

PREMISES LIABILITY LAW IN CONNECTICUT

I. STATUTES OF LIMITATIONS:

A. Bodily Injury:

Conn. Gen. Stats. § 52-584 is the statute of limitations for actions sounding in negligence for bodily injury. It provides that an action must be commenced within two years of the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered.

B. Injuries to Real or Personal Property:

The statute of limitations for actions sounding in negligence for injury to real or personal property is also governed by Conn. Gen. Stats. § 52-584. It provides that an action must be commenced within two years of the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered.

C. Contracts:

Pursuant to Conn. Gen. Stats. § 52-576, an action must be commenced within six years after the right of action accrues for any action on an account, or on any simple or implied contract, or on any contract in writing. Pursuant to Conn. Gen. Stats. § 52-581, an action must be commenced within three years after the right of action accrues for any action founded upon an express contract or agreement that is not reduced to writing, or of which some note or memorandum is not made. The latter section does not apply to causes of action governed by Article 2 of the UCC.

II. LIABILITY ISSUES:

Liability for an injury due to defective premises does not depend on mere ownership or title, but on possession and control. A defendant who has possession and control over property can be held liable for defective conditions existing on it even if he has no title to the property. Corvo v. City of Waterbury, 141 Conn. 719 (1954). The possessor is ordinarily the party responsible for the reason that the person in possession is in a position of control and is best able to prevent harm. Smith v. Town of Greenwich, 278 Conn. 428, 457 (2006). Possession and control are defined as the exercise of dominion over property. Although possession and control are ordinarily questions of fact not suitable for resolution by means of summary judgment, if the issue of control is expressed definitively in a lease it becomes, in effect, a question of law. Fiorelli v. Gorsky, 120 Conn. App. 298, 309 (2010).

The general rule regarding premises liability in the landlord-tenant context is that landlords owe a duty of reasonable care as to those parts of the property over which they have retained control. Fiorelli v. Gorsky, 120 Conn. App. 298, 308 (2010). *See also*, 2 Restatement (Second), Torts § 421 (1965) (nondelegable duty arises when possessor of land, having leased part of land, still owes duty to maintain in reasonably safe condition that part of land retained by him). Landlords generally do not have a duty to keep in repair any portion of the premises leased to and in the exclusive possession and control of the tenant.

To hold the defendant liable for personal injuries in a premises liability action the plaintiff must prove (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. Cruz v. Drezek, 175 Conn. 230 (1978).

Status of Entrant/Injured Party:

In general, there is an ascending degree of duty owed by the possessor of land to persons on the land, based on whether they are trespassers, licensees or invitees.

Kurti v. Becker, 54 Conn. App. 335, 338 (1999). Thus, in premises liability actions the applicable standard of care depends on the status of the visitor.

A. Trespassers

A trespasser is one who enters upon land without the consent of the possessor to do so.

An owner or possessor of land owes a trespasser a duty only to refrain from causing injury intentionally or by willful, wanton, or reckless conduct. Maffucci v. Royal Park Ltd. Partnership, 243 Conn. 552, 558-559 (1998). There is no duty to keep the premises in a safe condition, Skladzien v. Sutherland Building & Construction Co., 101 Conn. 340, 342 (1924), nor is there a duty to warn potential trespassers of hidden dangers. A possessor of land is under no duty to anticipate the presence of trespassers. Hale v. Crestline Realty, Inc., 148 Conn. 643 (1961).

There are, however, exceptions to the general rule that a landowner owes no duty to a trespasser. One exception is known as the constant trespasser exception. If the plaintiff proves that the defendant knew that the presence of trespassers was expected, then the defendant has a duty to take reasonable precautions against injuring the trespasser. Carlson v. Connecticut Co., 95 Conn. 724, 730 (1921). In order for this exception to apply, the plaintiff must prove that the defendant had notice not merely of a trespasser, but must prove that the defendant had reason to believe that the trespasser would be near the particular place where the accident occurred, or at another place with similar characteristics. Eichelberg v. National R.R. Passenger Corp., 57 F.3d 1179 (2nd Cir. 1995) (applying Connecticut law). In deciding whether this exception applies, the jury must find that the plaintiff proved that the presence of such trespassers was reasonably regular and predictable considering the location where the accident took place, the time of the accident and other circumstances surrounding the accident. Morin v. Bell Court Condominium Ass'n., 223 Conn. 323, 331 (1992).

B. Licensees

A licensee is a person who is privileged to enter or remain upon land by virtue of the possessor's consent, whether given by invitation or permission. Salaman v. City of Waterbury, 246 Conn. 298, 305 (1998).

The distinction between one who is an invitee and one who is merely a licensee turns largely on whether the visitor has received an invitation, as opposed to permission, from the possessor of land to enter the land or remain on the land. Corcoran v. Jacovino, 161 Conn. at 466. Although an invitation in itself does not establish the status of an invitee, it is essential to it. Mere permission, as distinguished from invitation, is sufficient to make the visitor a licensee, but it does not make him an invitee. Sevigny v. Dibble Hollow Condominium Ass'n., Inc., 76 Conn. App. 306 (2003).

A defendant possessor or owner of land ordinarily owes no duty to a licensee to keep his premises in a safe condition because the licensee must take the premises as he finds them and assumes the risk of any danger arising out of their condition. Laube v. Stevenson, 137 Conn. 469, 474 (1951). However, if the defendant actually or constructively knows of the licensee's presence on the premises, the licensor must use reasonable care both to refrain from actively subjecting him to danger and to warn him of dangerous conditions which the possessor knows of but which he cannot reasonably assume that the licensee knows of or by reasonable use of her faculties would observe. Salaman v. City of Waterbury, 246 Conn. 298, 305 (1998); Morin v. Bell Court Condominium Ass'n., Inc., 223 Conn. 323, 327-329 (1992).

Firefighter's Rule – The common law “firefighter's rule” provides, generally, that a firefighter or police officer who enters private property in the exercise of his duties occupies the status of a licensee. Levandoski v. Cone, 267 Conn. 651 (2004). Thus, the property owner's duty to a firefighter or police officer who comes onto the property in the line of duty owes to him the duty not to injure him willfully or wantonly.

C. Customers/Invitees

Invitees fall into three general categories:

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. Corcoran v. Jacovino, 161 Conn. 462, 465 (1971).

A *business 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.

Conn. Gen. Stats. § 52-557a recognizes a third kind of invitee, the *social invitee*, and it provides that the standard of care owed to a social invitee shall be the same as the standard of care owed to a business invitee.

An invitee who exceeds the limits of his invitation loses his status as an invitee. Frankovitch v. Burton, 185 Conn. 14, 21 (1981).

A possessor of land owes to invitees the duty to inspect and maintain the premises in order to render them reasonably safe. Warren v. Stancliff, 157 Conn. 216, 218 (1968). This duty to exercise ordinary care for the safety of invitees is non-delegable. Gazo v. City of Stamford, 255 Conn. 245, 257 (2001). The owner can hire an independent contractor to maintain the safety of the premises, but because the duty is non-delegable, the possessor of the premises remains vicariously liable for the negligent acts of its independent contractor. Smith v. Town of Greenwich, 278 Conn. 428, 456 (2006).

In addition, the possessor of land must warn an invitee of dangers the invitee cannot reasonably be expected to discover. Morin v. Bell Court Condominium Ass'n., Inc., 223 Conn. 323 (1992); Gulycz v. Stop & Shop Co., 29 Conn. App. 519, 521 (1992). Connecticut courts generally recognize that the possessor of land has no duty to warn an invitee of a dangerous condition when the invitee has actual knowledge of the condition. Warren v. Stancliff, 157 Conn. 216, 218-219 (1968); Kraus v. Newton, 14 Conn. App. 561, 568-569 (1988).

1. Employees

Since an employee is one who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land, an employee is classified as a business invitee of his employer. However, the Workers' Compensation Act, Conn. Gen. Stats. § 31-275 *et seq.*, provides the exclusive remedy for employees or their survivors with respect to personal injuries or death that occurs in the course of employment. Section 31-284(a) of the Act provides that if the employer complies with the statutory requirements pertaining to workers' compensation benefits, "[a]ll [other] rights and claims between [the] employer . . . and employees, or any representative or dependents

of such employees, arising out of personal injury or death sustained in the course of employment are abolished.”

Thus, Conn. Gen. Stats. § 31-284(a) provides a total bar to common law actions brought by employees against employers for job-related injuries, with one exception. When the employer has committed an intentional tort, the employer loses the immunity provided by the exclusivity provision. This is a very narrow exception, and requires proof that the employer actually intended to injure the plaintiff or that it intentionally created a dangerous condition that made the plaintiff's injuries substantially certain to occur. Suarez v. Dickmont Plastics Corp., 229 Conn. 99, 106 (1994); Scheirer v. Frenish, Inc., 56 Conn. App. 228, 233 (1999). Connecticut courts have consistently refused to impose liability on employers for accidental injuries, even where they were caused by gross negligence, willful and wanton misconduct, recklessness, statutory violations or other misconduct “short of a conscious and deliberate intent directed to the purpose of inflicting injury.” Ramos v. Branford, 63 Conn. App. 671, 680 (2001).

The exclusivity provision of the Workers' Compensation Act also bars most third party claims that seek indemnification from an employer. A third party's right to seek indemnification from an employer is limited to those situations where there is an independent legal relationship between the third party and the employer, thereby generating a legal duty owed by the employer to the third party seeking indemnification. Barry v. Quality Steel Products, 263 Conn. 424, 451 (2003). A third party's right to seek indemnity from an employer is clear when the obligation springs from a separate contractual relation, such as a tenant's express agreement to hold the landlord harmless, or a bailee's obligation to indemnify a bailor, or a contractor's obligation to perform his work with due care.

2. Independent Contractors

An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own means and methods and without being subject to the control of his employer, except as to the result of his work. Chute v. Mobil Shipping & Trans. Co., 32 Conn. App. 16, 20 (1993). The fundamental distinction between an employee and an independent contractor depends upon the existence or nonexistence of the right to control the means and methods of work. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent. Doe v. Yale University, 252 Conn. 641, 681 (2000).

If an independent contractor is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of land, then the independent contractor is classified as a business invitee. Therefore, for an independent contractor to recover for a breach of a duty owed to him as a business invitee, he has to allege and prove that the land possessor had actual or constructive notice of the presence of the specific unsafe condition that caused his injury. Ciarlo v. George, 2008 Conn. Super. LEXIS 2231 (2008).

An employer is generally not liable to others for the negligence of its independent contractors because the employer has no power of control over the manner in which the work is to be done by the contractor. Archambault v. Soneco/Northeastern, Inc., 287 Conn. 20, 53 (2008). The same rule applies to general contractors as employers of independent subcontractors: a general contractor is not liable for the torts of its independent subcontractors. However, there is an exception: if the general contractor reserves in his contract general control over the subcontractor or his servants, or over the manner of doing the work, or if he in the progress of the work assumes control or interferes with the work, or if he is under a legal duty to see that the work is properly performed, the general contractor will be responsible for resultant injury. The contractor's control need not be exclusive; it is sufficient if it is shared with another. Pelletier v. Sordoni/Skanska Construction Co., 264 Conn. 509, 517-518 (2003).

D. Children/Attractive Nuisance Doctrine

Connecticut has not adopted the doctrine of attractive nuisance. Neal v. Shiels, Inc., 166 Conn. 3, 11 (1974). However, when applying the principles of common law negligence, the courts have recognized that children require special consideration.

In Connecticut, if the owner or possessor of land knows, or from facts within his knowledge should know, that the presence of children is to be expected, he is bound to anticipate that and exercise reasonable care to avoid injuring them. Dzenutis v. Dzenutis, 200 Conn. 290, 304 (1986). Conduct which may be careful in dealing with an adult may be careless in dealing with a child. Moonan v. Clark Wellpoint Corp., 159 Conn. 178, 191 (1970). If the presence of children is anticipated, the care to be exercised is such as is reasonable having in view the probability that children, because of their youth, will not discover the condition or

realize the risk involved in coming within the area made dangerous by it. Wolfe v. Rehbein, 123 Conn. 110, 113-114 (1937).

Notice and Defect

A. Defect defined

Not every imperfection in a premises constitutes a defect for the purposes of a premises liability case. The test for whether a particular condition renders the premises “defective” is whether it renders the premises not reasonably safe for a reasonably anticipated use. Facey v. Merkle, 146 Conn. 129 (1959). In other words, does the condition render the property unreasonably dangerous?

B. Notice

Typically, for a plaintiff to recover for a breach of a duty owed to her as an invitee, she has to allege and prove that the defendant had actual or constructive notice of the existence of the specific unsafe condition that caused her injury. Meek v. Wal-Mart Stores, Inc. 72 Conn. App. 467, 474 (2002). Either type of notice, actual or constructive, must be 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. Riccio v. Harbour Village Condominium Ass’n., Inc., 281 Conn. 160, 165 (2007).

1. Actual Notice versus Constructive Notice

Actual notice simply means actual knowledge of a specific condition. Constructive notice, on the other hand, arises when the defect existed for a length of time sufficient for the defendant, in the exercise of due care, to discover it in time to have remedied it. Riccio v. Harbour Village Condominium Ass’n., Inc., 281 Conn 160, 163 (2007). Circumstantial evidence can be used to establish constructive notice. Sokolowski v. Medi Mart, Inc., 24 Conn. App. 276, 287 (1991).

2. Owner/Shopkeeper Created Defect:

If the plaintiff proves an affirmative act of negligence, i.e., that the defendant's conduct created the unsafe condition, proof of notice is not necessary. Holody v. First National Supermarkets, Inc., 18 Conn. App. 553, 556 (1989); Tuite v. Stop & Shop, Inc., 45 Conn. App. 305, 308 (1997).

3. Mode of Operation Rule

Connecticut recently adopted the "mode of operation rule," pursuant to which a business invitee can recover for injuries sustained as a result of a dangerous condition without a showing that the business had actual or constructive notice of the condition. Kelly v. Stop & Shop, Inc., 281 Conn. 768, 775 (2007). The rule relieves plaintiffs of the burden of establishing actual or constructive notice of a dangerous condition if the mode of operation of the business creates a foreseeable risk that the dangerous condition will regularly occur and the business fails to take reasonable measures to discover and remove it. Once a plaintiff introduces evidence that the business' mode of operation is such that a dangerous condition is foreseeable, the defendant business must produce evidence that it employed reasonable measures to discover and remedy the condition. A business can be found liable if the plaintiff proves that it should have anticipated that the dangerous condition was likely to occur.

Specific Hazards

A. Snow or Inclement Weather/Moisture Tracking

Mere proof of the presence of some snow or ice or both does not necessarily show a breach of a defendant's duty. Riccio v. Harbour Village Condominium Ass'n., 281 Conn. 160, 164. The burden rests upon the plaintiff, first, to offer evidence sufficiently describing the condition of the property so as to afford a reasonable basis in the evidence for the jury to find that a defective condition in fact existed; and, secondly, to offer evidence from which the jury could reasonably conclude that the defendant had notice of this condition and failed to take reasonable steps to remedy it after such notice.

In the absence of unusual circumstances, a property owner, in fulfilling the duty owed to invitees upon his property to exercise reasonable diligence in removing dangerous accumulations of snow and ice, may await the end of the storm and a reasonable time thereafter before removing ice and snow from outside walks and steps. Krause v. Newton, 211 Conn. 191, 193, 197-198 (1989). The rationale behind the rule is that to require a landlord or other possessor of premises to keep walks and steps clear of dangerous accumulations of ice, sleet or snow or to spread sand or ashes while a storm continues is inexpedient and impractical. Sinert v. Olympia and York Development Co., 38 Conn. App. 844, 850-851 (1995).

In determining whether unusual circumstances exist to preclude application of the general rule that a property owner may await the end of a storm or a reasonable time thereafter before removing ice and snow, it is improper to consider the status of the defendants as owners and maintainers of a commercial building in determining the duty owed to a plaintiff. Morin v. Bell Court Condominium Ass'n., Inc., 223 Conn. at 327. A landowner's duty of care with respect to others has always been determined based on the status of the entrant, i.e., trespasser, licensee, or invitee. Sinert v. Olympia and York Development Co., 38 Conn. App. 844, 849 (1995). Such factors as the location of the premises, the use of the premises, the day of the week and the time of day are not appropriate considerations in determining the existence of unusual circumstances.

B. Falling Objects

A store owner is not an insurer of its customers' safety. Meek v. Wal-Mart Stores, Inc., 72 Conn. App. 467, 478 (2002). Thus, if a customer is injured by an independent act of negligence which the merchant cannot reasonably be expected to foresee or guard against, the merchant is not liable. However, ordinary and foreseeable activities of patrons, not amounting to independent acts of negligence, should not result in injury to fellow patrons or themselves; and a merchant is negligent if he has so arranged his merchandise that such activities can cause merchandise to fall, resulting in injury.

Whether a storekeeper has displayed merchandise in an unsafe manner such that injury to customers is foreseeable is for the fact finder to determine and is to be answered by considering all of the surrounding circumstances. The merchant must use reasonable care in placing goods on the store shelves. Merchandise

must not be stacked or placed at such heights, widths, depths, or in such locations which would make it susceptible to falling. The jury also may consider the method of stacking, the presence or absence of lateral support, and the stacked item's dimensions and center of gravity. Storekeepers may have a special obligation in regard to the storing and stacking of large, cumbersome, or unstable items which are likely to fall and injure customers.

A merchandise display constructed so that an inspection by a customer, in a foreseeable and reasonable manner, causes the merchandise to fall, is a negligently constructed display.

C. Security Issues/Criminal Acts of Third Parties

As a general rule, there is no duty to protect another from a criminal attack by a third person. Stewart v. Federated Department Stores, Inc., 234 Conn. 597 (1995); *see also* Craig v. Driscoll, 262 Conn. 312, 332-33 (2003) (“[t]he reason for the general rule precluding liability where the intervening act is intentional or criminal is that in such a case the third person has deliberately assumed control of the situation, and all responsibility for the consequences of his act is shifted to him”). In Connecticut, there is only a limited duty to take action to prevent injury to a third person. Absent a special relationship of custody or control, there is no duty to protect a third person from the conduct of another. Fraser v. United States, 236 Conn. 625, 632 (1996).

A defendant can be held liable, however, if its negligence creates a foreseeable risk that harm will occur. Connecticut has adopted the standard set forth in § 442B of the Restatement (Second) of Torts, which states that “[w]here the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct.” Edwards v. Tardif, 240 Conn. 610, 617 (1997); Stewart v. Federated Department Stores, Inc., 234 Conn. 597, 607-608 (1995).

Section 448 of the Restatement provides: “[t]he act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation

which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.”

The act of a third person in committing an intentional tort or crime can be a superseding cause of harm that absolves the possessor of premises of liability. The terms intervening cause and superseding cause have been used interchangeably. The doctrine of superseding cause embodies the concept of an intervening force. A superseding cause is an act of a third person or other force which by its intervention prevents the original actor from being liable for harm to another even though his negligence was a substantial factor in bringing about the harm.

In Barry v. Quality Steel Products, Inc., 263 Conn. 424 (2003), the Connecticut Supreme Court determined that the doctrine of superseding cause should be abandoned in favor of a proximate cause analysis in most cases, but it did not abolish the doctrine of superseding cause in all civil cases. In fact, the Barry court specifically limited its decision to cases involving subsequent acts of negligence. It specifically left unanswered the question of whether superseding cause analysis remained pertinent in “those cases where the defendant claims that an unforeseeable intentional tort, force of nature, or criminal event supersedes its tortious conduct. . . .” Id. at 439 n.16. The Court recently confirmed its intention to limit the Barry decision in Archambault v. Sonoco/Northeastern, Inc., 287 Conn. 20 (2008) and in Sullivan v. Metro-North Commuter Railroad Co., 292 Conn.150 (2009). Thus, superseding cause remains a viable defense in cases where the alleged intervening cause is an unforeseeable intentional tort, force of nature or criminal event.

In order to prevail in a negligent security case, the plaintiff must ordinarily provide evidence that the crime was foreseeable and that the defendant failed to exercise reasonable care to protect her. The mere fact that a crime occurred is not sufficient to support a finding that the defendant did not meet its duty of reasonable care. Ordinarily, the plaintiff must present evidence of similar crimes in the area in order to sustain her burden of showing that the third party’s criminal act was foreseeable; however, it is not necessary that there be any evidence of prior similar incidents on the defendant’s premises. Monk v. Temple George Assocs., Inc., 273 Conn. 108, 121 (2005).

False Arrest/False Imprisonment

A. Defined and Duty owed

False imprisonment, or false arrest, is the unlawful restraint by one person of the physical liberty of another and any period of such restraint, however brief in duration, is sufficient to constitute a basis for liability. Green v. Donroe, 186 Conn. 265, 267 (1982). False imprisonment is categorized as an intentional tort for which the remedy at common law was an action for trespass. 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. Lo Sacco v. Young, 20 Conn. App. 6, 19 (1989).

B. Defenses

Conn. Gen. Stats. § 53a-119a, Connecticut's shoplifting statute, states that "any owner, authorized agent or authorized employee of a retail mercantile establishment, who observes any person concealing or attempting to conceal goods displayed for sale therein, or the ownership of such goods, or transporting such goods from such premises without payment therefore, may question such person as to his name and address and, if such owner, agent or employee, has reasonable grounds to believe that the person so questioned was then attempting to commit or was committing larceny of such goods on the premises of such establishment, may detain such person for a time sufficient to summon a police officer to the premises. Any person so questioned by such owner, authorized agent or authorized employee pursuant to the provisions of this section shall promptly identify himself by name and address. No other information shall be required of such person until a police officer has taken him into custody. Reasonable grounds shall include knowledge that a person has concealed un-purchased merchandise of such establishment while on the premises or has altered or removed identifying labels on such merchandise while on the premises or is leaving such premises with such un-purchased or concealed or altered merchandise in his possession."

Joint Liability

A. Apportionment Among Tortfeasors

Pursuant to Conn. Gen. Stats. § 52-572h(c), in a negligence action to recover damages resulting from personal injury, wrongful death or damage to property, if the damages are determined to be proximately caused by the negligence of more than one party, each party against whom recovery is allowed shall be liable to the claimant only for such party's proportionate share of the recoverable economic damages and the recoverable non-economic damages, except as provided in Conn. Gen. Stats. § 52-572h(g).

Conn. Gen. Stats. § 52-572h(g) provides for reallocation of economic damages amongst defendants in some circumstances. If the plaintiff, after judgment, is unable to collect from a defendant, he can file a motion within one year from the entry of judgment or exhaustion of all appeals. If the court finds that all or part of a defendant's share of the verdict is uncollectible from that defendant, it "shall reallocate such uncollectible amount among the other defendants." The non-economic damages are reallocated among the other defendants according to their percentages of negligence, "provided that the court shall not reallocate to any such defendant an amount greater than the defendant's percentage of negligence multiplied by such uncollectible amount." Economic damages are reallocated to the other defendants in "an amount equal to such uncollectible amount of recoverable economic damages multiplied by a fraction in which the numerator is such defendant's percentage of negligence and the denominator is the total of the percentages of negligence of all defendants, excluding any defendant whose liability is being reallocated." The defendant whose liability is reallocated is nonetheless subject to contribution pursuant to Conn. Gen. Stats. § 52-572h(h) and to any continuing liability to the claimant on the judgment.

B. Joint and Several Liability

Conn. Gen. Stats. § 52-572h(c) abolished joint and several liability in negligence actions arising after October 1, 1987. Defendants are required to pay only their proportionate share of the plaintiff's damages.

C. Indemnity and Contribution

Indemnity involves a claim for reimbursement in full from one on whom a primary liability is claimed to rest, while contribution involves a claim for reimbursement of a share of a payment necessarily made by the claimant which equitably should have been paid in part by others. Kaplan v. Merberg Wrecking Corp., 152 Conn. 405, 412 (1965).

Connecticut law does not allow for contribution except in certain defined circumstances. Pursuant to Conn. Gen. Stats. § 52-572h(h)(1), a right of contribution exists in parties who, pursuant to Conn. Gen. Stats. § 52-572h(g), are required to pay more than their proportionate share of such judgment. The total recovery by a party seeking contribution shall be limited to the amount paid by such party in excess of such party's proportionate share of such judgment.

Conn. Gen. Stats. § 52-572h(h)(2) provides "an action for contribution shall be brought within two years after the party seeking contribution has made the final payment in excess of such party's proportionate share of the claim."

Conn. Gen. Stats. § 52-598a provides "an action for indemnification may be brought within three years from the date of the determination of the action against the party which is seeking indemnification by either judgment or settlement."

A valid indemnification agreement does not necessarily require the indemnitor to compensate the indemnitee for court costs and attorney's fees incurred in an underlying action. Leonard Concrete Pipe Co. v. C. W. Blakeslee & Sons, Inc., 178 Conn. 594, 599-600 (1979) Instead, an indemnity agreement will be construed to cover such losses which appear to have been intended by the parties.

Indemnity against losses does not cover losses for which the indemnitee is not liable to a third person and which the indemnitor improperly pays. However, a person legally liable for damages and who is entitled to indemnity may settle the claim and recover over against the indemnitor, even though he has not been compelled by judgment to pay the loss. In order to recover, the indemnitee settling the claim must show the indemnitor was legally liable and that the settlement obtained by the indemnitee was reasonable.

D. The Effect of Public Policy on Contractual Indemnification and Hold Harmless Agreements

Connecticut courts generally disfavor hold harmless provisions as against public policy. The law does not favor contract provisions which relieve a person from his own negligence. Reardon v. Windswept Farm, LLC, 280 Conn. 153, 159 (2006). Our courts are careful not to allow hold harmless provisions to preclude recovery where there is unequal bargaining power between contracting parties. Hanks v. Powder Ridge Restaurant Corp., 276 Conn. 314, 333-334 (2005). Nonetheless, hold harmless provisions releasing a defendant from liability for his own negligence where the parties to the contract are both commercial entities are given effect. Dow-Westbrook, Inc. v. Candlewood Equine Practice, LLC, 119 Conn. App. 703, 712 (2010).

Public policy does not prevent a party to a contract from indemnifying against his or her own negligence as long as such intention is expressed in clear and unequivocal language. Burkle v. Car & Truck Leasing Co., Inc., 1 Conn. App. 54, 56-57 (1983). Indemnity clauses in contracts entered into by businesses should be viewed realistically as methods of allocating the cost of the risk of accidents apt to arise from the performance of the contract. Dow-Westbrook, Inc. v. Candlewood Equine Practice, LLC, 119 Conn. App. 703, 712 (2010).

The only exception to this rule lies in Conn. Gen. Stats. § 52-572k (a), pertaining to construction contracts. That section provides that any contract, 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 including moving, demolition and excavating connected therewith, 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, such promisee's agents or employees, *is against public policy and void*, provided this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by a licensed insurer.”

The language of § 52-572k (a) is arguably broad enough to encompass contracts for services that go beyond the services provided in traditional “construction” contracts. Although this issue has not been addressed at the appellate level, some trial courts have held that application of the statute is limited to construction

contracts. Travelers Indemnity Co. v. Sonitrol Security of Hartford, 41 Conn. L. Rptr. 39 (2006); Albany Ins. Co. v. United Alarm Services, 194 F. Supp. 2d 87 (D. Conn. 2002) (§52-572k applies only to construction contracts).

E. Common Law Indemnification

There is ordinarily no right of indemnification or contribution between joint tortfeasors; however, Connecticut recognizes common law indemnification under certain circumstances. Where one of the defendants is in control of the situation to the exclusion of the other, his negligence alone is the direct, immediate cause of the injury and the other defendant does not know of that negligence, has no reason to anticipate it and can reasonably rely on the other defendant not to be negligent, indemnification of the “passively negligent” defendant is permitted. Krytatas v. Stop & Shop, Inc., 205 Conn. 694, 697-98 (1988); Skuzinski v. Bouchard Fuels, Inc., 240 Conn. 694 (1997).

III. POTENTIAL DEFENSES:

A. Lack of Defect

Possessors of land do not insure the safety of all persons who enter their premises. Thus, they cannot be held liable merely because the plaintiff is injured on the premises. The plaintiff must prove that the premises were unreasonably dangerous due to the presence of a specific defect.

B. Lack of Notice

It is incumbent upon the plaintiff to allege and prove that the defendant either had actual notice or constructive notice of the presence of the specific unsafe condition which caused the plaintiff’s injury. Morris v. King Cole Stores, Inc., 132 Conn. 489, 492 (1946). 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. Monahan v. Montgomery, 153 Conn. 386, 390 (1966).

In determining whether a defendant may be charged with constructive notice of an unsafe condition, the crucial question is whether the condition had existed for such a length of time that the defendant should, in the exercise of due care, have discovered it in time to have removed it. White v. E & F Construction Co., 151 Conn. 110, 113 (1963). What constitutes a reasonable length of time within which the defendant should have learned of the defect, how that knowledge should have been acquired, and the time within which, thereafter, the defect should have been remedied are matters to be determined in light of the particular circumstances of each case. The nature of the business and the location of the defective condition are factors in this determination.

C. Comparative Fault/Contributory Negligence:

Connecticut is a modified contributory negligence state. Conn. Gen. Stats. § 52-572(h)(b) provides that “in causes of action based on negligence, contributory negligence shall not bar recovery in an action by any person or the person’s legal representative to recover damages resulting from personal injury, wrongful death or damage to property if the negligence was not greater than the combined negligence of the person or persons against whom recovery is sought including settled or released persons. The economic or non-economic damages allowed shall be diminished in the proportion of the percentage of negligence attributable to the person recovering.”

In essence, a plaintiff’s recovery is barred if she is more than 50% at fault for the incident. If she is less than 50% at fault, her recovery is reduced by the percentage of her negligence.

D. Open and Obvious Defect

Connecticut courts generally recognize that the possessor of land has no duty to warn an invitee of a dangerous condition when the invitee has actual knowledge of the condition. Warren v. Stancliff, 157 Conn. 216, 220 (1968); Krause v. Newton, 14 Conn. App. 561, 569 (1988). When there is room for reasonable disagreement as to whether the plaintiff was or should have been aware of the dangerous condition, the jury and not the trial judge should determine whether the defendant had a duty to warn the plaintiff of the condition. Fleming v. Garnett, 231 Conn. 77, 86.

E. Assumption of Risk

Pursuant to Conn. Gen. Stats. § 52-572h(1), the defense of assumption of risk has been statutorily abolished in all negligence actions. However, the defense is still available in Connecticut in particular cases. Assumption of risk may be a defense to an action based on absolute nuisance, Beckwith v. Stratford, 129 Conn. 506, 514 (1942); to an action based on an intrinsically dangerous activity, Starkel v. Edward Balf Co., 142 Conn. 336, 341 (1955); or to recklessness, Carabetta v. Meriden, 145 Conn. 338, 340 (1958). To charge a plaintiff with assumption of the risk, it must appear that he knew or ought reasonably to have known and comprehended the peril to which he was exposed and, having such knowledge and comprehension, continued of his own volition to subject himself to that peril. Ballou v. Jewett City Savings Bank, 128 Conn. 527, 531 (1942).

F. Liability of Minor for Contributory Negligence:

An infant or minor can be liable for his torts. Creer v. Active Auto Exchange, Inc., 99 Conn. 266, 273 (1923). In Connecticut, the age of majority is eighteen years. The standard of care for a child is gauged by the circumstances of his age, experience and stage of development. Grenier v. Glastonbury, 118 Conn. 477 (1934). In Connecticut, a cut-off age below which the court holds a child incapable of contributory negligence has not been fixed. Neal v. Shiels, 166 Conn. 3, 11 (1974). While cases have indicated that there is some age below which a child cannot be negligent, in Colligan v. Reilly, 129 Conn. 26 (1942), the court found that a child of four might possibly be contributorily negligent, but in Rutkowski v. Conn. Light & Power Co., 100 Conn. 49, 53 (1923), the court, discussing contributory negligence, stated that very little care can be expected of a child of five. Note that Connecticut adheres to the doctrine of parental immunity, where the parent is ordinarily not liable for the torts of his child. Squeglia v. Squeglia, 234 Conn. 259, 265 (1995); Dubay v. Irish, 207 Conn. 518, 522-28 (1988). The doctrine of parental immunity bars an unemancipated minor from bringing an action in tort against his or her parent.

G. Negligence of Third Parties:

A defendant may seek apportionment of liability against other persons or entities that he believes to be liable, in whole or in part, for the plaintiff's injuries. Liability may only be apportioned to a "party" to the action or persons who have obtained a settlement or release. Bradford v. Herzig, 33 Conn. App. 714, 724, 727 cert. denied, 229 Conn. 920 (1994).

The percentage of negligence attributable to settled or released parties remains at issue in a trial. Conn. Gen. Stats. § 52-572h (f). If the defendant believes a non-party was responsible for some or all of a plaintiff's injuries, then the defendant has the responsibility to make that person a party pursuant to Conn. Gen. Stats. §52-102b . The new party to the action becomes a party for apportionment purposes only. Apportionment complaints must be filed no later than 120 days after the return date on the plaintiff's complaint. If a defendant serves an apportionment complaint, the plaintiff may choose to amend her complaint to make the new party a full defendant to the original action, and not just a party for apportionment purposes.

IV. DAMAGES

A. Caps on Damages

Connecticut does not place a cap on damages that can be recovered. A plaintiff establishing tort liability is entitled to fair, just and reasonable compensation for his injuries. Herb v. Kerr, 190 Conn. 136, 139 (1983). On a motion to set aside the verdict as excessive, the test is whether the total damages awarded falls somewhere within the necessarily uncertain limits of fair and reasonable compensation in the particular case or whether the judgment so shocks the sense of justice as to compel the conclusion that the trial court could not reasonably have arrived at it. Funk v. Bannon, 148 Conn. 557, 562 (1961).

B. Collateral Source Rule

Conn. Gen. Stat. § 52-225a requires that the court reduce a plaintiff's verdict for damages resulting from personal injuries or wrongful death by the amount of

certain collateral sources before entering judgment. Gurliacci v. Mayer, 218 Conn. 531, 556-559 (1991). The defendant may only receive such a reduction from the award of economic damages. The defendant may not claim a collateral source reduction for a sum corresponding to a percentage of damages attributable to the plaintiff's negligence under Conn. Gen. Stat. § 52-572h(c). The court determines the amount of any claimed collateral source reduction at a post verdict hearing, but in practice the amount is usually agreed upon after negotiations between the parties.

C. Non-economic Damages

Plaintiffs are permitted to recover for non-pecuniary losses, including pain and suffering and emotional distress. The issue of damages for pain and suffering rests with the trier of fact, but only if there has been some demonstrable proof of pain and suffering by the plaintiff. Intelisano v. Greenwell, 155 Conn. 436, 443 (1967).

D. Economic Damages

1. Medical Bills

In Connecticut, expert testimony is not required for the introduction of medical expenses into evidence. Conn. Gen. Stats. § 52-174(b). Under the statute, bills signed by treating physicians are admissible without a witness as a "business entry." Medical bills are evidence of medical expenses, even in the absence of testimony from the provider of the services, where the plaintiff testifies that he incurred the charges as a result of the injuries received. Bruneau v. Quick, 187 Conn. 617, 622 (1982).

Proof of the expenses paid or incurred affords some evidence of the value of the services, and if unreasonableness in amount does not appear from other evidence or through application of the trier's general knowledge of the subject matter, its reasonableness will be presumed. Carangelo v. Nutmeg Farm, Inc., 115 Conn. 457, 462 (1932). However, even when the plaintiff's evidence is uncontradicted and comes from an expert witness, the trier may still allow a lesser figure. Clark v. Haggard, 141 Conn. 668, 674 (1954).

2. Lost Wages

An injured plaintiff may recover damages for actual lost wages, as well as diminution of earning power. Hayes v. Morris & Co., 98 Conn. 603, 606 (1923). Evidence must be of such certainty as the nature of the particular case may permit. Berndston v. Annino, 177 Conn. 41, 47 (1979). The plaintiff is not required to present proof which demonstrates the value of the loss of earning capacity to a mathematical certainty. Hoadley v. University of Hartford, 176 Conn. 669, 675 (1979). However, the plaintiff must lay a foundation which will enable the trier to make a fair and reasonable estimate of the damages. Delott v. Roraback, 179 Conn. 406, 411 (1980). Expert testimony is not required.

Damages may be recovered even though the injured party has been paid for lost wages or earnings. Gurliacci v. Mayer, 218 Conn. 531, 556 (1991). Whether or not the plaintiff in fact works or receives his salary is immaterial. If the employer continues to gratuitously pay the plaintiff while he is out of work, the plaintiff may still recover this item of damages. Dickerson v. Connecticut Co., 98 Conn. 87, 93-94 (1922).

E. Wrongful Death/Survival Actions

In Connecticut, an action for wrongful death must be brought within two years from the date of death and no more than five years from the date of the act or omission complained of. Conn. Gen. Stats. § 52-555. Because the right of action is purely statutory, the remedy exists during the prescribed period, and does not exist thereafter. Ecker v. West Hartford, 205 Conn. 219, 232 (1987). The time limitation therefore serves as a limitation on liability itself, rather than as a statute of limitations.

Conn. Gen. Stats. § 52-555 allows recovery of “just damages” plus reasonably necessary medical, hospital and nursing services and funeral expenses by the executor or administrator of an estate for injuries resulting in death. “Just damages” include: (1) the present cash value of the decedent's lost earning capacity less deductions for necessary living expenses; (2) compensation for the destruction of the decedent's capacity to carry on and enjoy life's activities; and (3) compensation for conscious pain and suffering. Katsetos v. Nolan, 170 Conn. 637, 657 (1976). “Just damages” also include compensation for the very loss or

deprivation of the life itself. Floyd v. Fruit Industries, Inc., 144 Conn. 659, 670 (1957). Fear of death, anxiety and mental anguish may be elements of special damage in a proper case. Meyer v. Basta, 102 Conn. 144, 147 (1925).

F. Prejudgment Interest

As a general rule, prejudgment interest is not awarded in personal injury actions in Connecticut. The plaintiff can, however, file a written offer of compromise pursuant to Conn. Gen. Stats. §52-192a(a), offering to resolve the matter for a sum certain. If the defendant fails to accept the offer of compromise within 30 days, and if the plaintiff thereafter recovers an amount equal to or greater than the sum certain stated in the offer, the court will add prejudgement interest to the plaintiff's recovery at a rate of 8% per year. The interest is calculated from the date the complaint was filed if the offer of compromise was filed not later than eighteen months from the filing of the complaint; otherwise, it is computed from the date the offer was filed.

Failure to accept an offer of compromise subjects the defendant to the imposition of interest even though the defendant may not have had notice of all of the plaintiff's claims at the time the defendant rejected the offer, or where the facts underlying the claim have changed. Lutynski v. B.B. & J. Trucking, Inc., 31 Conn. App. 806, 812-813 (1993), aff'd, 229 Conn. 525 (1993).

G. Punitive Damages

Connecticut provides for common law and statutory punitive damages in certain cases. Common law punitive damages consist of the plaintiff's litigation expenses, less taxable costs. Berry v. Loiseau, 223 Conn. 786, 825-27 (1992). Litigation expenses may include not only reasonable attorney's fees, but also any other nontaxable disbursements reasonably necessary to prosecuting the action. Generally, a plaintiff may recover common law punitive damages where the evidence shows that the defendant acted with reckless indifference to the rights of others, or intentionally and wantonly violated those rights. Ames v. Sears, Roebuck & Co., 8 Conn. App. 642, 654 (1986).

Various statutes have punitive features, allowing for double or treble damages in various situations. Among others, Conn. Gen. Stats. § 52-564 allows treble

damages for theft (clear and convincing evidence required); Conn. Gen. Stats. § 31-72 allows double damages for failure to pay wages; Conn. Gen. Stats. § 31-290a allows punitive damages for wrongful discharge; Conn. Gen. Stats. § 14-295 allows double or treble damages for reckless operation of a motor vehicle; and the Connecticut Unfair Trade Practices Act (CUTPA) permits the recovery of attorneys fees and punitive damages (See Conn. Gen. Stats. §42-110g(a)).

V. ALTERNATIVE DISPUTE RESOLUTION

Connecticut has a system in place for the resolution of disputes through alternative means. Connecticut Practice Book § 14-13 states that where a pre-trial conference is deemed necessary, both the parties and the attorneys shall attend and shall consider “alternative dispute resolution options to trial.”

A. Mediation

Active and retired Superior Court judges throughout the State are available as mediators to parties wishing to attempt to resolve claims without formal judicial intervention. This is a free service; however, it can take several months to accomplish, especially if the parties wish to use a judge who is well-respected as a mediator. Private mediation is an option, for a fee, and is available from a number of sources.

B. Arbitration

Connecticut has instituted a court annexed arbitration system. Under Conn. Practice Book § 23-61, the court, on its own motion, may refer to an arbitrator any civil action in which, in the discretion of the court, the reasonable expectation of a judgment is less than \$50,000, exclusive of interest and costs and in which a claim for a trial by jury and a certificate of closed pleadings have been filed. The arbitrators are typically local attorneys who have been appointed by the judicial department to serve as arbitrators.

The award in a court-annexed arbitration cannot exceed \$50,000, exclusive of legal interest and costs. Under Conn. Practice Book § 23-66, the decision of the arbitrator becomes a judgment of the court unless a party who appeared at the arbitration files a claim for a trial *de novo* within 20 days after the arbitrator’s

decision. The court may, in its discretion, schedule the matter for a trial within 30 days after a claim for a trial *de novo* is filed. The decision of the arbitrator shall not be admissible in any subsequent proceeding.

VI. STATE SPECIFIC ISSUES:

A. Abutting Owners:

An abutting landowner is ordinarily under no duty to keep the sidewalk in front of his property in a reasonably safe condition for public travel. Abramczyk v. Abbey, 64 Conn. App. 442, 446. An abutting landowner can be held liable, however, in negligence or public nuisance for injuries resulting from the unsafe condition of a public sidewalk caused by the landowner's positive acts.

Likewise, a landowner whose property is next to a public sidewalk is not liable for the formation of ice upon a public sidewalk due to the natural flow of surface water from its land. Smith v. Town of Greenwich, 278 Conn. 428, 434 (2006). A showing is required that the defendant so maintained its premises as to cause the water which flowed from its premises to be diffused upon the sidewalk in a manner substantially different in volume or course than would naturally have been the case.

Liability can be shifted from the municipality to the individual by statutory or charter provision, or by a city ordinance. Machado v. City of Hartford, 292 Conn. 364, 373 (2008). Imposition upon abutting owners of a duty to clear walks of snow and ice, with a provision of a penalty by fine and costs for failure to do so or for clearing the same by the municipality and collection of the cost from the abutting owner, is not sufficient to render the individual, instead of the city, liable for injuries sustained by reason of snow or ice thereon. Shubert Performing Arts Center, Inc. v. Boppers of New Haven, Inc., 1998 Conn. Super., Lexis 1454, citing Willoughby v. New Haven, 123 Conn. 446, 451 (1937). Rather, abutting owners have only been held liable for injuries from defective sidewalks where they were not only charged with the duty of keeping sidewalks in repair but also expressly made liable for injuries occasioned by the defective condition thereof. Machado v. City of Hartford, 292 Conn. 364, 373 (2008).

B. Recreational Use Statute

Pursuant to Conn. Gen. Stats. § 52-557f provides immunity from liability for landowners who allow their land to be used by the public for recreational purposes without a fee. This immunity applies even if the landowner has taken steps to prevent the public from using some areas of the property by posting “no trespassing” signs. Kurisoo v. Providence & Worcester Railroad Co., 68 F.3d 591 (2nd Cir. 1995). The immunity afforded by this statute extends to the landowner’s employees absent any allegations of willful or malicious misconduct. Manning v. Barenz, 24 Conn. App. 592, *aff’d* 221 Conn. 256 (1991).