COMMONWEALTH OF PENNSYLVANIA RETAIL AND HOSPITALITY COMPENDIUM OF LAW

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Retail, Restaurant, and Hospitality
Guide to Pennsylvania Premises Liability

NEGLIGENCE

A. General Negligence Principles

Negligence, at its very core is simply the failure to exercise that degree of care that a reasonably prudent person would have used under the same circumstances. *Schumacher v. Swartz*, 68 Pa. D.&C.3 (Com. Pl. Phila., 1948); and, 36 P.L.E. Negligence § 3. It is fundamental black letter law that in order to establish negligence, a plaintiff must show: (1) a duty recognized by law requiring the actor to conform to a certain standard with respect to the injured party; (2) a failure or breach of that duty; (3) a causal connection between the conduct and the resulting injury; and (4) actual loss or damage to the interest of another. *Fennell v. Nationwide Mut. Fire Ins. Co.*, 412 Pa.Super. 534, 603 A.2d 1064, 1066-67 (1992).

One of the most important elements, and consequently one of the most often litigated, is a person's duty to the injured party. Indeed, a duty "consists of one party's obligation to conform to a particular standard of conduct for the protection of another." *Wisniski v. Brown & Brown Ins. Co.*, 906 A.2d 571, 576 (Pa. Super. 2006). In Pennsylvania negligence cases, the existence of a duty can be created by statute or common law principles. *Sahmnoski v. P.G. Energy*, 579 Pa. 652, 858 A.2d 589 (2004). As discussed more fully below, in premises liability cases, the duty of a land possessor is largely determined based upon the injured person's status at the time of entry.

B. Premises Liability

In Pennsylvania, an individual or entity in possession of land is held responsible for the injuries suffered by individuals who are on the property. The duty owed by a land possessor is determined on the status of the land entrant at the time of the injury. *Palange v. City of Phila.*, 640 A.2d 1305, 1308 (Pa. Super. 1994). Therefore, it is critical to identify the class of the injured person, i.e. trespasser, licensee, or invitee.

a. *Trespassers*

A land possessor owes, by far, the lowest standard of care to a trespasser on his land. Pennsylvania has embraced the Restatement (Second) of Torts' definition of a trespasser, which is defined as "a person who enters or remains upon land in the possession of another without the privilege to do so created by the possessor's consent or otherwise." *Updyke v. BP Oil Co.*, 717 A.2d 546, 549 (Pa. Super. 1998) (quoting, Restatement (Second) Torts § 329 (1965)). In other words, a trespasser enters land without the permission of the land possessor.[1] As a general rule, the land owner's duty to a trespasser is to refrain from willfully or wantonly injuring the trespasser. *Oswald v. Hausman*, 378 Pa.Super. 245, 548 A.2d 594, 598 (1988). The Pennsylvania Supreme Court has defined "willful misconduct" as meaning "that the actor desired to bring about the result that followed, or at least that he was aware that it was substantially certain to ensure." *Evans v. Philadelphia Transp. Co.*, 418 Pa. 567, 212 A.2d 440, 443 (1965). This means that willful conduct requires **actual prior**

[1] See also, *Oswald v. Hausman*, 378 Pa.Super. 245, 548 A.2d 594, 598 (1988) ("A trespasser is one who enters the land of another without any right to do so **or** who goes beyond the rights and privileges which he or she has been granted by license or invitation.") (citing, 27 P.L.E. Negligence § 48) (emphasis added).

knowledge of the trespasser's peril. *Graham v. Sky Haven Coal, Inc.*, 386 Pa.Super. 598, 563 A.2d 891, 899 (1989). The *Evans* Court further defined "wanton misconduct" as meaning "that the actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences…." *Evans*, 212 A.2d at 443 (quoting, Prosser, Torts § 33 at 151 (2d ed. 1955)). However, ***foreseeable*** trespassers may, under certain circumstances, be entitled to greater protection. *Oswald*, 548 A.2d at 598 (citing, *Fanning v. Apawana Golf Club*, 169 Pa. Super. 180, 82 A.2d 584, 586 (1951)).

Licensee

The next—and higher—level of care owed by a land possessor to an entrant is the standard of care owed to a licensee. Again, Pennsylvania has adopted the Restatement (Second) of Tort's definition of a licensee, which is "a person who is privileged to enter or remain on the land only by virtue of the possessor's consent." *Updyke*, 717 A.2d at 549 (quoting, Restatement (Second) Torts § 330 (1965)). As the Pennsylvania Superior Court explained in *Oswald v. Hausman*, "[a] licensee enters upon the land of another solely for his own purpose; the invitation extended to him is given as a favor by express consent or by general or local custom, and is not for either business or social purposes of the possessor." *Oswald*, 548 A.2d at 599 (citing, *Fanning v. Apawana Golf Club*, 169 Pa.Super. 180, 82 A.2d 584, 586 (1951)).

The duty owed to a licensee is laid out by the Restatement (Second) of Torts § 342, which provides that:

> A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if:
>
> (a) The possessor knows or has reason to know of the condition and should realize that it involves a reasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
>
> (b) He fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
>
> (c) The licensees do not know or have reason to know of the condition and the risk involved.

See, *Rossino v. Kovacs*, 553 Pa. 168, 718 A.2d 755, 757 (1998) (quoting, Restatement (Second) of Torts § 342 (1965)).

This duty introduces the necessary requirement of notice, either actual or constructive. In other words, the plaintiff must show that the land possessor had some knowledge of the dangerous condition and that he did not warn the plaintiff or take reasonable steps to make the land safe. Finally,

liability will only attach if it is also demonstrated that the plaintiff did not know of the condition himself or its risks.

b. *Invitee*

In Pennsylvania, an invitee is owed the highest standard of care by a land possessor. Under Pennsylvania law, an invitee is characterized as either a "public invitee" or a "business visitor"/"business invitee."[2] *Gutteridge v. A.P. Green Servs.*, 804 A.2d 643, 655 (Pa. Super. 2002) (citing, *Updyke*, 717 A.2d at 549). A public invitee is "a person who is ***invited*** to enter or remain on land as a member of the public for a purpose for which the land is held open to the public." *Id*., at 655 (emphasis added); see also, Restatement (Second) of Torts § 332 (1965). While a business visitor/invitee is "a person who is ***invited*** to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of land." *Id*. at 655-56 (emphasis added); see also, Restatement (Second) of Torts § 332 (1965).

With regard to classification, the main difference between a licensee and an invitee is found within the distinction between ***invitation*** and ***permission***, which is central to the determination of whether an entrant is an invitee or a licensee. Comment (b) to the Restatement (Second) of Torts § 332 discusses this distinction:

> *Invitation and Permission*. Although invitation does not in itself establish the status of an invitee, it is essential to it. An invitation differs from mere permission in this: an ***invitation*** is conduct which justifies others in believing that the possessor desires them to enter the land: ***permission*** is conduct which justifies others in believing that the possessor is willing that they shall enter if they so desire.

Updyke, 717 A.2d at 549 (quoting, Restatement (Second) of Torts § 332 cmt. b) (emphasis added).

Invitees are the most common class of land entrants in most retail premises liability cases. Importantly, invitees are owed the highest standard of care by a land possessor in the eyes of Pennsylvania Courts. *Estate of Swift by Swift v. Northeastern Hosp.*, 456 Pa.Super. 330, 690 A.2d 719, 723 (1997) (citing, *Palange v. City of Phila.*, 433 Pa.Super. 373, 640 A.2d 1305, 1308 (1994)). The duty owed to an invitee is set forth in the Restatement (Second) of Torts § 343, which states that:

> A possessor of land is liable for the physical harm caused to his invitee by a condition on the land if, but only if, he or she:
>
> (a) Knows or by the exercise of reasonable care would discover the condition, and should realize it involves unreasonable risk of harm to such invitee; and
>
> (b) Should expect that they will not discover or realize the danger, or fail to protect themselves against it, and

[2] The terms "business visitor" and "business invitee" are used synonymously. *Gutteridge*, 804 A.2d at 656.

(c) Fails to exercise reasonable care to protect them against the danger.

Summers v. Giant Food Stores, Inc., 743 A.2d 498, 506 (Pa. Super. 1999) (quoting, Restatement (Second) of Torts § 343 (1965)). In other words, an invitee must prove either that the possessor of land had a hand in creating the harmful condition, or had actual or constructive notice of such condition. *Estate of Swift by Swift*, 690 A.2d at 723 (citing, *Moultrey v. Great Atlantic & Pacific Tea Co.*, 281 Pa.Super. 525, 422 A.2d 593, 598 (1980)).

C. <u>Known and Obvious Condition</u>

While a possessor of land owes the highest duty to an invitee, he is <u>not</u> liable to his invitees for physical harm caused to them by an activity or condition on the land where the danger is "known" and "obvious" to them, *unless* the possessor should anticipate the harm despite such knowledge or obviousness. See, *Carrender v. Fitterer*, 503 Pa. 178, 469 A.2d 120, 123 (1983) (quoting, Restatement (Second) of Torts § 343A (1965)). A danger is deemed to be "obvious" when "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising normal perception, intelligence, and judgment." *Id*. (quoting, Restatement (Second) of Torts § 343A cmt. b). Likewise, for a condition to be "known," it must "not only be known to exist, but … also be recognized that it is dangerous and the probability and gravity of the threatened harm must be appreciated." *Id*. at 124 (quoting, Restatement (Second) of Torts § 343A cmt. b).

This concept goes hand in hand with the doctrine of assumption of the risk, discussed more fully below. In fact, in *Carrender v. Fitterer*, which remains controlling precedent in Pennsylvania, our Supreme Court established that assumption of the risk is a function of the duty analysis:

> Appellee misperceives the relationship between the assumption-of-risk doctrine and the rule that a possessor of land is not liable to his invitees for obvious dangers. When an invitee enters business premises, discovers dangerous conditions which are both obvious and avoidable, and nevertheless proceeds voluntarily to encounter them, the doctrine of assumption of the risk operates merely as a counterpart to the possessor's lack of duty to protect the invitee from those risks. By voluntarily proceeding to encounter a known or obvious danger, the invitee is deemed to have agreed to accept the risk and to undertake to look out for himself. It is precisely because the invitee assumes the risk of injury from obvious and avoidable dangers that the possessor owes the invitee no duty to take measures to alleviate those dangers. Thus, to say that the invitee assumed the risk of injury from a known and avoidable danger is simply another way of expressing the lack of duty on the part of the possessor to protect the invitee against such dangers.

Denzel v. Fed. Cleaning Contrs. & J. Foster & Sons, 2015 Pa. Super. Unpub. LEXIS 3651, *11-12 (Pa. Super. Oct. 9, 2015) (quoting, *Montagazzi v. Crisci*, 994 A.2d 626, 635-36 (Pa. Super. 2010), and, *Carrender*, 469 A.2d at 125)).

Indeed, where a plaintiff has "voluntarily and deliberately proceeded to face a known and obvious risk," he is considered to have assumed liability for his own injuries, and the defendant is relieved of his duty owed to him. *Touchette v. Weis Mkts.*, 23 Pa. D.&C.5th 321, 332 (Ct. Com. Pl. 2011). For example, in *Touchette*, the plaintiff's deposition testimony clearly indicated that she had ***actual knowledge*** of the location of the snow and ice, its slippery propensities, and the dangers that she faced in voluntarily attempting to walk over it before she actually fell. *Id*., at 332. In its opinion, the *Touchette* Court noted that "under Pennsylvania law, there are some dangers that are so obvious that they will be held to have been assumed as a matter of law despite assertions of ignorance to the contrary." *Id*. (citing, *Howell v. Clyde*, 533 Pa. 151, 620 A.2d 1107 (Pa. 1993)). Indeed, "[i]ce is always slippery, and a person walking on ice always runs the risk of slipping and falling." *Id*. (citing, *Barrett v. Fredavid Builders*, 454 Pa.Super. 162, 685 A.2d 129 (1996)).

D. <u>The "Out of Possession Landlord"</u>

Under Pennsylvania law, as a general rule, a landlord that is "out of possession" is not liable for injuries incurred by third parties on the leased premises since the landlord has no duty to such persons. *Rafalko v. Sweeney*, 2016 Pa.Super. Unpub. LEXIS 244, *8-9, 136 A.3d 1040, (Pa. Super. Jan. 29, 2016) (quoting, *Jones v. Levin*, 940 A.2d 451, 454 (Pa. Super. 2007). This view is premised upon the legal view of a lease transaction as the equivalent of a sale of the land for the term of the lease. *Jones v. Levin*, 940 A.2d 451, 454 (Pa. Super. 2007). Put another way, liability is premised primarily on possession and control, and not merely upon ownership of the premises. *Id*.

Of course there are a number of exceptions to the general rule of non-liability of a landlord "out of possession." *Dorsey v. Continental Associates*, 404 Pa.Super. 525, 591 A.2d 716, 718 (1991). In *Henze v. Texaco, Inc.*, 508 A.2d 1200 (Pa. Super. 1986), the Pennsylvania Superior Court listed those exceptions as follows:

> A landlord out of possession is generally not responsible for injuries suffered by a business invitee on the leased premises. This rule is subject to several exceptions. A landlord out of possession may incur liability (1) if he has reserved control over a defective portion of the demised premises; (2) if the demised premises are so dangerously constructed that the premises are a nuisance per se; (3) if the lessor has knowledge of a dangerous condition existing on the demised premises at the time of transferring possession and fails to disclose the condition of the lessee; (4) if the landlord leases the property for a purpose involving the admission of the public and he neglects to inspect for or repair dangerous conditions existing on the property before possession is transferred to the lessee; (5) if the lessor undertakes to repair the demised premises and negligently makes the repairs; or (6) if the lessor fails to make repairs after

> having been given notice of and a reasonable opportunity to remedy a dangerous condition existing on the leased premises.

Henze, 508 A.2d at 1202 (internal citations omitted).

SPECIFIC EXAMPLES OF NEGLIGENCE CLAIMS

A. "Slip and Fall"

a. *Hills and Ridges Doctrine*

It has long been held by Pennsylvania Courts that a landowner has no absolute duty to keep his premises and sidewalks free from snow and ice at all times. *Heichel v. Smith Paving & Constr. Co.*, 2016 Pa.Super. Unpub. LEXIS 205, *9, 136 A.3d 1037 (Pa. Super. Jan. 25, 2016) (citing, *Rinaldi v. Levine*, 406 Pa. 74, 176 A.2d 623, 625 (1962)). Indeed, these formations are a natural phenomenon and are incidental to our climate. *Heichel*, 2016 Pa.Super. Unpub LEXIS at *9. As snow and ice are merely transient dangers, the only duty upon the landowner or tenant is to act within a reasonable time *after* notice to remove it when it is in a dangerous condition. *Rinaldi*, 176 A.2d at 625. Furthermore, "an owner or occupier of land is not liable for generally slippery conditions, for to require that one's walks be always free of ice and snow would be to impose an impossible burden in view of the climatic conditions in this hemisphere." *Heichel*, 2016 Pa.Super. Unpub. LEXIS at *9 (quoting, *Wentz v. Pennswood Apartments*, 359 Pa.Super. 1, 518 A.2d 314, 316 (1986)).

In order to recover for a fall on an ice or snow covered sidewalk or parking lot, it has been consistently held by the Pennsylvania Courts that a plaintiff must prove the following:

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

Heichel, 2016 Pa.Super. Unpub. LEXIS at *9-10 (quoting, *Harmotta v. Bender*, 411 Pa.Super. 371, 601 A.2d 837, 841 (1992)). "Absent proof of *all* such facts, [a] plaintiff has no basis for recovery." *Id*., at *10 (quoting, *Rinaldi*, 176 A.2d at 625) (emphasis in original).

Moreover, the "hills and ridges" doctrine applies with equal force to both public and private spaces. *Magaskie v. Wawa, Inc.*, 2015 Phila. Ct. Com. Pl. LEXIS 81, * (Ct. Com. Pl. March 26, 2015); see also, *Wilson v. Howard Johnson Restaurant*, 421 Pa. 455, 219 A.2d 676, 679 (1966) ("hills and ridges" standard was appropriate where a business invitee fell on ice in the parking lot of a restaurant); *Morin v. Traveler's Rest Motel, Inc.*, 704 A.2d 1085, 1089 (Pa. Super. 1997) ("hills and ridges" standard applied where the plaintiff slipped and fell on ice in a motel

parking lot); *Wentz v. Pennswood Apartments*, 518 A.2d at 316) ("hills and ridges" was the appropriate standard where the plaintiff slipped and fell on an ice-covered private walk owned by an apartment complex).

In short, the "hills and ridges" doctrine protects an owner or occupier of land from liability for generally slippery conditions resulting from ice and snow where the owner has not permitted the ice and snow to unreasonably accumulate in ridges or elevations." *Harvey v. Rouse Chamberlin, Ltd.*, 901 A.2d 523, 526 (Pa. Super. 2006) (quoting, *Morin v. Traveler's Rest Motel, Inc.*, 704 A.2d 1085, 1087 (Pa. Super. 1997)).

Importantly, the Pennsylvania Superior Court cautioned in *Bacsick v. Barnes*, 234 Pa. Super. 616, 341 A.2d 157 (1975) that the "hills and ridges" doctrine is limited in its application to those "cases where the snow and ice complained of are the result of an *entirely natural accumulation*, following a recent snowfall." *Harvey*, 901 A.2d at 526 (quoting, *Bacsick*, 341 A.2d at 160) (emphasis added).

b. *Slippery surfaces –Cleaner, Polish, Wax*

Slip and fall accidents can also be caused by the application of a floor cleaner, polish or wax that resulted in a slippery surface. Under Pennsylvania law, the mere presence of wax or oil or any other applicant that would make it slippery on the floor of business premises is not of itself negligence. *Weir v. Bond Clothes, Inc.*, 198 A. 896, 898 (Pa. Super. 1938). Moreover, the "mere fact that a person falls on a recently waxed floor, …, does not itself justify a finding of negligence on the part of the owner of the building." *McCann v. Philadelphia Fairfax Corp.*, 344 Pa. 636, 26 A.2d 540, 541 (1942). To the contrary, there must be evidence tending to show that it was ***improperly applied***, which is a question for the jury. *Weir*, 198 A. at 898.

c. *Defenses*

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

i. Notice

It is incumbent upon the plaintiff to demonstrate the existence of a dangerous condition and that the landowner had a hand in creating the harmful condition or had actual or constructive notice of it. If the plaintiff is unable to establish that the landowner created the harmful condition, the plaintiff must then prove that the landowner had actual or constructive notice of the condition. *Estate of Swift by Swift v. Northeastern Hospital*, 456 Pa.Super. 330, 690 A.2d 719, 722 (1997). Therefore, if the plaintiff fails to establish actual or constructive notice, the claim will fail.

ii. Comparative Negligence

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

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

See, 42 Pa.C.S. § 7102(a). In other words, if a plaintiff is found liable for his or her own negligence of a proportion not greater than defendant's negligence, the plaintiff's award will be diminished in proportion to plaintiff's own negligence.

In this context, one such way to establish negligence on the part of the plaintiff would be to establish that the dangerous condition was open and obvious and the plaintiff could have easily observed the condition if the plaintiff had paid more attention. Under Pennsylvania law, it is the duty of a person to look where he is walking to see that which is obvious. *Meckel v. Lehigh Valley Health Network*, 2015 Pa. Dist. & Cnty. Dec. LEXIS 25, *5 (Ct. Com. Pl. April 23, 2015) ("if there is anything settled in the law of negligence in Pennsylvania, it is the duty of a person to look where he is walking and see that which is obvious.") (quoting, *Villano v. Sec. Sav. Ass'n*, 268 Pa.Super. 67, 407 A.2d 440, 441 (1979)). Indeed, "the law requires that a person exercise reasonable care and diligence in crossing the street, walking a sidewalk, or … entering a commercial establishment." *Villano*, 407 A.2d at 441.

iii. Assumption of the Risk

Another doctrine that provides a defense to such cases is known as assumption of the risk. In *Malinder v. Jenkins Elevator & Machine Co.*, 371 Pa.Super. 414, 538 A.2d 509, 511 (1988), the Pennsylvania Superior Court explained that "[t]he basic premise of the doctrine of assumption of the risk is that a party who voluntarily and knowingly assumes a risk of a harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm." *Malinder*, 538 A.2d at 511 (citing, Restatement (Second) of Torts, § 496A (1965)). Stated another way:

> Under the doctrine of assumption of the risk, a defendant is relieved of its duty to protect a plaintiff where the plaintiff has voluntarily and deliberately proceeded to face a known and obvious risk and therefore is considered to have assumed liability for his own injuries. Our Supreme Court on occasion has affirmed a trial court's decision that as a matter of law, a plaintiff voluntarily proceeded in the face of a known risk and absolved the defendant from responsibility for the injuries sustained. However, the determination that the plaintiff has assumed the risk of his injuries such that recovery is prevented should occur only where it is beyond question that the plaintiff voluntarily and knowingly proceeded in the face of an obvious and dangerous condition.

Touchette v. Weis Mkts., 23 Pa. D.&C.5th 321, 332 (Ct. Com. Pl. 2011) (citing, *Barrett v. Fredavid Builders, Inc.*, 454 Pa.Super. 162, 685 A.2d 129, 130-31 (1996)).

As noted *supra*, in terms of premises liability, the doctrine of assumption of risk operates merely as a counterpart to the land possessor's lack of duty to protect an invitee from risks when an invitee voluntarily enters business premises despite the discovery of dangerous conditions which are both *obvious* and *avoidable*. *Touchette*, 23 Pa. D.&C.5th at 333 (citing, *Carrender v. Fitterer*, 503 Pa. 178, 469 A.2d 120, 125 (1983)). Indeed, the *Touchette* Court further expanded this relationship between assumption of the risk and a land possessor's lack of duty, stating:

> By voluntarily proceeding to encounter a known or obvious danger, the invitee is deemed to have agreed to accept the risk and to undertake to look out for himself. It is precisely because the invitee assumes the risk of injury from obvious and avoidable dangers that the possessor owes the invitee no duty to take measures to alleviate those dangers. Thus, to say that the invitee assumed the risk of injury from a known and avoidable danger is simply another way of expressing the lack of any duty on the part of the possessor to protect the invitee against such dangers.

Touchette, 23 Pa. D.&C.5th at 333 (internal citations omitted).

iv. Choice of Ways Doctrine

Pennsylvania Courts recognize the unique doctrine described as the "alternate ways" or "choice of ways" doctrine. The "choice of ways" doctrine imputes contributory negligence when a person who has a choice of ways to travel, one being perfectly safe and the other subject to risk and danger, **voluntarily chooses the risky path and is injured.** *Fullam v. Miller Bros.*, 2014 Pa.Super. Unpub. LEXIS 1291, *22 (Pa. Super. April 30, 2014) (citing, *Mirabel v. Morales*, 57 A.3d 144, 153-54 (Pa. Super. 2012)).[3] "It is apparent that the 'choice of paths' rule applies only if two distinct ways exists, one which is clearly safe and the other as involving danger … ." *Downing v. Shaffer*, 246 Pa.Super. 512, 371 A.2d 953, 956 (1977) (quoting, *Eller v. Work*, 233 Pa.Super. 186, 336 A.2d 645, 648 (1975)).

In *Downing v. Shaffer*, the Pennsylvania Superior Court explained the "choice of ways" doctrine, noting some of its inherent restraints:

> The rule requiring a person to select a safe route in favor of a dangerous one is nothing more than a formulation of the general rule that a person is contributory negligent if his conduct falls short of the standard to which a reasonable person should conform in order to protect himself from harm. See, *Dezelan v. Duquesne Light Co.*,

[3] This doctrine still exists in Pennsylvania despite the substation of comparative negligence for contributory negligence. See, *Mirabel v. Morales*, 57 A.3d 144, 153 (citing, *Updyke v. BP Oil Co.*, 717 A.2d 546, 552 (Pa. Super. 1998)).

> 334 Pa. 246, 5 A.2d 552 (1939); Restatement (Second) of Torts, § 466(b). However, the rule is not meant to impose unreasonable restrictions on travel: "There is no law which requires anybody to follow any particular course in reaching his destination. People have freedom of movement in this country and they may even follow whim or caprice in attaining their objectives. Even if the alternative course could be determined hypothetically safer but the one chosen is still free from hazard and authorized by law, a tortfeasor may not escape responsibility for his negligence by maintaining that the person injured through his (the tortfeasor's) negligence could have escaped injury by taking the alternative route." *Hopton v. Donora Borough*, 415 Pa. 173, 202 A.2d 814 (1964).

Downing, 371 A.2d at 956; see also, *Mirabel*, 57 A.3d at 154.

In order for there to be sufficient evidence to warrant an instruction to the jury for the doctrine of "choice of ways," there must be evidence of: (1) a safe course; (2) a dangerous course; and (3) facts which would put a reasonable person on notice of the danger or actual knowledge of the danger. *Mirabel*, 57 A.3d at 154 (quoting, *Downing*, 371 A.2d at 956); see also, Restatement (Second) of Torts, § 466, cmts. f and g. Notably, this doctrine has a narrow application, and should be applied in "the clearest case." *Mirabel*, 57 A.3d at 154 (citing, *Oswald v. Stewart*, 301 Pa.Super. 463, 448 A.2d 1, 2 (1982)); see also, *O'Brien v. Martin*, 432 Pa.Super. 323, 638 A.2d 247, 249-50 (1994) (In cases in which "the doctrine has been applied to find that the plaintiff was contributorily negligent, the danger the plaintiff chose to confront was indisputably obvious.").

B. Liability for Violent Crime

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

In Pennsylvania, landowners who hold their property open to the public for business purposes are subject to liability for the accidental, negligent or intentionally harmful acts of third persons. *Truax v. Roulhac*, 126 A.3d 991, 997 (Pa. Super. 2015). In *Moran v. Valley Forge Drive-In Theater, Inc.*, 431 Pa. 432, 246 A.2d 875 (1968), the Pennsylvania Supreme Court adopted the Restatement (Second) of Torts, § 344 to define the specific duty owed to business invitees against intentional or negligent acts of third parties. Section 344 states that:

> § 344. Business Premises Open to Public: Acts of Third Persons or Animals
>
> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

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

Truax, 126 A.3d at 997-98 (quoting, Restatement (Second) of Torts, § 344); and, *Moran*, 246 A.2d at 878.

Notably, such a duty to protect business invitees against third party conduct arises "only if the owner has reason to anticipate such conduct." *Truax*, 126 A.3d at 998. Comment f to Section 344 is instructive in this regard, stating that:

> *f. Duty to police premises*. Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of the third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experiences, is such that he should ***reasonably*** anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Truax, 126 A.3d at 998 (quoting, Restatement (Second) of Torts, § 344, cmt. f.) (emphasis added). The Supreme Court further explained the duty to take reasonable precaution against harmful third party conduct that might be reasonably anticipated:

> The reason is clear; places to which the general public are invited might indeed anticipate, either from common experience or known fact, that places of general resort are also places where what men can do, they might. One who invites all may reasonably expect that all might not behave, and bears responsibility for injury that follows the absence of reasonable precaution against that common expectation.

Truax, 126 A.3d at 998 (quoting, *Feld v. Merriam*, 506 Pa. 383, 485 A.2d 742, 745 (1984)).

In *Carswell v. Southeastern Pennsylvania Transp. Authority*, 259 Pa.Super. 167, 393 A.2d 770 (1978), the Pennsylvania Superior Court noted that, as a preliminary, Section 344 also requires proof that (1) the defendant is the possessor of land in question, (2) that he holds it open to the

public for entry for his business purposes, and (3) that the plaintiff entered on the land for such purposes. *Carswell*, 393 A.2d at 773, n.4.

b. *Defenses*

In Pennsylvania, evidence of industry standards and regulations is generally relevant and admissible on the issue of negligence. *Dallas v. F.M. Oxford, Inc.*, 381 Pa.Super. 89, 552 A.2d 1109, 1112 (1989); see also, *Brogley v. Chambersburg Engineering Co.*, 306 Pa.Super. 316, 452 A.2d 743 (1981) (evidence of OSHA regulations is admissible as a standard of care, the violation of which is evidence of negligence). With regard to liability for violent crime or acts inflicted upon a third party, a land possessor may introduce evidence of adequate lighting, security personnel or patrols, emergency call boxes, video surveillance, postings or signage, or any other evidence of measures taken by the land possessor to provide reasonable security measures.

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

1. The defendant is 60% or more at fault of the total liability apportioned to all parties;
2. There was an intentional misrepresentation;
3. There was an intentional tort;
4. There was a release or threatened release of a hazardous substance under section 702 of the Hazardous Sites Cleanup Act,, P.L 756, No. 108; or
5. There was a violation of section 497 of the Pennsylvania Liquor Code, P.L. 90, No. 21.

See, 42 Pa.C.S. § 7102(a.1)(2), and (3)(i)-(v).

C. Claims Arising From the Wrongful Prevention of Thefts

1. Offense Defined, Presumptions, and Detention

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

> **(a) *Offense defined.* --** A person is guilty of a retail theft if he:
> **(1)** takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise ...with the intention of depriving the merchant of the possession...;
> **(2)** alters, transfers or removes any ... indicia of value ... which aid in determining value affixed to any merchandise displayed...and

attempts to purchase such merchandise ...at less than the full retail value ...;
(3) transfers any merchandise ... from the container in ... which the same shall be displayed to any other container ...; or
(4) under-rings with the intention of depriving the merchant of the full retail value of the merchandise[;]
(5) destroys, removes, renders inoperative or deactivates any inventory control tag...

(b) ***Grading.***

(1) Retail theft constitutes a:

(i) Summary offense when the offense is a first offense and the value of the merchandise is less than $ 150.

(ii) Misdemeanor of the second degree when the offense is a second offense and the value of the merchandise is less than $ 150.

(iii) Misdemeanor of the first degree when the offense is a first or second offense and the value of the merchandise is $ 150 or more.

(iv) Felony of the third degree when the offense is a third or subsequent offense, regardless of the value of the merchandise.

(v) Felony of the third degree when the amount involved exceeds $ 1,000 or if the merchandise involved is a firearm or a motor vehicle.

(1.1) There are additional penalties for the theft of motor fuel outlined under this section.

…

(b.1) ***Calculation of prior offenses. …***

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

…

(d)Detention. **--** A peace officer, merchant or merchant's employee or an agent under contract with a merchant, who has probable cause to believe that retail theft has occurred or is occurring on or about a store or other retail mercantile establishment and who has probable cause to believe that a specific person has committed or is committing the retail theft may detain the suspect in a reasonable

> manner for a reasonable time on or off the premises for all or any of the following purposes: to require the suspect to identify himself, to verify such identification, to determine whether such suspect has in his possession unpurchased merchandise taken from the mercantile establishment and, if so, to recover such merchandise, to inform a peace officer, or to institute criminal proceedings against the suspect. Such detention shall not impose civil or criminal liability upon the peace officer, merchant, employee, or agent so detaining.
>
> ...

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

i. False Arrest and Imprisonment

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

Consequently, under the Retail Theft Statute, a shopkeeper is entitled to immunity from liability if he establishes probable cause for the reasonable detention of a suspected shoplifter.

The statute directs an inference of intent from the act of concealment of merchandise. Moreover, finding concealed unpurchased property on someone is *prima facie* evidence of intentional concealment. Another defense to a claim of false imprisonment/false arrest is if there is probable cause to believe that a retail theft has occurred. Karkut v. Target Corp., 453 F. Supp. 2d 874 (E.D. Pa. 2006).

ii. Malicious Prosecution

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

iii. Defamation

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

> (1) The defamatory character of the communication.
> (2) Its publication by the defendant.
> (3) Its application to the plaintiff.
> (4) The understanding by the recipient of its defamatory meaning—that the defendant was at least negligent with respect to the truth or falsity of the allegedly defamatory statements.
> (5) The understanding by the recipient of it as intended to be applied to the plaintiff.
> (6) Special harm resulting to the plaintiff from its publication.
> (7) Abuse of a conditionally privileged occasion.

42 Pa.C.S. § 8343(a)(1)-(7).

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

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

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

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

iv. Negligent Hiring, Retention, or Supervision of Employees

An *employer* may be liable under a theory of negligent retention if it knew or should have known that an employee was dangerous, careless or incompetent and such employment might create a situation where the employee's conduct would harm a third person. Brezenski v. World Truck Transfer, Inc., 2000 PA Super 175, 11 (2000). "The [Plaintiff] must establish that the

employer breached a duty to protect others against a risk of harm. The scope of this duty is limited to those risks that are reasonably foreseeable by the actor in the circumstances of the case." Id. at 20.

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

v. Food Poisoning

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

iv. Claims Arising From Construction-Related Actions

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

DAMAGES

A. Compensatory Damages

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

Justice, dissenting) (citing, Sedgwick on Damages (9th ed., p. 25)). These Compensatory damages are typically separated into "general damages," and "special damages."

i. General Damages

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

ii. Special Damages

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

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

B. Punitive Damages

Punitive damages are a form of relief that does not stand as a separate cause of action.

> If no cause of action exists, then no independent action exists for a claim of punitive damage since punitive damages is only an *element* of damages. To this extent, punitive damages must, by necessity, be related to the injury-producing cause of action. This does not mean, however, that specific compensatory damages must be awarded to sustain a punitive damage award. In *Hilbert*, when the underlying cause of action was dismissed, there existed no cause of action upon which the plaintiff could claim punitive damages. *Hilbert* is distinguishable from *Rhoads* in that in *Rhoads* damages were not awarded, however, liability was determined on the facts and punitive damages were awarded predicated upon the finding of liability.

Kirkbride v. Lisbon Contractors, Inc., 521 Pa. 97, 101 (Pa. 1989) (discussing *Hilbert v. Roth*, 395 Pa. 270, 149 A.2d 648 (1959), and *Rhoads v. Heberling*, 306 Pa. Super. 35, 451 A.2d 1378 (1982)).

The type of conduct that gives rise to a claim for punitive damages is a substantive issue governed by state law. Thomas v. Medesco, Inc., Div. of Harvard Indus., Inc., 67 F.R.D. 129,131

(E.D. Pa. 1974). Pennsylvania has adopted Section 908(2) of the Restatement (Second) of Torts regarding the imposition of punitive damages. This section provides that "punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *See* Rizzo v. Haines, 555 A.2d 58, 69 (Pa. 1989) and Chambers v. Montgomery, 192 A.2d 355, 358 (Pa. 1963). Punitive damages cannot be awarded for mere inadvertence, mistake, error of judgment and the like, which constitute ordinary negligence. Field v. Phi. Electric Company, 388 Pa. Super. 400, 428, 565 A.2d 1170, 1187 (1989). Further, as a matter of law, punitive damages may not be awarded upon "a showing of even gross negligence ...." Phillips v. Cricket Lighters, 883 A.2d 439, 445 (Pa. 2005) (citation omitted).

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

Punitive damages must be based upon conduct that is malicious, wanton, reckless, willful or oppressive. Chambers, 192 A.2d at 358; Rizzo, 555 A.2d at 69. The state of mind of the actor is vital to the determination. Feld v. Merriam, 485 A.2d 742, 748 (Pa. 1984). It is essential that there be some indication that the actor had an "evil motive" in acting or failing to act. Id. As explained by the Third Circuit in Burke v. Maassen:

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

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

In Burke, plaintiffs sued defendants for damages under Pennsylvania's Wrongful Death and Survival Acts. The lawsuit arose out of an accident where plaintiff's-decedent, George Burke, was standing on the shoulder of the Pennsylvania Turnpike when he was struck by a tractor-trailer

operated by defendant Maassen. At the time of the accident, Maassen was an agent of defendant Malone Freight Lines, Inc. acting within the course and scope of his employment. In addition to seeking damages under the Wrongful Death and Survival Acts, plaintiff also claimed punitive damages.

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

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

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

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

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

Medevecz, 569 F.2d at 1226-1227.

C. Wrongful Death

The Wrongful Death statute gives Plaintiff a right to bring a cause of action that is statutorily limited to beneficiaries recovering for the pecuniary loss suffered as a result of the decedent's death. Kiser v. Schulte, 538 Pa. 219, 226, 648 A.2d 1, 4 (1994). Specifically, under the Wrongful Death Statute, 42 Pa.C.S. § 8301:

> (a) *General rule.* — An action may be brought, under procedures prescribed by general rules, to recover damages for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another if no recovery for the same damages claimed in the wrongful death action was obtained by the injured individual during his lifetime and any prior actions for the same injuries are consolidated with the wrongful death claim so as to avoid a duplicate recovery.
>
> (b) *Beneficiaries.* — Except as provided in subsection (d), the right of action created by this section shall exist only for the benefit of the spouse, children or parents of the deceased, whether or not citizens or residents of this Commonwealth or elsewhere. The damages recovered shall be distributed to the beneficiaries in the proportion they would take the personal estate of the decedent in the case of intestacy and without liability to creditors of the deceased person under the statutes of this Commonwealth.
>
> (c) *Special damages.* — In an action brought under subsection (a), the plaintiff shall be entitled to recover, in addition to other damages, damages for reasonable hospital, nursing, medical, funeral expenses and expenses of administration necessitated by reason of injuries causing death.
>
> (d) *Action by personal representative.* — If no person is eligible to recover damages under subsection (b), the personal

> representative of the deceased may bring an action to recover damages for reasonable hospital, nursing, medical, funeral expenses and expenses of administration necessitated by reason of injuries causing death.

42 Pa.C.S. § 8301.

The Wrongful Death statute does not specifically include punitive damages as a recoverable damage. Under Pennsylvania law, the federal courts have held that punitive damages are *not* available in an action for wrongful death. Walsh v. Strenz, 63 F. Supp. 2d 548, 550 (M.D. Pa. 1999) (citing Harvey v. Hassinger, 315 Pa.Super. 97, 461 A.2d 814, 815–816 (1983)). However, the issue as to whether punitive damages are recoverable under the Wrongful Death Statute has not been addressed by the Supreme Court of Pennsylvania.

The Pennsylvania Wrongful Death Act has also been held to *not* include the loss or suffering of the deceased, or the mental suffering of the survivor occasioned by such death, and it excludes all questions of exemplary damages. Harvey v. Hassinger, 315 Pa. Super. 97, 101, 461 A.2d 814, 816 (Pa. Super. Ct. 1983). "In an action brought under subsection (a) [of the Wrongful Death Act], the plaintiff shall be entitled to recover, in addition to other damages, damages for reasonable hospital, nursing, medical, funeral expenses and expenses of administration necessitated by reason of injuries causing death." 42 Pa.C.S. § 8301(c).

Moreover, the Superior Court has specifically held that parents are not permitted to bring a cause of action for loss of a child's "companionship, comfort and society (consortium)." Jackson v Tastykake, 648 A.2d 1214 (Pa. Super. 1994). See, also, McCaskill v. Philadelphia Housing Authority, 419 Pa. Super. 313 (1992), and Schroeder v. Ear, Nose & Throat Associates, Inc., 557 A.2d 21 (Pa. Super. 1998). *Contra*., Rettger v. UPMC Shadyside, 991 A.2d 915, 932-33 (Pa. Super. 2010) (holding that parents *can* claim damages for emotional and psychological damages under the Wrongful Death Statute. Conspicuously, however, the Rettger Court, although basing its decision on the Machado case, *supra*, did not acknowledge that Machado decided whether a child could sue for the lost consortium of their parent, and not whether a parent could sue for the lost consortium of their child. Moreover, Rettger did not address the Pennsylvania Supreme Court's holding in Quinn v. Pittsburgh, 90 A. 353 (Pa. 1914) which recognized that Pennsylvania has never recognized a parent's loss of consortium claim for their child).

However, Pennsylvania Courts have found that *children* may recover for the "loss of companionship, comfort, society, and guidance of a parent" under the Wrongful Death Statute. Machado v. Kunkel, 804 A.2d 1238, 1245 (Pa. Super. 2002). *Contra*., Quinn v. Pittsburgh, 90 A. 353 (Pa. 1914) ("the right to recover for loss of companionship is confined to cases where a husband sues for injuries to his wife).

i. Pecuniary Loss

Pecuniary loss has been defined to be a destruction of a reasonable expectation

of pecuniary advantage from the deceased, and "must be grounded on reasonably continuous past acts or conduct of the deceased." Gaydos v. Domabyl, 301 Pa. 523, 530-534, 152 A. 549, 1930 Pa. LEXIS 517 (Pa. 1930) (citing, Pennsylvania R. Co. v. Butler, 57 Pa. 335, (1868); North Pennsylvania R. Co. v. Kirk, 90 Pa. 15, 1879 Pa. LEXIS 191 (Pa. 1879)). These types of damages are typically shown by evidence of "services, food, clothing, education, entertainment, and gifts bestowed; to be reasonable, the services and gifts must have been rendered with a frequency that begets an anticipation of their continuance; occasional gifts and services are not sufficient on which to ground a pecuniary loss." Gaydos, *supra*., at 530 (citing, Schnatz v. Phila. & Reading R.R., 160 Pa. 602, 28 A. 952, 1894 Pa. LEXIS 852 (Pa. 1894)).

> As a general rule pecuniary loss embraces the present worth of deceased's probable earnings during the probable duration of deceased's life, which would have gone for the benefit of the children, parent, husband or wife, as the case may be, and is broad enough to include the present worth of the value or probable services which would, in the ordinary course of events, be of benefit to one within this class. As stated in Sedgwick on Damages, 9th ed., volume 2, section 577, "The probable earnings of the parent which would have enured to the benefit of the child may be recovered and he may also be compensated for the value of the parent's services in the superintendence, attention to, and care of his family, and the education of his children of which they have been deprived by his death." And, as stated in an early case, since followed, "That loss is what the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the residue of his lifetime, and which would have gone for the benefit of his children, taking into consideration his age, ability and disposition to labor, and his habits of living and expenditure": P.R.R. v. Butler, supra; Mansfield Coal Co. v. McEnery, 91 Pa. 185, 189; McHugh v. Schlosser, 159 Pa. 480, 486; Burns v. P.R.R., 219 Pa. 225, 228. "The measure . . . is not what the deceased would have earned . . . but only so much thereof as the jury find would have gone for the benefit of his family": Glasco v. Green, 273 Pa. 353, 357. This rule was restated in the Act of April 4, 1868, P.L. 58, section 2, as applying to common carriers, and commented on in Cleveland & Pittsburgh Railroad Co. v. Rowan, 66 Pa. 393, 399.

Gaydos v. Domabyl, 301 Pa. 523, 530-531 (Pa. 1930). "[D]amages in death cases do not include a claim for mental suffering, grief or distress of mind." Id. (citations omitted).

ii. Survivor Action

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

> Under the survival statute, survival damages are essentially those for pain and suffering between the time of injury and death. 42 Pa.C.S.A. § 8302. The survival action has its genesis in the decedent's injury, not his death. In the survival action, the decedent's estate sues on behalf of the decedent, upon claims the decedent could have pursued but for his or her death. The recovery of damages stems from the rights of action possessed by the decedent at the time of death. *Nye v. Com., Department of Transportation*, 331 Pa.Super. 209, 480 A.2d 318 (1984). In other words, the survival action simply continues, in the decedent's personal representative, the right of action which accrued to the deceased at common law. *Id.* The measure of damages in a survival action is the decedent's pain and suffering prior to death and loss of gross earning power from the date of injury until death, less the probable cost of maintenance as proved by evidence and any amount awarded for wrongful death. *Krock v. Chroust*, 330 Pa.Super. 108, 478 A.2d 1376 (1984).

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

INDEMNIFICATION AND INSURANCE-PROCUREMENT AGREEMENTS

A. Indemnification

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

In addition to shifting liability, indemnity agreements often contain language imposing a duty to defend the indemnitee. For example, if the indemnity clause states that "Indemnitor agrees to defend, indemnify, and hold harmless indemnitee from any and all acts …," then the indemnitor will be required to indemnify *and* defend the indemnitee for the specified acts covered in the indemnity clause. Indemnity clauses are common in service contracts. For instance, a hotel that contracts with a laundry service will require that the laundry service defend, indemnify and hold

harmless the hotel for any damage caused by the laundry service. In doing so, the hotel has added a protective layer around itself in the event someone is injured at the hand of the laundry service, and claimant attempts to sue the hotel.

B. Statutory Limitations on Indemnification

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

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

See, 68 P.S. § 491. Based on the anti-indemnification statute's language, its application is extremely limited in scope.

C. Indemnification for Indemnitee's Negligence

Often times, a party will insert an indemnification clause seeking indemnity not only from the indemnitor's negligence, but also from *its own negligence*. Notably, Pennsylvania generally disfavors such agreements. *Hershey Foods Corp. v. General Electric Service Co.*, 422 Pa.Super. 143, 619 A.2d 285 (1992). Indeed, indemnity agreements are to be narrowly interpreted and strictly construed by Courts against the party seeking indemnification. *Williams v. Dialysis Props., LP*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 92, *10 (Ct. Com. Pl. May 31, 2013) (citing, *CONRAIL v. Delaware River Port Auth.*, 880 A.2d 628, 632 (Pa. Super. 2005); and, *Jacobs Construction, Inc. v. NPS Energy Services, Inc.*, 264 F.3d 365, 371 (3rd Cir. 2001) (applying Pennsylvania law)).

In fact, Pennsylvania Courts often examine such agreements through the lens of the "Perry-Ruzzi" rule, crafted from two Pennsylvania Supreme Court cases: *Perry v. Payne*, 217 Pa. 252, 66 A. 553 (1907) and *Ruzzi v. Butler Petroleum Company*, 527 Pa. 1, 588 A.2d 1 (1991). Under the "Perry-Ruzzi" rule, "a contract of indemnity against personal injuries should not be construed to indemnify against the negligence of the indemnitee, unless it is so expressed in **unequivocal terms**." *Hershey Foods Corp.* 619 A.2d at 288 (1992) (quoting, *Perry*, 66 A. at 557). "No inference from words of general import can establish such indemnification." *Id*. (quoting, *Ruzzi*, 588 A.2d at 4).

These "words of general import" include key phrases such as "all claims", "any and all liability", or "to the fullest extent of the law" are held to be legally insufficient to shift liability to the indemnitor for the indemnitee's negligent acts. See, *Perry*, supra; *Ruzzi*, supra; and, *Greer v. City of Philadelphia*, 568 Pa. 244, 795 A.2d 376 (2002). In *City of Wilkes-Barre v. Kaminski Bros.*, the Commonwealth Court stated that:

> We think it clear, on reason and authority, that a contract for indemnity against personal injuries, should not be construed to indemnify against the negligence of the indemnitee, unless it is so express in unequivocal terms. The liability on such indemnity is so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts its beyond doubt by express stipulation. No inference from words of general import can establish it.

See, *City of Wilkes-Barre v. Kaminski Bros.*, 804 A.2d 89, 95 (Comwlth. Ct. 2002) (citing, *Perry*, supra, at 557); see also, *Urban Redevelopment Authority of Pittsburgh v. Noralco Corp.*, 281 Pa.Super. 466, 422 A.2d 563 (1980) (reaffirming these principles).

D. Insurance Procurement Agreements

Contracts and leases often contain clauses that require a party to procure or provide insurance coverage. Under these so-called "insurance procurement agreements" or clauses, a party to the contract or lease agrees to obtain an insurance policy providing adequate coverage. While not always the case, these agreements sometimes require the party that is obligated to obtain insurance to also name the other party as an additional insured under the policy. Under this structure, both parties will be provided coverage under the same policy, subject to the terms within the policy itself. In the event that a party who has agreed to obtain liability insurance coverage on behalf of another party fails to do so, Pennsylvania holds the breaching party liable for the full amount of the damages sustained. See, *Hagan Lumber Co. v. Duryea School Dist.*, 277 Pa. 345, 121 A. 107 (1923); *Wilkinsburg v. Trumball-Denton Joint Venture*, 390 Pa.Super. 580, 568 A.2d 1325 (1990); and, *DiPeto v. City of Philadelphia*, 344 Pa.Super. 191, 496 A.2d 407 (1985).

E. The Duty to Defend

Much like other jurisdictions, in Pennsylvania, the duty to defend is broader than the duty to indemnify. *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 589 Pa. 317, 908 A.2d 888, 896 n.7 (2006). In instances where a party is covered by an insurance policy, either as a named insured or an additional insured, an insurer's duty to defend is triggered when a claim that is **potentially covered** becomes apparent. *Heffernan & Co. v. Hartford Ins. Co.*, 418 Pa.Super. 326, 614 A.2d 295 (1992). Importantly, this duty remains until the insurer can confine the claim to a recovery excluded from the policy. *Sclabassi v. Nationwide Mut. Fire Ins. Co.*, 789 A.2d 699, 703 n.2 (Pa. Super. 2001). Put another way, "an insurer who refuses to defend its insured from the outset does so at its peril … because the duty to defend remains with the insurer until it is clear the claim has been narrowed to one beyond the terms of the policy." *Board of Pub. Educ. of the Sch. Dist. v. National Union Fire Ins. Co.*, 709 A.2d 910, 913 (Pa. Super. 1998).

DRAM SHIOP

A. Dram Shop Act

In Pennsylvania, any liability that may be imposed upon an individual or entity who provides alcohol to a visibly intoxicated person is governed by the Pennsylvania Liquor Code, Section4-493(1). Under Section 4-493(1), it is unlawful:

> For any licensee or the board, or any employe[e] servant or agent of such licensee or of the board, or any other person, to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given, to ***any person visibly intoxicated***, or to any minor: Provided further, that notwithstanding any other provision of law, no cause of action will exist against a licensee or the board or any employe[e], servant or agent of such licensee or the board for selling, furnishing or giving any liquor or malt or brewed beverages or permitting any liquor or malt or brewed beverages to be sold, furnished or given to any insane person, any habitual drunkard or person of known intemperate habits unless the person sold, furnished or given alcohol is ***visibly intoxicated*** or is a minor.

See, 47 P.S. § 4-493(1) (emphasis added). Notably, Section 4-497 reaffirms that a licensee is insulated from liability to injured third persons *unless* the customer was served while visibly intoxicated. In that regard, Section 4-497 states as follows:

> No licensee shall be liable to third persons on account of damages inflicted upon them off of the licensed premises by customers of the licensee ***unless*** the customer who inflicts the damages was sold, furnished or given liquor or malt or brewed beverages by the said licensee, or his agent, servant or employe[e] ***when the said customer was visibly intoxicated***.

See, 47 P.S. § 4-497 (emphasis added).

Pennsylvania Courts have consistently held that in order for a liquor licensee to be liable to a third person, there must be service of alcohol to a **visibly intoxicated** person. *Jardine v. Upper Darby Lodge No. 1973, Inc.*, 413 Pa. 626, 198 A.2d 550 (1964). Indeed, in *Rivero v. Timblin*, 12 Pa. D.&C.5th 233 (Ct. Com. Pl. 2010), the Court noted that the Pennsylvania Superior Court has made it clear that "[v]isible intoxication must be proven under section 4-497 as a *prerequisite* to imposing any liability upon a licensee." *Rivero*, 12 Pa. D.&C. 5th at 253 (quoting, *Hiles v. Brandywine Club*, 443 Pa.Super. 462, 662 A.2d 16, 20 (1995)) (emphasis added).

In order to recover, a plaintiff must prove two things: (1) that an employee or agent of [the defendant] served the patron alcoholic beverages at a time when he was visibly intoxicated; and (2) that this violation of the statute proximately caused the plaintiff's injuries. See, *Schuenemann*

v. Dreemz, LLC, 34 A.3d 94, 100 (Pa. Super. 2011) (quoting, *Fandozzi v. Kelly Hotel, Inc.*, 711 A.2d 524, 525-26 (Pa. Super. 1998)).

B. Commercial Sale

The Pennsylvania Courts have refused to extend liability under the Pennsylvania Liquor Code to non-licensed persons who furnish intoxicants to individuals who are visibly intoxicated. See, *Manning v. Andy*, 454 Pa. 237, 310 A.2d 75 (1973). Indeed, the general rule in Pennsylvania is that "there can be no liability on the part of a social host who serves alcoholic beverages to his or her adult guests." See, *Williams v. Seafross*, 2015 Pa. Dist. & Cnty. Dec. LEXIS 33, *20 (Ct. Com. Pl. April 2, 2015) (quoting, *Klein v. Raysinger*, 504 Pa. 141, 470 A.2d 507 (Pa. 1983)); see also, *Sites v. Cloonan*, 328 Pa.Super. 481, 477 A.2d 547 (1984) (holding that a non-commercial organization which sponsored a private social gathering and acted strictly as a social host and gratuitously supplied liquor could not be held liable to third parties injured when struck by an automobile driven by a guest who became intoxicated at the event).

C. Visibly Intoxicated

Under Pennsylvania law, it is not sufficient to simply show consumption of alcohol; instead, a plaintiff must prove that the patron was served alcoholic beverages while visibly intoxicated. In Dram Shop cases, proof of visible intoxication can be demonstrated by both direct evidence and sufficient circumstantial evidence. In *Fandozzi*, the Superior Court stated that:

> We note, however, that in the eighteen years since *Couts* [*v. Ghion*, 281 Pa.Super. 135, 421 A.2d 1184 (1980)] was decided, neither this Court nor our Supreme Court has held that direct evidence is required to prove that a patron was served alcohol while visibly intoxicated. Subsequent decisions of this Court have addressed *Couts*, noting that it is not binding, but nevertheless examining whether similar circumstantial evidence has been presented. … Accordingly, we conclude that a plaintiff can prove dram shop liability in the absence of direct eye witness testimony that an individual was served at a time when he or she was visibly intoxicated.

Fandozzi, 711 A.2d at 527 (citing, *Conner v. Duffy*, 438 Pa.Super. 277, 652 A.2d 372 (1994); *Johnson v. Harris*, 419 Pa.Super. 541, 615 A.2d 771 (1992); and, *McDonald v. Marriott Corp.*, 388 Pa.Super. 121, 564 A.2d 1296 (1989)).

Moreover, "[t]he jury may not be permitted to reach its verdict merely on the basis of speculation and conjecture, but there must be evidence upon which logically its conclusions may be based." *Rohm & Haas Co. v. Continental Casualty Co.*, 732 A.2d 1236, 1254 (Pa. Super. 1999). However, expert testimony corroborated by additional circumstantial evidence is sufficient to state a cause of action that will withstand summary judgment on the issue of whether a patron is visibly intoxicated. *Fandozzi*, 711 A.2d at 528-29. In other words, while an expert in toxicology testifying

as to the patron's blood alcohol level itself may not be enough, additional circumstantial evidence as to the visible intoxication of the patron will be allowed. *Id.*

D. Sale to Underage Person

The Pennsylvania Dram Shop act establishes a duty on the part of bar owners not to serve alcohol to minors. *Reilly v. Tiergarten, Inc.*, 430 Pa.Super. 10, 633 A.2d 208, 210 (1993); see also, 47 P.S. § 4-493(1); *Herr v. Booten*, 398 Pa.Super. 166, 580 A.2d 1115, 1118 (1990) (the serving of alcohol to any person under the age of 21 is negligence *per se*); and, *Matthews v. Konieczny*, 515 Pa. 106, 527 A.2d 508 (1987) (commercial licensees may be held liable for injuries caused by the service of alcohol to minors). In *Matthews v. Konieczny*, the Supreme Court found that the statutory immunity from a third party lawsuit against licensees, where the party served was not visibly intoxicated, did not insulate the sellers, as licensees, from liability based on service to minors. Specifically, the Court held that "the statutory immunity provided in section 4-497 of the Liquor Code may not be asserted by a licensee unless the customer in question was of legal age." *Matthews*, 527 A.2d at 514.

Furthermore, the Pennsylvania Superior Court has held that seller's duty to refrain from selling alcohol to minors can be breached by an *indirect* sale to a minor through an adult intermediary, ***if*** it is known or should have been known by the licensee that the alcohol was being purchased for the use of a minor. *Thomas v. Duquesne Light Company*, 376 Pa.Super. 1, 545 A.2d 289, 294 (1988); see also, *Reber v. Commonwealth, Pennsylvania Liquor Control Board*, 516 A.2d 440 (Commwlth. Ct. 1986) (holding that the Pennsylvania Liquor Board also owes a duty not to furnish liquor to minors, either directly or through likely intermediaries).