Restatement (Second) of Torts, § 35, comment h.
[67] *OSP, Inc. v. Aetna Cas. & Surety Co.*, 256 Conn. 343, 361, 773 A.2d 906 (2001).
[68] *DeLaurentis v. New Haven*, 220 Conn. 225, 250, 597 A.2d 807 (1991).

Actions for vexatious suit or malicious prosecution may be brought against an attorney. The same requirements of want of probably cause applies to such an action. Suits which all reasonable lawyers agree are completely lacking in merit – that is those which lack probable cause.

3. Defamation

Claims of defamation may also arise where a shopper has been wrongfully accused of a crime. Defamation is "that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory, or unpleasant feelings or opinions against him."[69] To establish a *prima facie* case of defamation, the plaintiff must demonstrate that: "(1) the defendant published a defamatory statement; (2) the defamatory statement identified the plaintiff to a third person; (3) the defamatory statement was published to a third person and; (4) the plaintiff's reputation suffered injury as a result of the statement." Truth is a defense to defamation.[70] In Connecticut, it is settled law that wrongful accusations of theft are slander (oral defamation) *per se*.[71]

In order to prevail on his defamation claim, the plaintiff must prove that the defendants acted with actual malice. "Actual malice requires that the statement when made, be made with actual knowledge that it was false or with reckless disregard of whether it was false. . . A negligent misstatement of fact will not suffice; the evidence must demonstrate a purposeful avoidance of the truth."[72] To be actionable, the statement in question must convey an objective fact, as generally, a defendant cannot be held liable for expressing a mere opinion.[73]

Connecticut recognizes certain privileges to defamation claims, where the statement is made in good faith, without malice, in an honest belief in the truth of the statement, and in discharge of a public or private duty.[74]

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[69] *DeVito v. Schwartz*, 66 Conn. App. 228, 234 (2001) citing W. Prosser & W. Keeton, Torts (5th Ed.1984), p. 773.
[70] *See Hopkins v. O'Connor*, 282 Conn. 821, 838 (2007).
[71] *Id.* at 236; *Ventresca v. Kissner*, 105 Conn. 533 (1937).
[72] *Chadha v. Charlotte Hungerford Hospital*, 97 Conn. App. 527, 537–38 (2006).
[73] *Daley v. Aetna Life & Casualty Co.*, 249 Conn. 766, 795 (1999).
[74] *Miles v. Perry*, 11 Conn. App. 584, 594, 529 A.2d 199, 205 (1987).

4. Negligent Hiring, Retention, or Supervision of Employees

Another claim often raised by plaintiffs who claim to have been somehow harmed by actions of employees is that the employee was improperly hired, trained, or supervised. Under Connecticut law, which generally follows the Restatement of Torts, an employer may be liable for negligently supervising an employee who causes harm to a third party when the harmful conduct was reasonably foreseeable.[75] A defendant does not owe a duty of care to protect a plaintiff from another employee's tortious acts unless the defendant knew or reasonably should have known of the employee's propensity to engage in that type of tortious conduct.[76]

5. Lawful Detention Defense for Merchants

Despite the many claims a wrongfully detained plaintiff may possibly bring against a defendant, Connecticut statutory law provides some protection to retailers who attempt to detain suspected shoplifters. Conn. Gen. Stat. § 53a-119a permits reasonable detention without incurring liability:

> [E]vidence that the defendant had reasonable grounds to believe that the plaintiff was, at the time in question, committing or attempting to commit larceny or mutilating, defacing or destroying a book or other archival library materials shall create a rebuttable presumption that the plaintiff was so committing or attempting to commit larceny or mutilating, defacing or destroying a book or other archival library materials.

It follows that a shopkeeper who takes only the steps authorized by § 53a-119a(a) is not liable to a plaintiff for having taken such action. The operation of § 53a-119a(a) would be such that the plaintiff would have no right of recovery if the trier of fact found that the defendant and its employees took only the actions authorized by § 53a-119a(a), or, alternatively, that she would have no right to recover for those actions permitted by statute.[77]

6. Claims for Emotional Distress

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[75] *Jean-Charles v. Perlitz*, 937 F. Supp. 2d 276, 282 (D. Conn. 2013), citing *Gutierrez v. Thorne,* 13 Conn. App. 493, 500, 537 A.2d 527 (1988).

[76] *Roberts v. Circuit–Wise, Inc.*, 142 F.Supp.2d 211, 214 (D.Conn. 2001); *see also Gutierrez v. Thorne,* 13 Conn. App. 493, 500, 537 A.2d 527 (1988).

[77] *Barrows v. J.C. Penney Co., Inc.*, CV94-0356980, 1994 Conn. Super LEXIS 1585 (Conn. Super. Ct. June 17, 1994).

a. Intentional Infliction of Emotional Distress

A claim of intentional infliction of emotional distress must establish the following elements: (1) the defendant intended to inflict emotional distress or should have known that such was likely to result; (2) the defendant's conduct was extreme and outrageous; (3) the plaintiff's emotion distress was a direct result of the defendant's conduct; and (4) the emotion distress was severe.[78]

b. Negligent Infliction of Emotional Distress

To prevail on a claim of negligent infliction of emotional distress, "the plaintiff must prove that the defendant shall have realized that its conduct involved an unreasonable risk of causing emotional distress and that the distress, if it were caused, might result in illness or bodily harm."[79]

c. Bystander Emotional Distress

The emotional anguish experienced by a person who witnessed a parent, child or sibling being seriously injured as a result of an accident caused by another is compensable under Connecticut law.[80] In certain cases, Connecticut does recognize a cause of action for loss of parental consortium brought by a minor child.[81]

In order to recover from bystander emotion distress, these four elements must be established: (1) the bystander must be closely related to the victim; (2) the bystander's emotional injury must be caused by "contemporaneous sensory perception of the event"; (3) the injury suffered by the victim must be "substantial" – death or serious personal injury; and (4) the bystander must have suffered serious emotional injury.[82]

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

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[78] *Carrol v. Allstate Ins. Co.*, 262 Conn. 433, 442-43 (2003).
[79] *Scanlon v. Conn. Light & Power Co.*, 258 Conn. 436, 446 (2001).
[80] *Clohessy v. Bachelor*, 237 Conn. 31 (1996).
[81] *Campos v. Coleman, 319 Conn. 36 (Conn 2014) (overruling Mendillo v. Bd. Of Educ. 246 Conn. 456 (Conn. 1998).*
[82] *Clohessy*, 237 Conn. at 42.

prudence respecting the fitness of the food it furnishes for consumption. A restaurant owner "is not an insurer of the quality of the food served by him, but is liable only if he has failed to exercise the degree of care required of him in its preparation and service."[83] As in any personal injury action, a plaintiff must show a causal relationship between the contaminated product and their illness. The issue of proximate cause is ordinarily a question of fact, but in some circumstances, expert testimony by medical experts is required to establish causation.[84]

Products liability actions relating to food poisoning are often brought under Conn. Gen. Stat. §52-572m *et. seq.*,[85] which is relevant to:

> [A]ll claims or actions brought for personal injury, death or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation. . . of any product. 'Product liability claim' *shall include, but is not limited to,* all actions based on the following theories: Strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation or nondisclosure, whether negligent or innocent.

Moreover, when a products liability claim is asserted, "it shall be in lieu of all other claims against product sellers, including actions of negligence, strict liability and warranty, for harm caused by a product."[86]

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[83] *Lynch v. Hotel Bond Co.,* 117 Conn. 128, 167 A. 99 (1933).
[84] *Shay v. Adams Mill Restaurant,* CV89-0370952S, 1991 Conn. Super. LEXIS 2399 (Conn. Super. Ct. 1991).
[85] *See Primini v. Liuzzi Mkt.* CV020280469S, 2003 Conn. Super LEXIS 3115 (Conn. Super. Ct. Nov. 10, 2003).
[86] Conn. Gen. Stat. § 52-572n.

E. Construction-Related Claims

1. Negligence

Within the specific context of a negligent construction claim, the plaintiff must show "that the defendant knew or should have known of the circumstances that would foreseeably result in the harm suffered."[87] A builder is held to be "under a duty to exercise that degree of care which a skilled builder of ordinary prudence would have exercised under the same or similar circumstances."[88]

The same principal applies to a claim of professional negligence against a design professional. The extent of an architect's duty can be limited by the scope of work identified in the contract.[89]

Note, however, that recovery on certain negligent construction claims may be barred by the economic loss doctrine. The doctrine holds that a plaintiff may not recover in tort where "the relationships between the parties is a contractual one [sic] and the only losses alleged are economic."[90] While no Connecticut appellate court has employed this doctrine in the context of a construction case, various Connecticut trial courts have.[91]

2. Breach of Contract

In order for parties to recover on breach of contract claims, they must first perform their own obligations under the contract or otherwise have a legal excuse for not rendering such performance.[92] Relating specifically to construction contracts, "[s]ubstantial performance contemplates the performance of all items of a building contract except for

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[87] *Coburn v. Lenox Homes, Inc*., 186 Conn. 370, 372 (1982); *see also Greene v. Perry*, 62 Conn. App. 338, 341 (2001).

[88] *Coburn*, 186 Conn. at 381.

[89] *AIU Ins. Co. v. O'Brien*, CV095012427, 2010 Conn. Super. 620 *2-3 (Conn Sup. Ct. Mar. 12, 2010) (Architect's contract specifically provided that the architect was not to be responsible for construction means, methods, procedures, sequencing, or safety precautions since these were solely the responsibility of the contractor, thus architect had no duty to design, work, prevent, or protect in relation to the water pipes within the modular home that allegedly burst resulting in severe damage to the home).

[90] *Morganti Nat'l, Inc. v. Greenwich Hosp. Assoc.,* No. X06CV990160125, 2001 Conn. Super. LEXIS 2837, at *3 (Conn. Super. Ct., Sept. 27, 2001).

[91] *See* Morganti, 2001 Conn. Super. LEXIS, at *2 (holding that "[a]llowing a party to a broken contract to proceed in tort where only economic losses are alleged would eviscerate the most cherished virtue of contract law, the power of parties to allocate the risks of their own transactions"); *Worldwide Pres. Servs., LLC v. The IVth Shea, LLC*, No. X05CV980167154S, 2001 Conn. Super. LEXIS 308 (Conn. Super. Ct. Feb. 1, 2001).

[92] *Argentinis v. Gould*, 23 Conn. App. 9, 14 (1990) *rev'd in part on other grounds*, 219 Conn. 151 (1991).

minor details, those easily remedied by minor expenditures. Whether a building contractor has met this standard is ordinarily a question of fact for the trier."[93]

In addition to traditional contract principles, commercial construction contracts in Connecticut are governed by Conn. Gen. Stat. § 42-158i *et. seq.* These statutes enumerate various requirements and characteristics of commercial contracts, including an identification of specific terms which must be included, a prohibition against a term which purports to waive the right to claim a mechanic's lien, a regulation regarding certain required job site postings, and a provision compelling adjudication in Connecticut.

3. Breach of Warranty

Construction defect claims may involve both express and implied warranty breach claims. Statutorily recognized express warranties may be specifically created within construction contracts between a vendor and a purchaser in one of three different ways: (1) by a written affirmation of fact or promise about the construction improvement which shall be completed and which is part of the agreement between the vendor and the purchaser; (2) by any written description of the improvement which is to be completed and which is part of the agreement between the vendor and the purchaser; and (3) by a sample or a model which is put forth as part of the agreement between the vendor and the purchaser.[94] These statutory express warranties apply only where there is the purchase of real estate in fee simple.

Under this same statute, it is not necessary that any formal words (*i.e.*, "warranty" or "guarantee") be used to create an express warranty.[95] Express warranties may thus be breached even if not written specifically into the contract between the vendor and the purchaser.[96] Where construction contracts exist outside of a purchase of real estate in fee, express warranties may still exist within contracts and may still be breached.[97]

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[93] *Id.*

[94] Conn. Gen. Stat. § 47-117(a).

[95] *See* Conn. Gen. Stat. § 47-117(b).

[96] *See, e.g.*, White v. Towantic Woods Ass'ns, No. CV044001446S, 2007 Conn. Super. LEXIS 666, at *3 (Conn. Super. Ct. Mar. 6, 2007) (noting that because the defendant contractors failed to construct the building in question in a workmanlike manner, they breached their express agreement within the construction contract requiring the same).

[97] *See, e.g., Sellner v. Beechwood Constr. Co*., 176 Conn. 432, 433 (1979) (upholding the lower court's finding that defendant construction company breached the express warranty contained within the construction contract to remedy the defects in the plaintiffs' home).

Construction contracts also create a number of implied warranties which may be breached. There are four statutorily-created implied warranties in Connecticut. They are: (1) an implied warranty that the construction improvement is free from faulty materials; (2) an implied warranty that the construction improvement was constructed "according to sound engineering standards"; (3) an implied warranty to construct in a workmanlike manner; and (4) an implied warranty of habitability at the time of delivery or the time of completion of an improvement if not completed when deed is delivered.[98] Outside of the statutory context, Connecticut courts are unclear as to whether these specific warranties continue to exist. However, most situations in which issues arise regarding alleged breaches of implied warranties occur where purchasers of a new home or business development contract with construction contractors for the improvements to the real estate in question, where these statutorily-created warranties are applicable and enforceable.

Finally, Connecticut courts recognize the "Spearin Doctrine" from the seminal Supreme Court case *United States v. Spearin*, 248 U.S. 132 (1918). Under *Spearin* and its progeny, there is an implied warranty that plans and specifications produced by the owner's design team are adequate and constructible provided the contractor relying on the plans and specifications constructs the project in accordance with the plans and specifications.[99] A contractor cannot, however, rely on the Spearin Doctrine where the contractor knew or should have known there were errors in the plans and specification[100]

4. Misrepresentation and Fraud

Under Connecticut law an action for fraud can arise in any circumstance where all the following elements are present: (1) a false representation made as a statement of fact, (2) known to be untrue by the party making it, (3) that the statement was made to induce the other party to act upon it, and (4) the other party did act upon it, to his or her

[98] *See* Conn. Gen. Stat. § 47-118(a).
[99] *D'Esopo and Co. v. Bleiler*, 13 Conn. App. 621, 623-24 (1988) (contractor not liable for failure to install additional subflooring where contractor followed plans and specifications provided by the owner's architect).
[100] *See Southern New England Contracting Co. v. State*, 165 Conn. 644, 656-657 (1974) (Rejecting state's argument that contractor knew or should have known errors in plans and specifications where contractor had limited time to review plans and specifications during bidding period).

detriment.[101] Furthermore, the specific acts relied upon must be set forth in the complaint.[102]

A plaintiff in a fraud action is entitled to recover "any consequential damages resulting directly from the fraud."[103] The formula for calculating damages in a fraud action depends on whether the claimant was a fraudulently induced buyer or seller. If the claimant was a buyer then the "benefit of the bargain" formula will be applied: "the difference in value between the property actually conveyed and the value of the property as it would have been if there had been no false representation."[104] Where appropriate, such diminution in value may be determined by the cost of repairing the damage or defect.[105] The repair costs, however, must not exceed the former value of the property, nor represent an enhancement in the value of the property over what it was before it was damaged.[106]

Furthermore, while a simple breach of a construction contract does not violate the Connecticut Unfair Trade Practices Act (CUTPA)[107], the presence of fraud or

[101] *Bradley v. Oviatt*, 86 Conn. 63, 67 (1912).
[102] *Gates v. Steele*, 58 Conn. 316, 318 (1890); *Bradley v. Reynolds*, 61 Conn. 271 (1892).
[103] *Kilduff v. Adams*, 219 Conn. 314, 323–24 (1991).
[104] *Miller v. Appleby*, 183 Conn. 51, 57 (1991).
[105] *Willow Springs Condo. Ass'n, Inc. v. Seventh BRT Dev. Corp*., 245 Conn. 1, 59 (1998); see also *Belanger v. Maffucci*, No. CV054013892, 2007 Conn. Super. LEXIS 244 (Conn. Super. Ct. Jan. 26, 2007) (cost of refurbishing leaking and moldy basement was the proper measure of damages where the seller had misrepresented the condition of the drainage system).
[106] *See Willow Springs*, 245 Conn. at 59.
[107] *See, Emlee Equip. Leasing Corp. v. Waterbury Transmission, Inc*. 41 Conn. Supp. 575 (1991).

misrepresentation may be a "substantially aggravating" factor creating such a violation.[108]

[108] *See* Conn. Gen. Stat. § 42-110a, et seq.; *see also, CNF Constructors, Inc. v. Culligan Water Conditioning Co.*, No. CV92-0242302S, 1993 Conn. Super. LEXIS 2302, at *3 (denying defendant's motion to strike a CUTPA claim because allegations of misrepresentation, including the supply of used materials under the guise of new ones, were allegations of "more than a simple breach of [a] contract" to supply a water purification system for a construction project); *cf. Naples v. Keystone Bldg. & Dev. Corp.*, 295 Conn. 214 (Conn. 2010) (The trial court properly found a lack of unethical behavior or other aggravating factors necessary to establish a CUTPA violation. It properly declined to pierce the corporate veil to allow plaintiffs to hold the principal individually liable for his negligence, as there was no evidence that he used that control to commit fraud or other injustice, or that declining to pierce the corporate veil would leave plaintiffs without compensation for defendants' breach of contract.)

IV. Indemnification and Insurance-Procurement Agreements

Parties often attempt to shift the risk of loss stemming from a plaintiff's 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

Connecticut allows one party to seek indemnification from another where the other is substantially more negligent. Although there is ordinarily no right of indemnification between joint tortfeasors, where one is in control of the situation and his negligence alone is the direct, immediate cause of the injury, and the other defendant is not aware of the fault, has no reason to anticipate it, and may reasonably rely upon the former not to commit a wrong, the former may be forced to bear the burden of damages.[109]

1. Statutory Limitations on Indemnification

Connecticut courts generally disfavor contractual provisions that relieve an individual from liability for his own negligence.[110] Connecticut statutory law echoes this disfavor regarding construction contracts in Conn. Gen. Stat. § 52-572k, which provides, in pertinent part, that "(a) Any covenant, promise, agreement or understanding entered into in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of any building, structure or appurtenances thereto . . . that purports to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of such promisee . . . is against public policy and void . . ."

Significantly, however, Connecticut courts have construed this statutory prohibition, specifically the "in connection with or collateral to" language, very

[109] *See, e.g., Kyrtatas v. Stop & Shop, Inc.*, 205 Conn. 694, 697-98 (1988).
[110] See, *Griffin v. Nationwide Moving & Storage Co*., Inc., 187 Conn. 405, 413 (1982) (citing Restatement (Second) of Contracts § 195, cmt. b).

narrowly.[111] The courts have upheld certain contracts when "the language clearly and unequivocally sets forth an intention of the parties to indemnify against liability due to one's own negligence."[112] This very strict standard for construing the language of indemnity contracts requires the parties to express their intent to indemnify in "unmistakable language."[113] Notably, the Supreme Court of Connecticut has also recognized that "[i]ndemnity clauses in contracts entered into by businesses, particularly in construction contracts, should be viewed realistically as methods of allocating the cost of the risk of accidents apt to arise from the performance of the contract."[114]

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. Connecticut law recognizes that an agreement to procure insurance is not an agreement to indemnify or hold harmless. "Whereas the essence of an indemnification agreement is to relieve the promisee of liability, an agreement to procure insurance specifically anticipates the promisee's continued responsibility for its own negligence for which the promisor is obligated to furnish insurance."[115] Therefore, while ordinary contractual indemnification clauses may be found to be in violation of public policy 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.[116]

Furthermore, it is well 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

[111] *See, e.g.*, *Sandella v. Dick Corp*., 53 Conn. App. 213, 227–28 (1999) (affirming jury finding that Conn. Gen. Stat. § 52-572k did not apply to contract for construction and renovation services performed for town's wastewater treatment plant because the agreement was not "entered into in connection with or collateral to a contract or agreement relative to the construction . . . .").
[112] *Kahl v. United Techs. Corp.*, CV010808238S, 2003 Conn. Super. LEXIS 2058, at *2 (Conn. Super. Ct. July 8, 2003).
[113] *Id*. at **3–4.
[114] *Cirrito v. Turner Constr. Co*., 189 Conn. 701, 704–05 (1983).
[115] *Cappello v. Phillips*, CV085004470S, 2011 Conn. Super. LEXIS 1371 (Conn. Super. Ct. June 1, 2011).
[116] *Id.* at 49.

the resulting damages, but the insured has the burden of proving that the settlement is reasonable in proportion to the insurer's liability under its duty to defend.[117]

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, the duty to defend is triggered by the allegations contained in the underlying complaint. "In construing the duty to defend as expressed in an insurance policy, [t]he obligation of the insurer to defend does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether he has, in his complaint, stated facts which bring the injury within the coverage. If the latter situation prevails, the policy requires the insurer to defend, irrespective of the insured's ultimate liability. . . It necessarily follows that the insurer's duty to defend is measured by the allegations of the complaint."[118] Because the duty to defend has a broader aspect than the duty to indemnify and does not depend on whether the injured party will prevail against the insured, "if an allegation of the complaint falls even possibly within the coverage, then the insurance company must defend the insured."[119]

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 activities covered by the agreement."[120] Connecticut courts hold that the term "arising out of" is very broad. It is generally understood that for liability for an accident or an injury to be said to "arise out of" an occurrence, it is sufficient to show only that the accident or injury "was connected with," "had its origins in," "grew out of,"

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[117] *Capstone Bldg. Corp. v. Am. Motorists Ins. Co.,* 308 Conn. 760, 804-05, 67 A.3d 961, 992 (2013).
[118] *Royal Indem. Co. v. Terra Firma, Inc.*, 50 Conn. Supp. 563, 571, 948 A.2d 1101, 1107 (Super. Ct. 2006) *aff'd*, 287 Conn. 183, 947 A.2d 913 (2008); *see also Hartford Cas. Ins. Co. v. Litchfield Mut. Fire Ins. Co.*, 274 Conn. 457, 464, 876 A.2d 1139, 1144 (2005).
[119] *Misiti, LLC v. Travelers Prop. Cas. Co. of Am.*, 132 Conn. App. 629, 638, 33 A.3d 783, 789 (2011) *aff'd*, 308 Conn. 146, 61 A.3d 485 (2013).
[120] *Misiti LLC*, 132 Conn. App., at 640-43.

"flowed from," or "was incident to" that occurrence, in order to meet the requirement that there be a causal relationship between the accident or injury and that occurrence.[121]

Furthermore, it is settled law in Connecticut that a party who breaches his duty to defend "is liable to pay to the insured not only his reasonable expenses in conducting his own defense but, in the absence of fraud or collusion, the amount of a judgment [or settlement] obtained against the insured up to the limit of liability fixed by its policy."[122]

[121] *Id.* at 641-42, quoting *Hogle v. Hogle*, 167 Conn. 572, 577, 356 A.2d 172 (1975).
[122] *Hartford Cas. Ins. Co.*, 274 Conn. at 470.

V. Damages in Premises Liability Cases

A. Caps on Damages

Damages refer to the money paid or awarded to a plaintiff following a successful claim in a civil action. In Connecticut, there is no statutory or common law cap on damages.[123] "[T]he amount of an award [of damages] is a matter peculiarly within the province of the trier of facts . . . the ultimate test which must be applied to the verdict by the trial court is whether the jury's award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury [was] influenced by partiality, prejudice, mistake or corruption."[124] However, pursuant to Connecticut General Statue § 52-225a (2012), the economic loss portion of a jury damage award can be reduced by the amount of collateral source payments received by the injured plaintiff less amounts paid to secure the collateral benefits.[125]

B. Calculation of Damages

There is no specific formula to calculate damages in Connecticut and it varies depending on the type of case.[126] Compensatory, or "economic," damages are intended to compensate one party after a loss or injury caused by another party. In a personal injury claim, compensatory damages may include, *inter alia*, all economic losses caused by the injury, including past and probable future medical expenses, loss of the earnings that would have been earned "but for" the injury, and, if the injury resulted in a disability and the disability is permanent, the loss of future earnings through retirement. In addition to economic loss, an award may also include non-economic losses, such as pain and suffering,

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[123] *Thorsen v. Durkin Dev., LLC*, 129 Conn. App. 68, 74 (2011) (quoting *Mahon v. B.V. Unitron Mfg., Inc.*, 284 Conn. 645, 661-62, 935 A.2d 1004 (2007)).
[124] *Id.*
[125] *Cruz v. Montanez*, 294 Conn. 357, 369-70 (2009) (citing CONN. GEN. STAT. § 52-225a en route to affirming that the legislature can limit the apportionment of damages).
[126] *Am. Diamond Exch., Inc. v. Alpert*, 302 Conn. 494, 510-11 (2011) (internal citation omitted) (stating that "mathematical exactitude is [not] a precondition to an award of damages but . . . evidence, with such certainty as the nature of the particular case may permit, lay a foundation [that] will enable the trier to make a fair and reasonable estimate").

emotional anguish, and loss of enjoyment of life. Punitive damages and attorney's fees may also be calculated under certain circumstances.

1. Economic Damages

Economic damages are defined as compensation determined by the trier of fact for pecuniary losses.[127] Conn. Gen. Stat. § 52-572h(a) defines economic damages as "compensation determined by the trier of fact for pecuniary losses including, but not limited to, the cost of reasonable and necessary medical care, rehabilitative services, custodial care and loss of earnings or earning capacity excluding any noneconomic damages." Thus, economic damages refer directly to economic loss, and can only be awarded for costs incurred as a result of injury. Because economic damages are quantifiable, they must be specifically pled and proven by the injured party.

Aside from the above expenses, lost past earnings and the impairment of future earnings as a result of injury are another form of economic damages.[128] In determining whether there is a loss of earning capacity '[t]he essential question is whether the plaintiff's capacity to earn [has been] hurt.' . . . "Wages before and after an accident are only material as guides to the trier."[129] However, Connecticut law reasons that prior wages are not dispositive because the assessment of damages for lost earning capacity does not depend on the plaintiff's receipt of any wages at all because it is the capacity to earn that governs the amount of damages to which a plaintiff is entitled.[130]

Damages for lost opportunity are available in Connecticut but the circumstances in which such damages are available greatly vary and have included, *inter alia*, lost business opportunity, lost opportunity from the sell or purchase of real estate, and lost opportunity for further compensation.[131]

2. Non-Economic Damages

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[127] *Daigle,* 60 Conn.App. at 467 n. 1.
[128] *Paul v. Caporossi,* NNICV044001430S. 2006 Conn. Super. LEXIS 3263 (Conn. Super. Ct. Oct. 30, 2006).
[129] *Jerz v. Humphrey*, 160 Conn. 219, 221, 276 A.2d 884 (1971).
[130] See *Lashin v. Corcoran*, 146 Conn. 512, 514, 152 A.2d 639 (1959).
[131] *Savvidis v. City of Norwalk*, 129 Conn. App. 406, 413 (2011).

Noneconomic damages are defined as compensation determined by the trier of fact for all nonpecuniary losses including, but not limited to, physical pain and suffering and mental and emotional suffering.[132] Noneconomic 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.

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.[133] Damages may be awarded for pain and suffering, past, present and future, resulting from the injuries so long as the evidence affords a basis for a reasonable estimate by the trier of fact of the amount.[134] 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.[135] Due to the unquantifiable nature of noneconomic damages, the calculation of the award is left in the hands of the jury.

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.[136] 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.[137] Nominal damages usually take the form of miniscule awards, such as one dollar, or at times even less.

Generally, nominal damages are not recoverable in a negligence action because actual damages are a necessary element of the action. In contrast, nominal damages may be awarded in cases involving intentional torts, such as assault and battery, false

[132] *Daigle v. Metropolitan Property & Casualty Ins. Co.,* 60 Conn.App. 465, 467 n. 1, 760 A.2d 117 (2000), *aff'd,* 257 Conn. 359, 777 A.2d 681 (2001); Conn. Gen. Stat. § 52-572h (a).
[133] *Vajda v. Tulsa*, 214 Conn. 523, 539 (1990).
[134] *Id.* at 532.
[135] *See e.g., Hamernick v. Bach*, 64 Conn. App. 160, 162 (2001).
[136] *See e.g., Sessa v. Giggliotti*, 165 Conn. 620, 621-22 (1973).
[137] *Id.*

imprisonment, trespass to land, and invasion of privacy.[138] Indeed, the Connecticut Supreme Court has held that a plaintiff bringing an action in negligence is not entitled to nominal damages, as a matter of law, when the defendant has admitted liability but has denied having caused actual injury.[139]

D. Punitive Damages

Punitive damages are damages not awarded in order to compensate the plaintiff, but in order to punish, reform or deter the defendant for the conduct that damaged the plaintiff. Common law punitive damages in Connecticut are limited to the plaintiff's attorney's fees and nontaxable costs, and thus serve a function that is both compensatory and punitive.[140] Because they usually compensate the plaintiff in excess of the plaintiff's provable injuries, punitive damages are awarded only in special cases or if allowed pursuant to statute.

With respect to common law claims, there must be an intentional and wanton violation of his rights.[141] The basic requirement to justify an award of punitive damages is described in terms of wanton and malicious injury, evil motive and violence. Damages may not exceed the amount of the expenses of litigation in the suit, less taxable costs and it is essential to the award of punitive damages for the plaintiff to offer evidence of what those damages are.

Similar to a claim for common law punitive damages, most statutes that allow a claim for statutory punitive damages likewise require some evidence of reckless or wanton conduct on the part of a tortfeasor to justify an award of damages.[142] The specific statutes that allow claims for punitive damages are too numerous to list. Please speak with your Connecticut counsel.

Awards of punitive damages for common law claims are normally not insurable. Awards of punitive damages pursuant to statute may be insurable if the liability for punitive

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[138] *Right v. Breen*, 277 Conn. 364, 372, 890 A.2d 1287, 1291 (2006), quoting 2 D. Pope, Connecticut Actions and Remedies, Tort Law (1993) § 25:24, pp. 25-35 through 25-36.
[139] *Right*, 277 Conn. at 364.
[140] *Bodner v. United Servs. Auto. Ass'n*, 222 Conn. 480, 492 (Conn. 1992).
[141] *Venturi v. Savitt, Inc.*, 191 Conn. 588, 593 (Conn. 1983).
[142] *See, e.g., Bridgeport Harbour Place I, LLC v. Ganim*, 131 Conn. App. 99, 139-40 (Conn. App. Ct. 2011) (example of a statute of which punitive damages are awarded for wanton behavior).

damages is specifically assigned by statutory fiat rather than as punishment for the tortfeasor's wrongdoing.[143]

[143] *See Bodner v. United Servs. Auto. Ass'n*, 222 Conn. 480, 498 (Conn. 1992).

E. Mitigation

A plaintiff who has been injured by the negligence of another must act in good faith and use reasonable care to minimize the resulting losses and damages and to prevent any aggravation or increase of the injuries.[144] A failure of a plaintiff to mitigate his or her damages results in a reduction of damages accordingly.

F. Wrongful Death and Survival Actions

Connecticut's Wrongful Death Statute is governed by Conn. Gen. Stat. § 52-555 (2012). A wrongful death claim shall be brought within two years from the date of death, "but no more than five years from the date of the act or omission complained of."[145] This statutory right belongs to the decedent alone and damages are recoverable "for the death as for one of the consequences of the wrong inflicted upon the decedent."[146]

Connecticut's "Survival Statute" is codified in Conn. Gen. Stat. § 52-599 (2012), which essentially prevents a cause of action from being lost by the death of the possessor.[147] Under the Survival Statute, a cause of action "shall survive in favor of or against the executor or administrator of the deceased person."[148]

VI. DRAM SHOP - CONNECTICUT

A. Dram Shop Act

In Connecticut, liability for the sale of alcohol to a visibly intoxicated person falls under the provisions of the state's "Dram Shop Act," Connecticut General Statute §30-102. "General Statutes [Section] 30-102 . . . authorizes a private cause of action against the seller of alcohol to an intoxicated person who causes injury to another person due to his or her intoxication."[149] Under the statute, recovery by the injured plaintiff is limited to two hundred fifty thousand dollars ($250,000). The statute includes a written notice

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[144] *See, e.g., Burns v. Hanson*, 249 Conn. 809, 831 (Conn. 1999).
[145] *Foran v. Carangelo,* 153 Conn. 356, 360 (1966).
[146] *Id.*
[147] *Id.*
[148] Conn. Gen. Stat. § 52-599(a)(2012).
[149] *Johnson v. Raffy's Café I, LLC,* CV106002069S, 2013 Conn. Super. LEXIS 446, *7 (Conn. Super. Ct. Feb. 26, 2013).

requirement, whereby an injured person must give written notice to the alcohol vendor of his or her intent to bring a claim within 120 days of the injury, or within 180 days if the person is killed or incapacitated.

To establish a cause of action under Connecticut's Dram Shop Act, a plaintiff is required to prove that there was: (1) a sale of intoxicating liquor; (2) to an intoxicated person; and (3) who, in consequence of such intoxication, causes injury to another person or property of another.[150] Although claims arising under the Dram Shop Act frequently arise in the context of motor vehicle accidents, they also include claims for assaults.[151]

B. Sale of Alcohol

Connecticut case law has given the term "sale" of alcohol a liberal construction. Use of the word 'sell' in the Dram Shop Act is not confined to a sale in the strict sense, but is used in the sense or purvey or furnish.[152] "The purveying or furnishing of intoxicants for a price to the person or group of two or more obviously in one company constitutes such a sale to each member of the group, regardless of whether he personally ordered or paid for such."[153]

C. Exclusive Remedy

As part of a legislative amendment in 2003, the Dram Shop Act provides the exclusive remedy for injuries arising from the negligent sale of alcohol to an intoxicated adult. The statute also precludes derivative common law claims such as those for bystander emotional distress and loss of consortium.[154] By its terms, the Dram Shop Act

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[150] *Sanders v. Officers Club of Connecticut, Inc*., 196 Conn. 341, 349, 493 A.2d 184 (1985).
[151] *See, e.g. Kowal v. Hofher,* 181 Conn. 355 (1980); *Collar v. Da Cruz*, CV030830138, 2004 Conn. Super. LEXIS 2394, *1 (Conn. Super. Ct. Aug. 13, 2004)
[152] *Pierce v. Albanese,* 144 Conn. 241, 256 (1957); *Bero v. Ham*, CV020389474, 2006 Conn. Super LEXIS 502, *11 (Conn. Super. Ct. Feb. 14, 2006).
[153] *Pierce*, 144 Conn. at 259.
[154] *Capo v. Knybel,* X06CV075008267S, 2009 Conn. Super. LEXIS 1328 (Conn. Super. Ct. May 13, 2009).

precludes a parallel cause of action for negligence against the seller for the sale of alcohol to a person twenty one or older.[155] However, a vendor may be liable in negligence for sales of alcohol to a minor.

D. Visibly Intoxicated

As stated above, the language of the Dram Shop Act refers only to the sale of alcohol to "an intoxicated person." The Connecticut Supreme Court has interpreted that language to require a plaintiff bringing an action under the Dram Shop Act to prove that the patron was "visibly or otherwise perceivably intoxicated."[156] The Court rule that this standard does not require evidence of "obvious" intoxication, and that a plaintiff need only prove that signs of the patron's intoxication "could have been observed, not that they would have been obvious to anyone coming into contact with him."[157] "Although a person is not 'obviously intoxicated,' the fact that he is 'intoxicated' would be discoverable by reasonably active observation of his appearance, breath, speech, and actions."[158]

E. Voluntary Intoxication of Plaintiff

Liability under the Dram Shop only applies to injuries to third-persons as a result of the intoxication of the person causing the harm. A person who caused harm to himself as a result of his or her own voluntary intoxication does not have a cause of action under the Dram Shop Act. "Nothing in the history of the statute or the case law of Connecticut suggests that the intoxicated person over the age of twenty-one has a cause of action in

[155] Conn. Gen. Stat. § 30-102; *Collar v. Da Cruz*, CV030830138, 2004 Conn. Super. LEXIS 2394, *1 (Conn. Super. Ct. Aug. 13, 2004).
[156] *O'Dell v. Kozee*, 307 Conn. 231, 235 (2012)
[157] *Id.* at 272-73.
[158] *Id.* at 272

negligence against the alcohol purveyor for injuries resulting from his own intoxication."[159]

[159] *Kupec v. Classic Rock Cafe, Inc*., CV075005586S, 2007 Conn. Super. LEXIS 3169, *6 (Conn. Super. Ct. Nov. 28, 2007) .