

OOPS! PAY UP.®

**AN INJURY ATTORNEY'S PERSPECTIVE ON
ACCIDENT PREVENTION IN THE WORLD OF
HOTEL & PREMISES LIABILITY LAW**



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BINGHAM**
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FOREWARD & OVERVIEW

OOPS! is a compilation of 25 years of practicing personal injury in Nevada. Through my experiences, I have gained tremendous knowledge in the world of accidents, injuries, and hotel personal injury claims. I am pleased to provide this book, as it has many real-world examples provided in a simple and straightforward approach to practical issues confronting the managers and decision-makers in the hotel industry and in the legal profession. I hope it makes a difference in the lives of those who read it and ultimately avoids those accidents and personal injuries that have caused so much pain and suffering to those victims I have represented. I found it so surprising that much of what I learned about guest satisfaction and safety prevention in school was so overlooked in the real world. I started my career at Earl Wooster High School in Reno, Nevada, where I owe much to the football program that ingrained the spirit of competition, aggressiveness, team play, winning, and, above all, a belief in one's self that anything is possible if you put your mind to it. I carried that character to the courtroom and into my profession, where advocacy and zealousness are necessary attributes of a successful plaintiff's lawyer.

Graduating in 1990 from the William F. Harrah's College of Hotel Administration at the University of Nevada, Las Vegas, I received my Bachelor's of Science in Hotel Administration, exploring summer studies in Lausanne, Switzerland, and Mexico while working for my father's, where I gained much of my outlook on law. I worked at the iconic Las Vegas Hotel and Casino, "The Frontier," before taking a job with the Four Seasons Hotel Chain. In 2000, I graduated from the Thomas Jefferson School of Law in San Diego and passed the Nevada Bar Exam, where I have practiced personal injury law ever since. As a founding partner in the law firm Benson & Bingham since 2003, I have handled over 5,000 personal injury matters, many involving hotels and casinos.

The area of law encompassed in the world of hospitality is quite vast. This book focuses on the areas that consistently contribute to risk management claims to the hoteliers of the world. As a plaintiff's lawyer for twenty years (in the hotel room capital of the world of Las Vegas, where we currently have over 154,000 hotel rooms (and thousands more being built), much of the inspiration of this book comes from real experiences from thousands of cases personally handled by myself or my firm (and/or turned down by my firm). I will attempt to share with you some practical issues that

will both enlighten and educate those who wish to prevent issues in the fields of hotel management and hotel construction.

I write this book with what I believe to be a lucky and skilled opportunity to have represented countless victims of carelessness in a city of major hotels who are prone to make mistakes (because we are all humans). Our firm was of the first generation to capture the Internet and its ability to change communication, and marketing lawyers knew it, allowing victims from all over to find us. For now, hotel guests around the world can easily research a law firm or personal injury lawyer from the comfort of their own home in a practical and methodical way: the web.

I thank my late Father, Joseph L. Benson, Esq., who carved my path, and without him I would not be practicing law. I thank my mother, Darlene Jones, who raised me right and whose genetic code in microbiology, German engineering, and overall scientific approach helps me daily to confront many of the legal issues that emerge. I thank my step-father (who raised me), Clinton W. Jones, for his dedication to me as a young boy. I thank my wife, Elena, for all her support and true love, and I dedicate this book to my two sons, whom I hope find their way in life, and I wish them a profession that is rewarding and challenging, but above all one that makes them happy.

~ Joseph L. Benson II, Esq.



HOSPITALITY LAW AND HOTELIERS

NEGLIGENCE LAW

Civil law and criminal law are two different areas of law. The latter focuses on crime and punishment and is not the focus of this book. Civil torts (civil wrongs), and specifically, Negligence Law, is the most common area of law the hotel's risk management department deals with. Negligence is a very complex subject with various state-to-state distinctions, but the common law elements are the same no matter where an incident occurs. When a lawyer considers bringing a lawsuit based on a theory of negligence, the following elements must be analyzed:

- The hotel must have a **DUTY** to begin with.
- The hotel must have **BREACHED** its' duty.
- The breach of duty must be **CAUSALLY** related both legally and proximately to bring about the harm.
- The resulting **HARM** must, in fact, be a **DAMAGE** that is also causally related to the incident in question.

DUTY

The prongs above have exhausting examples of statutory and state case law interpretations that will define the notion of when a duty arises. For our illustrations, we are most concerned with the innkeeper's duty to his guest. This is both a statutory (meaning the Nevada State Legislature has mandated by virtue of the N.R.S.—Nevada Revised Statutes) as well as the common law (Judge interpretation of different cases that have

become precedent and therefore law).

To understand the legal concepts, let's assume the following fact pattern: Betty-the housekeeper is mopping a highly polished marble lobby with soapy water and does not place warning cones. John the guest does not see Betty, who has stepped away to grab a towel, and John breaks his ankle as he slips on the floor. Here, Betty owes a duty to John. That duty is manifested by the nature of the guest/patron relationship and her position as an employee of the hotel.

The duty of the hotel management would seem obvious to most who have stayed in a hotel: Keep me safe! And, for the purposes of this book, the duty of a hotel is to keep you safe, so it is not a consideration that requires a whole lot of thought when doing a legal analysis. In most circumstances, the duty element will be met given that hoteliers are legally required to provide a reasonable and necessary premise that includes certain safety standards to their guests. A guest is not necessarily someone who has a hotel room, but any "guest." Much of the distinctions of the past (e.g., invited guests, uninvited guests) have been consolidated into what lawyers refer to as the duty owed to foreseeable guests—almost everyone. Most law schools spend many weeks just on this subject—who has a duty and to whom? For example, does a doctor have a duty to help someone who is not his patient in a casino? Yes. Does a guest have a duty to another guest? Usually not, unless he is responsible for the resulting incident. Does a hotel housekeeper have a duty to the guest who falls in the hall? Yes. The point of these examples is to point out that a relationship must exist between two parties that creates a duty. By virtue of who the persons are, or what capacity they have, will change the duties owed. For our purposes, a duty is owed 100% to all our guests, and that duty is that of an innkeeper or, in transportation, a common carrier (a higher duty owed, or what we call a heightened duty).¹

BREACH

Hotels breach their duties just about every day, and many do not know it. For example, when a lazy "bar back" forgoes cleaning up a spill, that creates liability as we have breached a duty owed to the bar patron. Or, when the proprietor makes a marble surface that is highly slippery and often polished, and it is known that thousands of people will rely on that floor to walk, liability may be had for breach of the duty to construct a safe floor or provide floor mats. This is a classic example of "risk vs. utility." In negligence analysis, it is often disputed whether safety risk can be decreased or balanced against the durability or practicality of the material. In our example with Betty, there are arguments about how she breached her duty: 1.) She did not put warning cones; 2.) She did not stanchion off the area; 3.) She failed to towel the water as she was mopping. 4.) She left the scene knowing all of this. Thus, we know that Betty breached her established duty to John. We will go more into depth later about these types of issues in their respective sections. The takeaway point is to remember that a violation of what a reasonable person would do when they have an inherent or implied duty is a breach of duty.

1. See *Sherman v. S. Pac. Co.*, 33 Nev. 385, 405, 111 P.416, 424 (1910).

CAUSATION: TYPE I = LEGAL CAUSATION

The legal causation tests, once used, have been clarified over the years to become a more basic approach to understanding this third element of negligence. Traditionally, the “but for” test was used to argue whether the element of causation was met. By inserting the words “but for _____” prior to the breach, one can figure out if this legal element is satisfied. For example, “But for the mopping, would the event have happened?” On the surface, most would say yes. But is it possible that John’s shoes had grease on them? What if John was highly intoxicated? But for the mopping, would John have fallen? This becomes a more complicated analysis when additional facts are ascertained.

CAUSATION: TYPE II = PROXIMATE CAUSATION

The concept of proximate causation can be very confusing. For a layman’s understanding, think of a chain of events or a roll of dominoes that eventually leads to an accident. A proximate cause of injury, damage, loss of harm is a cause which, in a natural and continuous sequence, produces the injury, damage, loss, or harm and without which the injury, damage, loss, or harm would not have occurred.²

Most [hotel accidents](#) do not need an in-depth analysis of proximate causation because the causal chain is simple: Hotel guest injury caused by hotel or hotel staff. In our mopping example, if Betty breaches her duty to John by mopping with soapy water without notice, then Betty has proximately caused the injury to John because her actions were a “foreseeable” event. Without getting too complicated, foreseeability is a test that must be utilized in examining a negligence legal issue. Here is a classic law school example of the concept of foreseeability and proximate cause: Betty mops the floor with soapy water and causes John to fall and break his ankle; John was not drinking alcohol and was wearing anti-slip industrial work boots. On John’s way to the hospital, a taxi cab driven by Mr. Green collides with John’s ambulance and causes John to have a broken leg. John goes to the hospital and gets an infection of that leg. The doctors then decide they must amputate his leg to save John’s life. The doctors cut off his leg, the wrong leg, realize their mistake, and then correctly amputate the infected leg. John is now left with two amputated legs. So, in this example, we have a pretty horrific scenario. Is Betty responsible for everything that happened in this chain of events? Can we hold the hotel responsible for the doctor cutting off the wrong leg caused by an infection? Or was that caused by a taxi driver? This is a classic example of proximate causation.

Under legal causation, the “but for” test would simply fail. Everyone would be liable for all circumstances until the end of time. So, we have the issue of proximate causation we must deal with in certain cases. In our example, it is likely that Betty would be liable for the ankle, the leg, and the subsequent doctor error (medical malpractice),

2. NEV.J.I. 4.04

but one could argue the negligence of the taxi driver created a superseding intervening cause. This is not something we will explore in this book given the complexities of proximate cause, but it is something that should be noted to fully understand the principles of negligence. Proximate causation is an archaic term of law that is slowly being subsumed by legal causation. Practically speaking, this means that most lawyers and judges look to legal causation and the “but for test” as opposed to proximate causation issues. To prove a case of negligence, both Type I and Type II causation must be established. Thus, a victim must prove both legal and proximate causation in most jurisdictions. In our example, most jurisdictions, including Nevada, have held that proximate causation is satisfied when a second tortfeasor (our confused surgeon) commits professional negligence, such that the hotel can be held liable for the resulting doctors screw up.



DAMAGES

Damages in a hotel negligence context refer to a quantifiable total of: injuries, medical expenses, wage loss, loss of earning capacity, needed to compensate a victim. In the business of personal injury, we refer to these damages as “special damages”: medical expenses and wage loss, both past and future. Collectively, special damages are then added to damages for “pain & suffering.” Pain and suffering can often exceed the amounts of medical expenses and wage loss depending on both the type of injury and the permanency of the injury, and is a question of fact left for the jury to determine. This is the value equation that makes determining injury cases difficult, as no injury is really the same, and how it affects a plaintiff varies greatly. Damages are fairly easy to recognize but hard to calculate, especially when dealing with the pain and suffering that should be awarded for what is “fair and reasonable.” As the Nevada jury instructions state, there is no set standard for awarding pain and suffering.

On its face, damages seem easy to recognize in a fact pattern (e.g., John broke his ankle). However, the injuries may have a sub-component to them: causation. This is the most litigated amongst personal injury attorneys and insurance companies because injuries often may have more than one contributing factor. For example, John may have broken his ankle given his [slip and fall](#), but if we add the fact that John had broken his ankle two years before in a soccer game or had a bad sprain two weeks ago, prior to his fall in the lobby, the hotel will defend their conduct, saying that John’s slip was only a part of the damage; that the true injury “pre-existed” the fall; hence, compensation for the broken ankle should be diminished to some extent given the other potential cause.

Below is a list of common defenses to a damages claim:

That claimant, plaintiff, or client had a pre-existing injury (not caused by this particular accident) in the form of:

- Inevitable injury/age (e.g., John’s arthritis or osteoporosis in his ankle was bound to give out);
- Alternative injury (e.g., John, a marathon runner, Achilles tendon wore-out is the real issue here).

- Fraudulent injury. No “objective” injury is presented, and injury is based on complaints of the victim without substantial medical correlation. The plaintiff is a malingerer and is lying about the pain syndromes.

The plaintiff’s lawyers will argue the opposite:

- Exacerbation of an older injury, plus the victim did not have any painful symptoms (i.e., asymptomatic at the time of injury).
- Inevitable issues are a slippery slope to argue. We all get older, and without the trauma, no injury would have occurred. But for the accident, the injury would not have manifested.
- Alternative injuries are often a contributing factor, but medical evidence will prove what the underlying cause is.
- Medicine is both an art and a science, and it is not perfect. Medical issues are often not recognized in cookie-cutter fashion and “subjective” complaints given by the patient are the only way we know a person is hurt, as we do not have a “pain-o-meter” test.

DAMAGES: THE MOST COMMON HOTEL INJURIES

The most common injuries in hospitality litigation are ones involving the lumbar spine (low back). Knees, ankles, hips, wrists, and elbows are also major damages given the most common and avoidable accidents: slips and falls. Understanding these common injuries should emphasize that the expense of not improving safety measures will ultimately be much more expensive in the long run. Lumbar spine surgeries lead to million-dollar verdicts, so much attention and planning should be given to prevent such horrific accidents.

Proving up injury causation can only be done by a qualified medical doctor. In other words, a doctor will have to testify in court that the injuries sustained were causally related to the trauma. Hence, both sides will hire their expert doctors to state, under oath, their position and rationale for the cause for a jury to decide.

“NEGLIGENCE PER SE”

Legally, this doctrine means “Negligence as a Matter of Law.” Under Nevada law, negligence as a matter of law simply means that there is a violation of a code, law, or ordinance, and that creates a “presumption” of negligence against the hotel if that code violation was in fact the causal link that made a person fall or become injured. Negligence per se is a useful tool for plaintiff’s attorneys as it makes proving the case much easier.

In order to prove negligence per se, the plaintiff must show that

- The defendant violated the statute,
- The act caused the kind of harm the statute was designed to prevent, and
- The plaintiff was a member of the statute's protected class³.

In some jurisdictions, negligence per se creates merely a presumption of negligence—Nevada is one of them. The Negligence per se cause of action is also a great tool if a building code requires a certain “coefficient of friction” for a walking area, and that floor does not meet or exceed, then one can argue the hotel was “negligent as a matter of law.”

Just the same, if a car runs a stop sign and crashes, causing another to be injured, not only would that injured party have a negligence action, they have a “presumption of negligence” because running a stop sign is in itself a breach of the law. The important analysis of negligence per se is that the law must have been designed to protect that class of person that was in fact injured. This is an important distinction given the A.D.A. (American Disability Act), because if a violation of the Act is obvious, it must apply to the protected class of disabled persons. Often, persons who are injured are the elderly, who are often regarded as disabled for some types of health conditions. The Nevada Supreme Court in 2001 extended the negligence per se doctrine to adopt violations of the building code as being negligence per se if the other prongs are met⁴. (See: The Court already has adopted violation of a city ordinance as grounds for asserting negligence per se.⁵)

SUMMARY

In sum, the elements of negligence are straightforward and logical. The tricky part is being able to recognize when these elements become issues independent of each other, such that if a lawyer is unable to prove one of the elements, he or she can't prove a case of negligence. Recognizing these elements will help a hotel practitioner and those making safety decisions to avoid lawsuits and claims from disregarding common sense.

3. Nevada Common Law and Negligence per 3rd Re-statement of Torts, 2001

4. Vega v. Eastern Courtyard Associates, 24 P.3d 219 (2001)

5. Barnes v. Delta Lines Inc., 99 Nev. 688, 669 P.2d 709.



SLIP, TRIP, & FALLS: THE BASICS

Falls tend to occur with more frequency in hotels than any other mishap. Whether the hotel is liable is always the fundamental question. Juries tend to blame the fall victim simply because they are perceived to possess blame; by their very nature, they control their own body and every step. Negligent slips and trips are caused by a foreign object or material that is on the floor—and that foreign hazard often is water or a water-based mix. According to the National Safety Council’s “Accident Facts” Report, slips and falls represent ten percent of all occupational deaths⁶. Slips and falls account for 20 percent of time lost due to non-occupational injuries. Slip falls rank only second (behind motor vehicles) for workers’ compensation claims. The average claim for slip-falls is \$13,096 (excluding administrative and legal costs). Slip-falls cost US businesses in excess of \$12 billion per year.*

THE DUTY ELEMENT OF NEGLIGENCE AND SLIPS & FALLS: ACTUAL & CONSTRUCTIVE NOTICE

A hotel has an obvious duty to clean up spills as they find them. The question is whether a hotel has a duty to clean up spills they possess no knowledge about. This distinction is “notice.” Before a legal duty arises for a hotel, the staff must be on notice of the hazard in some form. Actual notice is exactly what the name infers. The staff had actual notice that the hazards existed. In our ongoing example of Betty and John, this is apparent as Betty has full knowledge of the soapy water because she, in fact, put the water there herself. This is a clear example of actual notice. And because of this notice, the hotel has a legal duty to make sure people are aware of the hazard so they do not fall.

(Because the hotel employee, Betty, created the hazard herself, many jurisdictions, including Nevada, presume liability against the hotel. This will be discussed later)

6. <https://media.videos.mhi.org/wp-content/uploads/2023/12/17183901/National-Safety-Council-Injury-Facts.pdf>

Constructive notice is a different concept. Constructive notice infers a duty when the hotel should be “expected” to know about the hazard. This is to avoid a concept called willful blindness and to encourage proprietors to actively seek out slippery conditions. The common example in law school is the old banana-peel-in-a-grocery-store, or the grape that bounced down from a produce shelf. If a patron slips on this, the first thing that should be looked at is the sweep log. Grocery stores are areas where hazards can, at any time, become evident. Jars of oil and jars of any liquid can fall and break. Fruits can fall. Meat can leak. Grocery stores are high-traffic areas with high propensities for hazards. Given this “foreseeable” problem, grocery stores implement sweep programs to sweep every 20 minutes to catch those items they may not have actual notice about. The notion of how frequently a mop or broom goes by is a question of reasonableness. If the store has a sweep program and it is recorded on a sweep log, then the store has at a minimum a defense to a constructive notice claim. Similarly, in the context of a hotel, if a busy lobby with a marble floor is in the fact pattern and there is a bar or restaurant nearby, then the hotel will need to show they have done something to seek out any hidden dangers. The primary point here is to understand that the law is fair. It is not designed to hold someone accountable for something they didn’t know about, but at the same time, balancing the public’s and other guests’ expectations of safety.

THE SLIP

Slips and falls are preventable. There is no reason in today’s society, with modern technology and engineering fundamentals, for people to slip in hotels. However, because of issues with flooring design and stairwell construction, the idea of beauty over function prevails. In Las Vegas, multi-billion dollar resorts are willing to take the risk that a polished marble or stone floor is worth the risk of having a few people fall given the “utility” of the durability of the hard floor and its associated grandeur. Wax coatings are often applied to the marble or sealed concrete to create a textured surface. In many maintenance personnel depositions, wax coatings are often applied with a buffing machine, which can give the floor a nice shine and some friction protection. The problem is that once water is added to the surface, it decreases the friction between the shoe and non-porous floors, and a slippery condition is created.

Slippery conditions common in hotels are caused by:

- Guests who spill drinks
- Ice Machines
- Water feature overspray (fountains, ceiling rain features)
- Rain or snow that is dragged into the hotel.

Because there is no way to prevent water or other liquids from spilling on floors, the hotel should strongly consider a high-friction floor. Tiles with grooves, concrete with an anti-slip additive, or rough-cut/honed marble make ideal surfaces and limit the risk of a slip. As with any risk, hotels often use a balancing test. Yes, they could make

the floor 100% rough, but would that truly serve the overall architectural objective? Similarly, in bathrooms, sealed tiles and marble are routinely used because of the sanitation requirements. Because there are lots of liquids in the bathroom, the concerns of bacterial control (utility) and anti-slippage must be constantly balanced.

THE TRIP

Trips are just as frequent as slips. The only difference tends to be the directional difference that the body lands. The trip seems to cause more extremity injuries by the instinctual nature of arms and hands going first to protect the body. Slips, more often than not, cause low back, ankle injuries, and head contusions.

Trip conditions common in hotels are caused by:

- Carpets. (Bad seams, improperly tucked)
- Improper lighting
- Uneven edges (floor to carpet, curb to curb)
- Vacuum & Electrical Cords
- Objects or boxes

Slips, trips, and falls are preventable. Hotels should implement policies and procedures to limit the risk associated with such events. Regular sweeping, mopping, and visual inspection should be done and recorded. Safety training with employees and maintenance staff is critical to identifying potential hazards. Rewards programs to encourage employees to spot potential hazards should be implemented to create a safety mindset. As Ben Franklin said, “an ounce of prevention is worth a pound of cure.”

Casino accidents are plentiful within the gaming floor. The enclosed photo represents a blackjack dealer box used to help shorter dealers stand at the blackjack tables. This photo was taken after a patron tripped over, breaking her arm. The stanchions were put out after the fall. Notice how the box blends with the multicolored carpet. It is very hard for a casino guest to recognize the 3-dimensional box with the heavy carpet pattern, and given casino blackjack pits seem to blend with walkways, it is very difficult to distinguish where the intended walk path really is. Casinos are very bad at warning customers about which areas are not intended for patron access, as rarely are signs posted, nor stanchion up to direct eager gamblers. This error cost this casino \$28,000 (2010) for a broken arm.



CASINO DEALER BOX BLENDS WITH CARPET, CAUSING TRIP AND INJURY⁷.



IMPROPERLY TACKED CARPET⁸

7. Bellagio Casino floor with the hazard: A Dealer Box.

8. Notice the waves and ripples: Flamingo Hotel & Casino 2013



FLOORING, OSHA, AND MATERIAL SELECTION

FLOORING

Flooring choices are by far and away the easiest way to prevent slips and falls from occurring. It is the one choice a hotel and designer can make to eliminate the risk of falls. Choosing hard flooring over carpet has utility benefits given the length of time that hard flooring lasts.

COF = Coefficient of Friction. The standards set out by OSHA maintain a 0.5 coefficient of friction or greater. This is only a recommendation by OSHA and is not a mandatory rule. The 0.5 has become the industry standard by most experts that have worked on cases with me. This threshold is only one measurement by which to go, and many experts have trouble getting an accurate measurement given the difficulty in testing certain areas (especially if the subject area is too small to test properly). Moreover, an expert must use the exact liquid to get both a wet and dry test number. Ironically, many floors fail this 0.5 standard. To put this in perspective, ice on ice has a coefficient of friction of 0.02-0.09⁹. Rubber on Rubber is 1.16¹⁰.

Commercial-grade carpet is a very popular choice for casino floors. Presumably, the fancy designs would be more expensive in stone, but even more curious is the likelihood that casinos don't want patrons slipping near the blackjack tables! Carpet is quiet and provides good slip resistance, helping to reduce [casino injuries](#). Carpet also allows for slot machines to be relocated in different designs. The problem with carpet is that it frays and must be tacked down. Temporary carpet installations typically seen at convention centers and trade shows like the Las Vegas Convention Center and the Sands Expo are handled by a unionized private company that handles installation of booths and carpet, often for failure to tack down temporary carpet.

9. <https://www.osha.gov/laws-regs/federalregister/2003-05-02>

10. <http://physics.info/friction/>

Material selection on floors is critical. Management often overlooks this when designing or opening a hotel. The following are recommendations from Daltile®, a popular manufacturer of residential and commercial tile, stone, and other hard flooring.

It is interesting to read what factors Daltile® recommends in a flooring selection:

Consider Prior to Tile Selection

Residential

- Glazed floor tiles should not be used where there is a consistent presence of water, oil, or grease unless COF exceeds 0.60.
- Proper maintenance is critical. Improper maintenance and improper maintenance products can result in a contaminant build-up on the surface of the tile, causing the tile to be slippery.
- Exterior applications, including pool deckings, are considered to have continuous exposure to standing water, creating a potential for a slippery floor surface. Dal-Tile does not recommend glazed floor tiles on exterior applications unless the tile surface is: (1) sufficiently protected from direct weather elements; (2) equal to or greater than .60 COF wet; (3) textured; and (4) not polished or semi-polished.
- Ramped surfaces, irrespective of the slant of the incline, require a more slip-resistant surface, and Dal-Tile recommends a minimum of .80 COF on these surfaces.
- “Polished surfaces” create a very smooth surface. Dal-Tile does not recommend polished surfaces in any areas subject to water, oil, or grease exposure.
- No floor tile is “slip-proof.”

Commercial

- Absent an exception below indicating otherwise, glazed floor tiles and porcelain tiles should not be used in floor applications where there is a consistent surface presence of water, oil, or grease. This includes outdoor areas.
- Proper maintenance is critical. Improper maintenance and improper maintenance products can result in a build-up on the surface of the tile, causing the tile to be slippery. See maintenance recommendations.
- Professional restaurateurs use special floor cleaning machines and cleaners to assure removal of contaminants, which are critical to maintaining slip resistance in dining areas. Restaurant and commercial kitchen applications are considered high-risk areas subject to floor contamination by substances that increase slipping. Dal-Tile does not recommend the use of glazed floor tile or porcelain tile in a commercial kitchen unless the COF exceeds .80 wet. The use of a glazed floor tile in a dining room of a restaurant is subject to the same risk factors. A glazed floor tile or porcelain tile may be suitable for the dining area if: (a) the COF meets or exceeds .60 wet, AND (b) the utmost care is taken to properly clean the floor and minimize the presence of water.
- Pool decking has a continuous exposure to standing water and Dal-Tile does not

recommend glazed floor tile or porcelain tile on pool decks unless the surface (1) has minimal glaze, (2) meets or exceeds .60 COF wet, (3) has a textured surface, and (4) is not polished or semi-polished. Proper drainage is a necessary prerequisite for all pool decking tile applications.

- Exterior applications, excluding pool deckings, are considered to have a continuous exposure to standing water due to weather conditions. Glazed and unglazed ceramic and porcelain tiles are not recommended for exterior floor applications unless the tile surface: (1) meets or exceeds 0.60 COF, (2) is textured, (3) is not polished or semi-polished. NOTE: Exterior areas require extra attention to minimize slippery conditions including proper drainage, systematic clean up of wet or contaminated conditions, and regular inspection of tiled floor surface to assure immediate correction of wet or contaminated conditions.
- Slippery conditions can be minimized by (1) limiting foot traffic in wet conditions, (2) prompt removal of contaminants, (3) effective drainage, and (4) proper maintenance.
- Polished and semi polished surfaces create a very smooth surface. Dal-Tile does not recommend polished surfaces in any areas subject to water, oil, or grease exposures.
- Ramped surfaces, irrespective of the degree of incline, require a more slip resistant surface for safety purposes. Dal-Tile recommends a minimum of .80 COF on all ramps or inclined flooring.
- Test Methods - there are many different test methods for slip resistance. The tile industry uses ASTM C1028. Dal-Tile recommends that customers have the tile independently tested to determine if the Dal-Tile product meets the requirements of the customer's preferred test method (if other than ASTM C1028) prior to product selection. Be sure to test competitor's products under any preferred alternative method for comparison purposes. Dal-Tile does not warrant that any of its products will meet any testing parameter other than that measured by ASTM C1028.
- No floor tile is "slip proof."

A good way to understand what makes great flooring over unsafe flooring is to look at pictures. See below some of the floors that I have litigated over the years.

STAIRS

Stairs present a special problem with victims of falls because of the inherent issues of the need to hold on. Handrails, however, do not prevent all falls because most people can't lift nor hold their own body weight.

Stair construction in hotels varies, especially if the stairs are exterior or in a stairwell. Those exterior stairs tend to be more industrial in nature to withstand the elements.

The stairs at the Bellagio hotel in Las Vegas are made of concrete. I find fault with them for a few reasons:

- They do not channel water when it rains or they are cleaned;
- They do not have an anti-slip surface such as grip tape or a textured edge;
- They have a protective metal strip that protects the stair but creates a high polished slippery edge; and,
- The evening lighting is minimal.



PHOTOGRAPH BELLAGIO HOTEL AND CASINO, LAS VEGAS, NEVADA, MARCH 2008 (NORTH STAIRWELL)¹¹.

COLOR CONTRAST OF NOSING

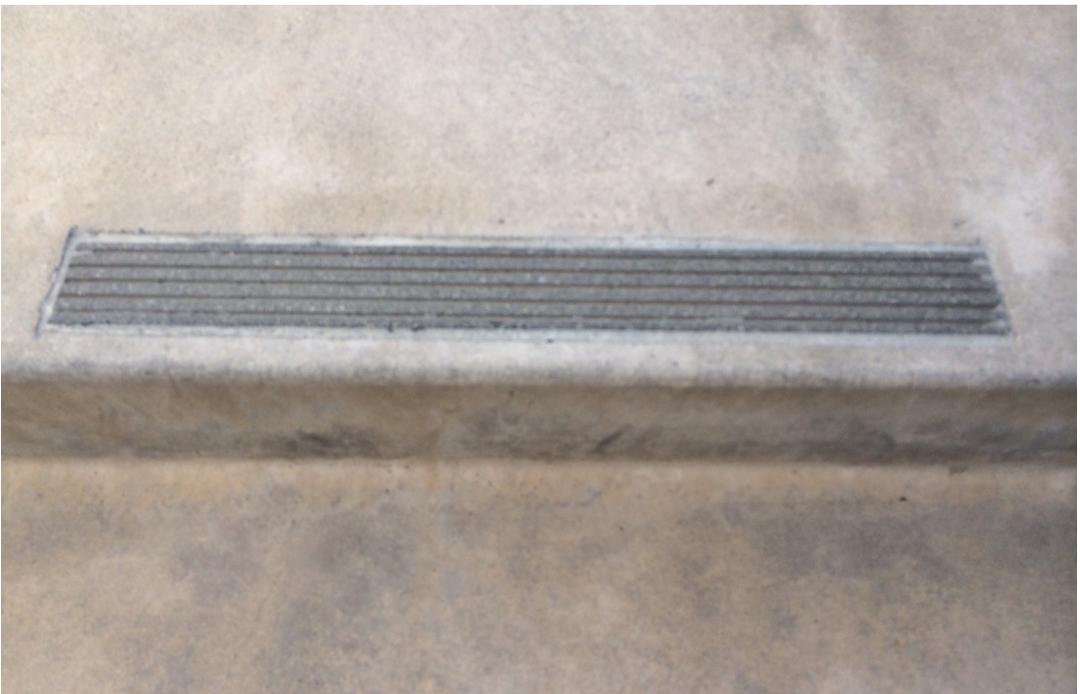
Stair nosing should provide visual contrast on the tread nosing for visibility reasons¹². Anti-slip tape is a great way to provide contrast, but the tape must be maintained in heavy use.

11. Stainless steel strip that is fabricated into the stair edge. A rubber or leather sole will not gain much traction with this. Wet = completely slippery. The coating of white paint has lost adhesion to the steel strip. 2.) The heavy pedestrian traffic on these stairs has literally taken a broom-finish concrete and made it smooth.

12. 2010 ADA standards 504.4 Nosings and tread surface



CITY OF SAN DIEGO AIRPORT STAIRS WITH BUILT-IN GRIP ARE VERY EFFECTIVE FOR MOIST ENVIRONMENTS.

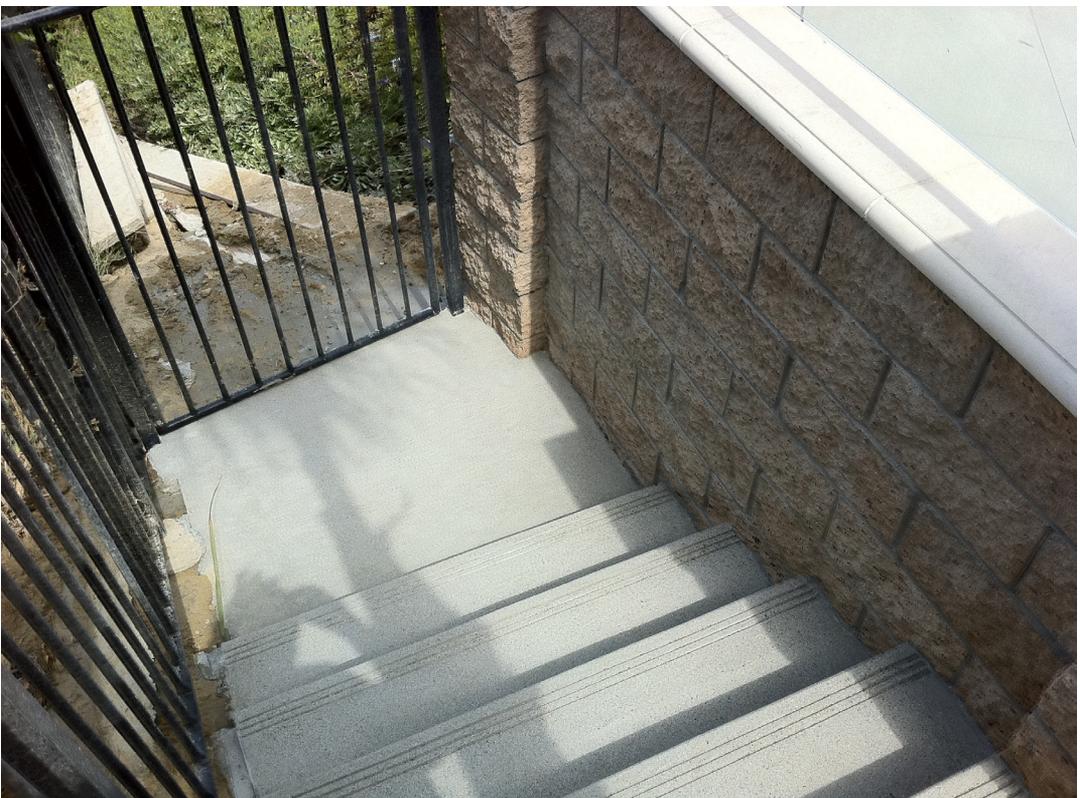


ANTI-SLIP FEATURE BUILT ON STAIRS¹³

13. Unique stair construction that provides anti-slip features built into concrete construction; stairway goes up to a pool*** Bardessono Hotel in Yountville, CA. 2014



THESE WELL-MARKED STAIRS HERE ARE CHEAP AND A GREAT WAY TO IDENTIFY DROPS IN ELEVATION; HOWEVER, THEY SHOULD ALSO INCLUDE SOME FRICTION DESIGN ELEMENTS.



GROOVES TO INCREASE WATER CHANNELING ARE ALSO A GOOD CONSTRUCTION PRACTICE AS THEY CREATE AN ANTI-SLIP TEXTURE.

INSUFFICIENT LIGHTING / "PHOTOMETRICS"

Poor lighting is a significant risk to hotel patrons and is a known security issue. Stairwells are often the major area where one may find accidents due to poor lighting. At night, parking garages are very dark and create unreasonable risks of harm. The subject is known as photometrics.

PHOTOMETRY

"Photometry means the measurement of light." The term photometry is often used to define any test data that describes the characteristics of a luminaire's light output. The most common type of photometric data includes candlepower distribution curves, spacing criteria, luminaire efficiency, so-called foot candle plots, coefficients of utilization, and luminance data. Photometric data is placed into standard format (for use in lighting calculation computer programs)¹⁴. Photometrics encompasses the study of light in relation to safe visibility. Architects and engineers routinely do a luminaire schedule in building plans to make sure there is enough light to properly illuminate an area. As the name suggests, luminaire schedules include the number of lights, the amount of lumens each light produces, and where those lights will be located within a parking lot, hallway, or structure.

AGGREGATE/ CONCRETE

Mortar or concrete is the material of choice for exterior concrete stairs, given the durability and ease of construction. There are numerous choices in concrete surfaces (many are not listed here):

Broom Finish: Where a broom or brush is passed over wet concrete, giving it a tiny-channeled texture.

Salt Finish: Salt is sprinkled over smooth or broomed concrete to give it pits. The salt absorbs the water and creates little pits.

Stamped, Stained, and Sealed Finish: While concrete is wet, a rubber or plastic mold is laid across the concrete, creating a unique pattern. Optional stain and seal can be added to the concrete. Anytime a seal is added to concrete, it fills the pores, creating less traction. Sealed concrete with a smooth pattern is very dangerous when wet.

EXPOSED AGGREGATE

I am not an expert on all concrete, but "exposed aggregate" is a great choice in the construction of stairs and other high-traffic areas prone to water exposure. Exposed

14. [The Fundamentals of Lighting](#)

aggregate is just like the name implies: tiny rocks are mixed with the concrete and allowed to dry. The top surface is sprayed with chemicals to keep the top layer of cement from hardening. Then, a power sprayer is used to wash off the top layer of cement, exposing the aggregate. Different sizes of pebbles can be chosen depending on the application. A very fine exposed aggregate creates a sandpaper-like finish and will hold its traction abilities even when wet.



STAIRS WITH AN EXTRA-THICK EXPOSED AGGREGATE CONCRETE FROM WHISTLER VILLAGE IN B.C. CANADA, WHERE SNOW, WATER, AND ICE ARE VERY COMMON.



ROUGH SURFACES LIKE THE ABOVE STONE SURFACE ARE EXCELLENT OUTDOOR AND INDOOR SURFACES WHERE WATER IS LIKELY.



TEXTURED TILE MADE TO BE ABRASIVE IS A SMART CHOICE FOR AREAS KNOWN TO BE WET, SUCH AS THIS TILE IN A HAWAIIAN HOTEL THAT IS INSTALLED THROUGHOUT THE COMMON AREAS.

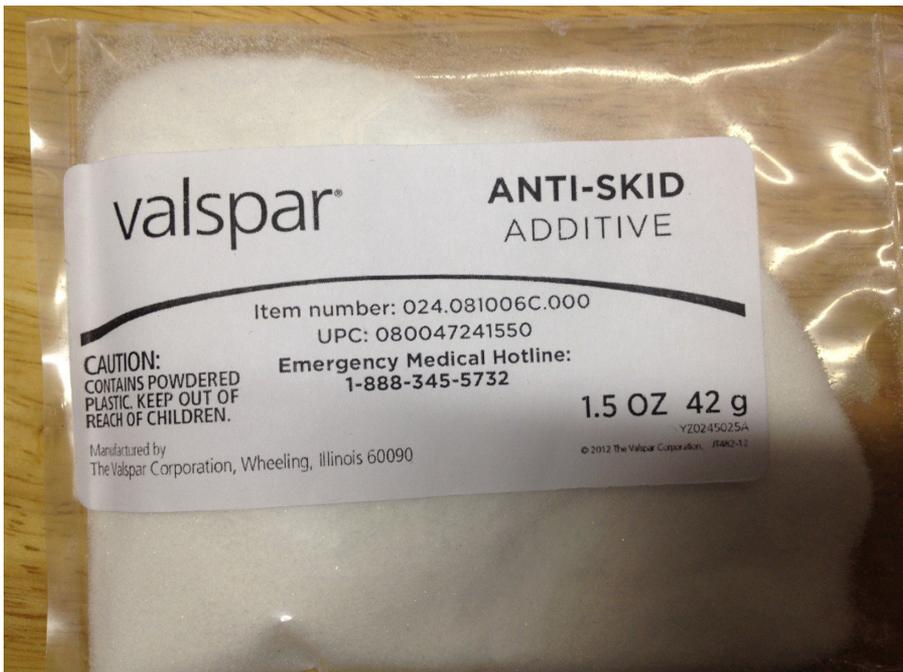
PAINT

There are many options in paint colors and types of paint that can be chosen for stairs or curbs. It is shocking that fire curbs are still painted with high-gloss red paint with no Anti-Slip additives. Many of these curbs are located near grass or other landscaping that needs sprinkler water. The mix is very dangerous, as unsuspecting pedestrians who might walk off the curb can be seriously injured.

Anti-Slip Paint Additives are a cheap and cost-effective way to increase traction on painted floors. Made, of course, of non-absorbable plastics or silica, these finely gritted pieces dry into the paint or epoxy seal, incorporating another layer of anti-slip protection.



H&C® SHARKGRIP® IS A POPULAR CHOICE TO ADD TO COMMERCIAL PAINTING APPLICATIONS.



VALSPAR PAINT BRAND ADDITIVE FOR RESIDENTIAL USE CAN BE MIXED WITH PAINT TO CREATE A VERY FINE BUT ABRASIVE SURFACE.

RISE & RUN/TREAD OF STAIRSTEPS

Experts tend to measure the rise and run of stairs to see if they meet building code compliance. Local building codes mandate residential and commercial standards. The standard rise and run (the stair platform) for most stairs is 7.75" rise and 10" tread run¹⁵. The theory is that a step with a large rise will create a trip hazard. A short run may create a stability problem. *Note: If a building code is violated in stair construction, the victim will have a "presumption" of negligence based upon the concept of "negligence per se."

15. IBC- International Building Code



A.D.A. THE AMERICANS WITH DISABILITIES ACT.

Congress enacted the A.D.A. in 1992, and it changed the hotel landscape forever. The Americans with Disabilities Act mandated certain modifications to existing public and commercial businesses and guidelines for new construction. These changes included many design and construction modifications to hotel walkways, rooms, doorways, parking areas, and many others. The original laws codified in 28 C.F.R. 351 (Code of Federal Regulations) spelled out the building requirements for handicapped compliance. In order to get changes moving quickly, Congress turbocharged the enforcement by adding mandatory attorney fees in the event the plaintiff was successful in his claim. Thus, any violations of the ADA recognized by savvy plaintiff's lawyers simply needed an affected plaintiff (any handicapped person who was discriminated against). Often it just took one handicapped person to traverse and visit multiple locations for violations to then exist. Under Title III of the ADA 1990, the "drive-by lawsuits" (as commonly referred to) were perpetrated by single acting plaintiffs who would serve plaintiffs on hundreds of lawsuits, leading to outcry that the system was being abused. Often the plaintiff was paid to become a victim by merely using the facility that had corrective ADA issues. "Voluntary remediation" was instituted such that if parties would fix the compliance issue, nothing further could be legally done.

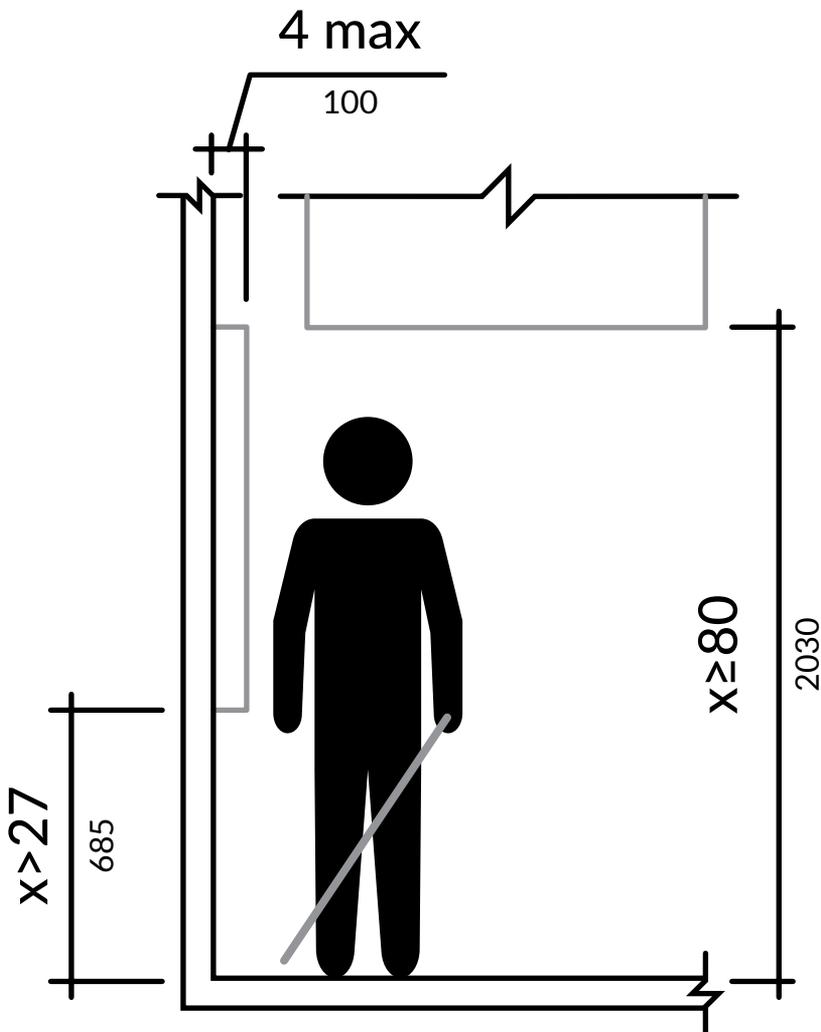
In 2010, the Department of Justice codified the design requirements again with the 2010 ADA standards. In the context of hotel rooms, the ADA mandates a percentage of hotel rooms that must comply with mobility features (e.g., roll-in showers) and be fully accommodating to persons with disabilities¹⁶. For example, a 100-room motel must have 5 total rooms with mobility features. The laws have special provisions for everything, including amusement rides, boat ramps, access to public golf tee boxes, in-room special communication devices, saunas and steam rooms requirements, swimming pools and spas, floor transitions/thresholds, bus shelters, ATMs, and many others.

Time limitations on bringing lawsuits for ADA violations in Nevada are one year.

16. <http://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards.htm>

WALL SCONCES

Hallways in hotels are areas where few would expect accidents and injuries to take place, however, they are places where many occur. Wall sconces and other lighting fixtures provide necessary hall light but can be a hazard for an unsuspecting guest. Often a hotel guest may look down on the floor, fumbling with a card key or cell phone, or be slightly or heavily intoxicated. Whatever the distraction, a large wall sconce is a dangerous eye-level impediment. The obvious argument against these unsuspecting guests is to watch out, but the legal arguments of foreseeability and notice are going to be hard for a hotel to negate, especially if a violation of the ADA has occurred. The ADA requires these objects to protrude less than 4" from the walls¹⁷. Obviously, a person must be in the class of persons (disabled) to make a negligence per se action against a hotel. However, a violation of the ADA is valuable in showing that the hotel's safety is not in compliance.



(FIGURE REPRODUCED FROM THE 307.2 2010 ADA STANDARDS)

17. Id. Section 307.2 Protruding Objects

HANDRAILS

Handrails may extend a maximum of 4.5" away from the wall¹⁸.

RAMP SLOPES

Slopes must not be steeper than 1:10 or 3 inches in maximum rise. Per the 2010 Standards, it is advised that ramps provide the least amount of possible running slope for persons with heart disease and limited stamina¹⁹.

STAIRS

Treads must be 11" deep by a maximum of 4" in rise²⁰. Stair treads and landings subject to wet conditions shall be designed to prevent the accumulation of water²¹.

GRAB BARS

Grab bars for toilets shall be provided on the sidewall closest to the water closet and the rear wall. There are numerous requirements for grab bars in the hotel bathroom. For a full list, please read Section 609 of the 2010 ADA standards.

ELEVATOR DOORS

Power operated swinging doors shall remain open for 20 seconds when activated²².

SIGNAGE

Signage, symbols, and pictorials, including braille and letter requirements, are listed in Section 703.5.



(INTERNATIONAL SYMBOL OF ACCESSIBILITY.)

18. Id https://codes.iccsafe.org/s/IBC2021P1/chapter-10-means-of-egress/IBC2021P1-Ch10-Sec1011.11#IBC2021P1_Ch10_Sec1014

19. Id. At Section

20. Id. at Section 504.2 Treads and Risers

21. Id. At Section 504.7 Wet Conditions

22. Id. At section 408.3.2.2

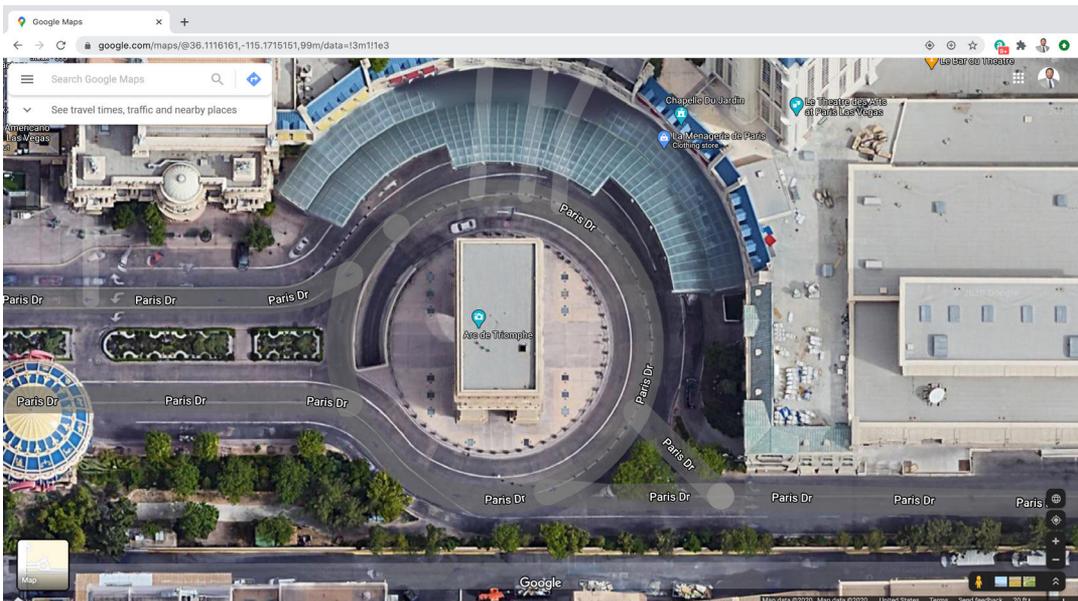
VALET & HOTEL LOBBY

The hotel valet and lobby are often the first physical impressions of the hotel. For that reason, hotels tend to beautify these areas with flowers and plants, glossy floors, and heavy lighting—all of which create their own potential hazards.

Car valet is a convenient way to park. Protection of vehicles and personal items is of paramount concern for the hotel. The valet area is a very high-risk area for many reasons.

TAXI & RIDESHARE LINES

In busy hotels, taxi lines must be cordoned off in a very organized fashion. Signage and stanchions must be placed in a safe manner to avoid collisions with oncoming taxis and pedestrians waiting to board. One of the more complicated taxi areas in Las Vegas is the Paris Hotel and Casino. The Valet here is designed to emulate the “Arch de Triomphe” in Paris, France. Four lanes of travel circle the arch to drop off and pick up guests. Each lane provides a labeled purpose: valet, drive-through, taxi drop-off and pick-up, and a waiting area. Given the action of drop-offs and pick-ups, the inevitability of taxi vs. person collisions is great. In my experience, unfamiliar guests often walk right out of a cab and get hit by the next lane of cabs picking up. This design is extremely dangerous.



PICTURE FROM GOOGLE EARTH

Valets are also areas where drinks and car fluids collect on the floor. Parked valet cars drop transmission fluid, oil, and antifreeze. Cat litter and other absorbing compounds are used to clean up such spills. This area should never simply have a sealed concrete surface given the congestion of so many liquid hazards.

I have represented victims who have slipped on oils in a valet and from flower pots that leaked water. The beautiful potted plants and other foliage need water, and

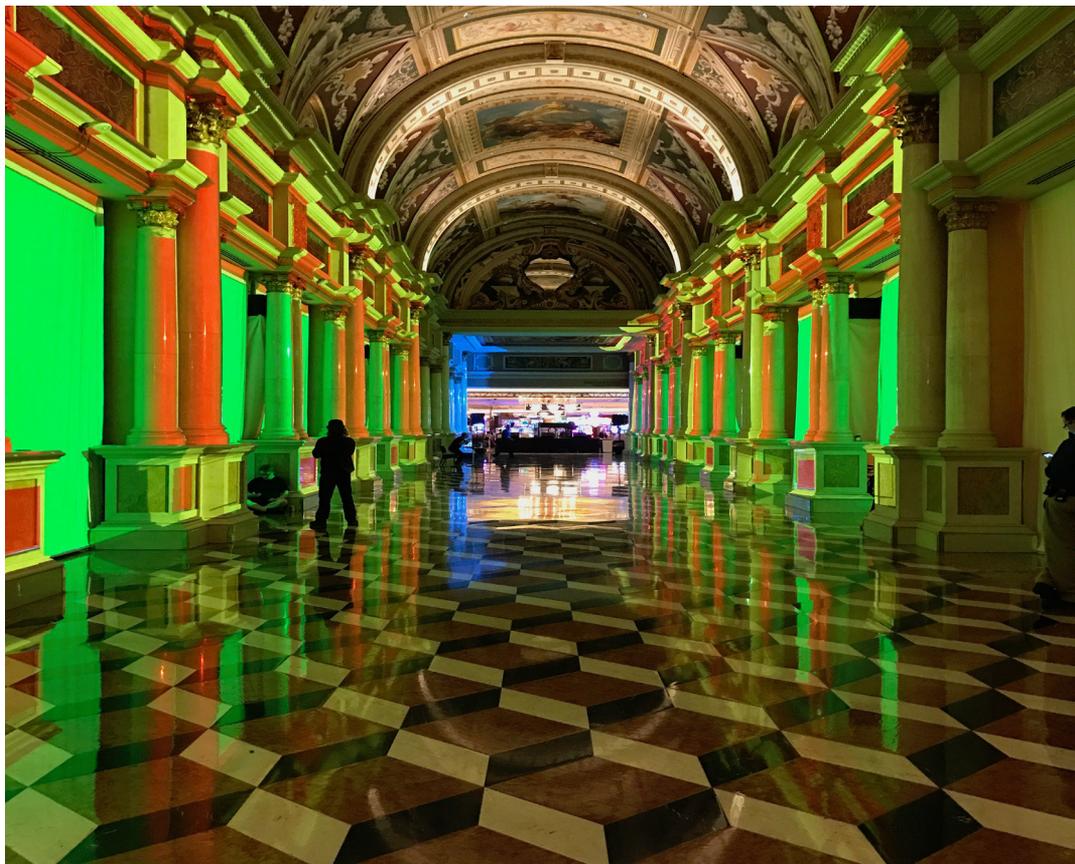
whether the hotel has automatic water systems or hand watering, the pots must be inspected to avoid overflow or leaking or have adequate drains. It seems too simple and basic, but pots should never be used in high pedestrian areas, and they continue to be used. Depositions of the valet personnel reveal continued overflow of these pots, and this notice creates liability. Hard water spots around the pot are also good evidence of notice.

LOBBIES

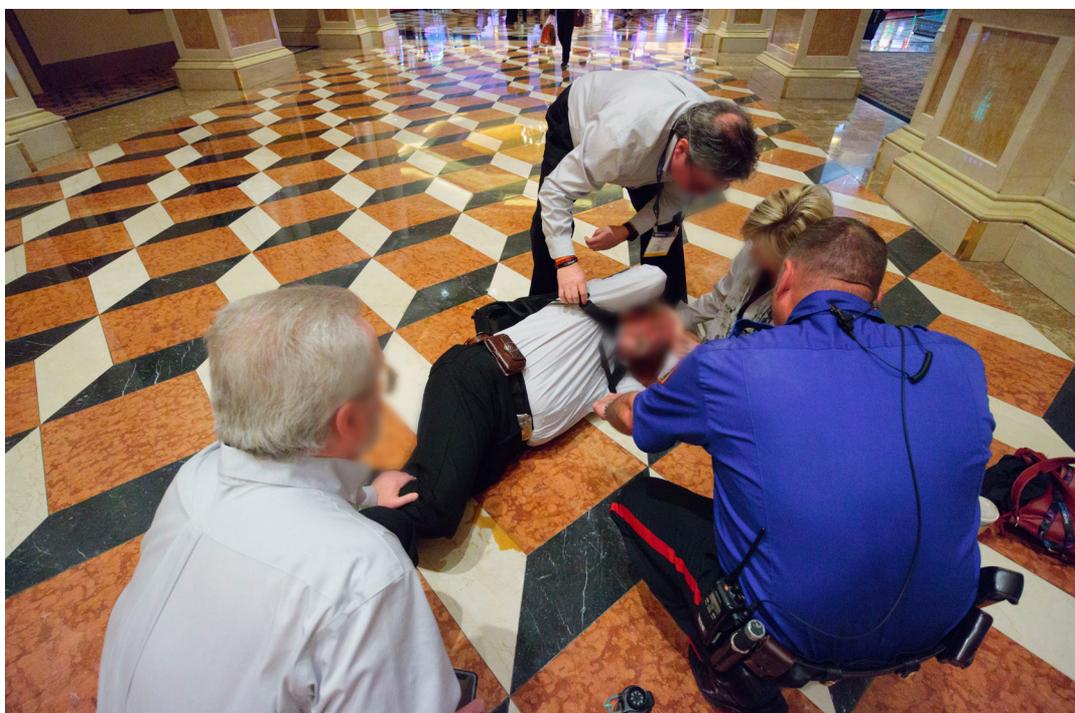
Hotel Lobbies are the center of the action. The modern lobby is often accompanied by the hotel reception with a waiting area and by a refreshment and coffee bar. This arrangement has very high foot traffic, and that, mixed with beverages, can be a recipe for disaster. The finest imported marbles and stones are utilized. The Venetian Hotel in Las Vegas has one of the more elaborate flooring configurations with marble cuts that seem like they were computer designed and fabricated (and perhaps were). This high-polish and very impressive floor does what it is supposed to: amaze. Practically speaking, it does nothing for safety. The intricate design can hide foreign objects and liquids, creating latent dangers for the bewildered and entertained guests.



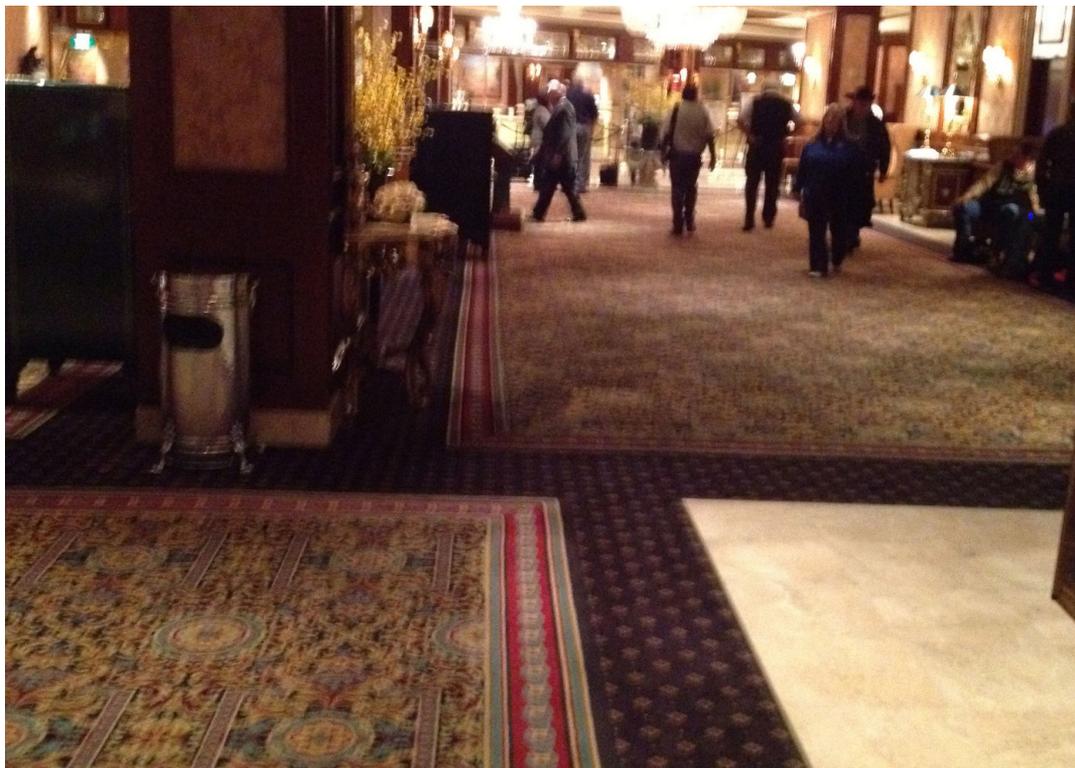
(FORMER) MILOS RESTAURANT, COSMOPOLITAN~ CARRERA MARBLE FLOORS (VENUE NOW CLOSED.)



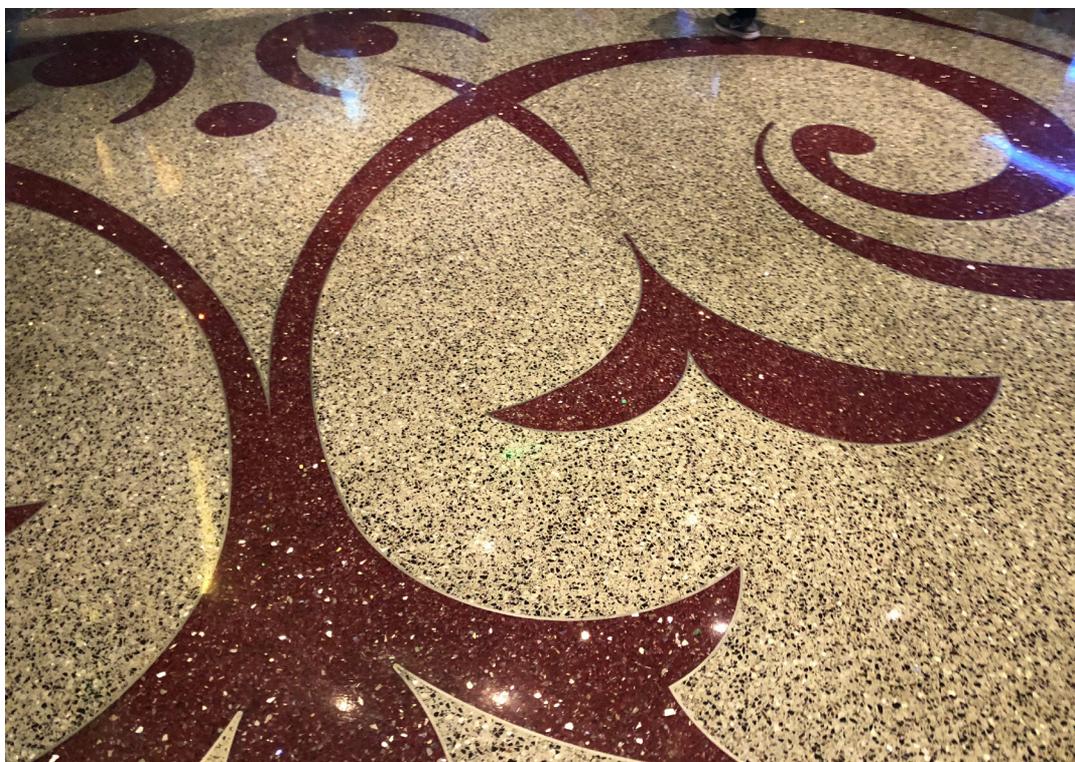
VENETIAN HOTEL CASINO LOBBY IN LAS VEGAS, NEVADA.



PATRON WHO SLIPPED AND FELL AT VENETIAN LOBBY DUE TO FOREIGN SUBSTANCE ON SEALED MARBLE.



THE SILVER LEGACY CASINO IN RENO, NEVADA. CARPET IS COMPATIBLE WITH THE RENO, NV CLIMATE.



EPOXY FLOORS—COSMOPOLITAN WALKWAY.

HOUSEKEEPING

The housekeeping department is not often the culprit of negligence actions. They do a very tough job cleaning rooms and turning for the next guest. Vacuum hallways with long cords are a trip hazard. Failure to completely dry a recently mopped bathroom floor. Public restrooms within hotels always get the bulk of claims and lawsuits by the very nature they are busy areas and constantly cleaned and mopped. The use of large cones and warning signs usually suffices, but shutting down a restroom completely and letting it dry prior to allowing in new guests is a smart idea. The reasons are simple: most of the time the bathroom stalls are occupied during a cleaning shift. Unsuspecting guests often fall on the way to the sink. Large bathrooms with blind corners cause headaches, literally. Staff often fail to anticipate what might happen. Location of warning signage is also problematic: corners and entrance are paramount; a guest is bound not to see the warning if left near the actual spot of mopping. Closing the restroom will save insurance money.

ICE MACHINES

Ice machines are normally located in one area on each floor. Ice buckets inevitably overflow when filled, and ice scatters, then melts. Depending on the flooring of the ice room, mats and warning signs are the best precautions. Below is an example of a bad design and set up in a hotel in Reno, Nevada²³. The small sign states, "FLOOR MAY BE SLIPPERY WHEN WET." This is a perfect example of what is wrong with signage; by the time someone reads this, it is likely too late. It is not visible from the hallway. Moreover, notice the plain tile on the floor is noticeably absent of a rubber mat, and the choice of a smooth surface tile for a wet area is another bad decision.



ICE MACHINE LOCATED IN A HOTEL HALLWAY WITH SLIP HAZARD WARNING.

23. Silver Legacy Hotel and Casino, 16th Floor, Reno, Nevada, January 2012.



GUEST SAFETY

The safety of the guest is of utmost importance, but it seems that it is preached and not practiced. While modern casinos and hotels have cameras, rarely do they capture an event with such great detail as to help the finder of fact determine who may be at fault. The most basic and fundamental item that can be offered by a hotelier to a guest is to be safe and secure. Top service is second.

GUEST SECURITY

Door Locks

Door locks on certain older hotel rooms are amazingly simple to break open. At a major hotel in Reno, NV, my electric card key routinely did not open my room. After a few trips down to the front desk, it was discovered that it was not my key that was the problem. It was the battery in the door lock that went bad. A security guard and engineer met at the door and they opened the door with a screwdriver in about two seconds. It boggled my mind that with such a simple device, he could gain access to the room. Dead bolts and lock chains are normally included, giving a secondary locking mechanism, but I was shocked at how little real protection was offered. While the electronic key is becoming more advanced in its ability to control room functions and track employees, there is no doubt safety has been compromised by the lack of mechanical engineering. Venturing beyond the more modern hotels of Las Vegas, where budgets are not as adept to buying the highest quality locks, risks abound for break-ins. Keyless entry with smart phones is now the norm, but if the mechanics are not there, the lock itself is a liability.

Hotel corporations have been sued for horrific crimes that occur in rooms, including rape, robbery, and murder. The facts of each case will ultimately decide whether the hotel is liable. Normally, a hotel is not responsible for criminal acts that occur within the hotel, unless they choose to ignore an obvious safety issue. Front Desk privacy, including the handling of room numbers and guest names, is always a good start. Issuing

keys to non-guests has been the reason for many lawsuits against hotels when that non-guest has a criminal plan. Major casinos, larger hotels, and integrated resorts all have security staff. Others may have a few security guards who monitor the premises. Camera technology has evolved and is an excellent tool for both evidence and prevention. In 2018, the Circus Circus hotel failed to have fully closing and locking doors as a Vietnamese couple were robbed and murdered. “Door Pushers”—opportunists who seek entry will just push on doors seeking ones that just open as the locking mechanism doesn’t lock. These defective doors are easily preventable.

Smartphone Hotel Locks

An innovator in the smart key hotel lock industry is Openkey²⁴. Their applications allow guests to not only use their smartphone to open the door but to completely avoid the front desk when checking in—completely cardless and keyless. The system allows a guest to request cleaning services, make dining reservations, and has other customizable features. Mobile pay will be integrated into the applications such that the experience is all with the guest—all the time.

Terrorism

October 1, 2017: The Mass Shooting at Mandalay Bay Hotel & Casino

Terrorism is no longer a super rare or unexpected event. Hotels have been used as direct targets and as bases for terror. The Mumbai shootings in India in 2008 were one of the first coordinated attacks where groups of Islamic terrorists killed 168 people and wounded over 300 people. In 2015, the Sousse attack in Sousse, Tunisia, killed 38 people. The rampage started on a beautiful beach as the shooter hid behind an umbrella and shot with an assault rifle at an unsuspecting guest. It occurred at the Spanish-owned five-star Riu Imperial Marhaba Hotel. These events showed the vulnerability of guests and the inadequate security measures that would ultimately need addressing. Unarmed security personnel are no longer the appropriate standard of care for hotels.

The Mandalay Bay Casino shooting, where a gunman shot from the 32-story hotel suite onto 22,000 attendees at the Route 91 Country Music Festival, left 58 people dead and over 500 injured. The shooter, Steven Paddock, committed the largest mass shooting ever in the United States as he broke out the hotel windows and fired down across the street onto the festival. He was known to be a heavy gambler at the MGM properties and was given privileged access to the service elevators, where he kept nearly 25 rifles with “bumpstock” modifications allowing for simulated automatic fire. Thousands of rounds of ammunition were stored in the room. It was believed he stayed in the room for a period of 4 days prior to the shooting, often ordering room service but keeping his do not disturb sign on his door. This enabled Paddock to prepare and plan for his massacre. He further rigged a room service cart with cameras, and he had bolted the emergency stair exit to prevent and slow response teams.

This event immediately drove a response from disgraced hotelier and Las Vegas

24. <https://www.openkey.co/>

mogul Steve Wynn, who at the time stated on Fox News, “The scenario that we’re aware of would have indicated that he didn’t let anyone in the room for two or three days, that would have triggered a whole bunch of alarms here... And we would have — on behalf of the guests, of course, investigated for safety and it would have been provocative situation. I’m sure that the same is true in other hotels but in this hotel, a 36-hour, a 24-hour, 36-hour ‘Do Not Disturb’ on a room is a predicate for investigation.” This statement all but confirmed that the duty of care had been breached.

The Lawsuits from Mandalay Bay

As covered under Nevada negligence law, if a person or company’s lack of providing reasonable care and foreseeable harm causes injury to others, victims are entitled to financial compensation. The foreseeability of this disaster, given what hotels already knew was only a matter of time, and immediately after the shooting, the security at MGM and their response came under scrutiny. It was completely inadequate for the size of the hotel and its operation. It was well known that security personnel are not allowed to carry firearms to protect the hotel guests, nor did it have any viable protections in place to prevent firearms from being used on its premises: no screening of bags to prevent dangerous items from being lodged in the hotel, nor active elevator security manned or staffed at the elevator terminals. It has become very clear that hotels must now do more in the face of homegrown terror and that hotels, especially those with billion-dollar revenues, must do what they can to implement and protect guests.

“Proving negligence has three prongs. In other words, the injured person must show that it is more likely than not (i.e., preponderance of the evidence) that:

- The defendant had a duty to the injured person,
- The defendant’s act or failure to act was not reasonable and caused the injured person’s injuries, and
- The injured person suffered some form of injury as to be entitled to damages.

The hotel, while not directly responsible for the mass shooting, was open to liability for not exercising reasonable care and enabling his actions by ignoring multiple warning signs displayed prior to his wicked actions. Three years later, the MGM and its insurance settled this lawsuit for \$800 million²⁵.

Nightclubs

The advent of the party scene within a hotel is nothing new. Mega clubs and daytime pool parties have become a moneymaker for hotels. Hotels run some clubs, and others are contracted out to 3rd party club owners. Anytime one mixes alcohol with another activity, issues are bound to occur. Often the club owners will assume any liability for events or accidents that occur within the nightclubs. The biggest issues tend to be patrons slipping on the dance floor, fighting with the bouncers, and fighting amongst each other. Most of the bouncers or doormen at nightclub tend to be oversized men, many who

25. Court-approved settlement, Clark County District Court, J. Linda Bell, Oct. 2, 2020

have not been properly screened for criminal backgrounds or for anger management and eventually reveal their propensity for overzealous security and overreactions.

Assault and Battery

Being punched or hit by a patron or security guard is an example of a battery. Both in criminal and civil law, the definition is the same. A battery is the unreasonable touching of another, and an assault is the immediate apprehension of a battery. If a bouncer, for no apparent reason, pretends to punch you but does not, he is liable for an assault. If he connects a punch, he would be liable for a battery. Battery is the most common criminal offense in nightclubs, besides perhaps underage drinking and/or illegal drug use. Loud music and massive congestion make nightclubs an easy recipe for something to go wrong. Given the difficulty in communicating, words often get exchanged, and inadvertent bumps and shoves occur. Swings often follow.

If an assault or battery has occurred and security has done their job, then both parties will be apprehended until the police can do their own investigation. That investigation normally includes interviewing the witnesses, reviewing videotape, and then speaking to the parties. If someone brings charges, they usually go to jail. If both bring charges, they both go to jail. Then, the court system adjudicates the rights and wrongs. Security needs to understand that they are agents of the club and their actions will be the responsibility of the club. This concept is known as vicarious liability.

DAY CLUBS & POOL PARTIES

The notion of alcohol and swimming pools has never been a good mix. A few cocktails while getting a tan has always been a relaxing endeavor for vacationers. Day clubs, however, tend to encourage dancing and swimming while in and around a wet pool area.

Modern-day issues of pool parties include:

- **Misters, water nozzles, and cooling stations:** These devices tend to accumulate water in areas not intended. The point of these is to cool the ambient air in a cabana or bar, but they are becoming more common in and around the pool walking areas.
- **High-Slip Flooring:** Pool construction rarely uses the old “cool decking” that, by its application, cooled the surface by use of texture pockets and color, causing a cooling effect and traction effect for bare feet. Pool decks now utilize a variety of surfaces, many of which are made for beauty, not safety.
- **Umbrellas & Cabanas:** In Las Vegas, the winds blow very hard at times. Umbrellas must be fastened down with strong stands or sandbags. An umbrella with wind behind it can create a flying missile.
- **Assaults and Batteries:** Alcohol consumption is a key ingredient when discussing batteries, and they occur not only at nightclubs but also at pool parties and, of course, bars in general. Alcohol renders the body’s reflexes slower, causing

physical coordination issues and mental slowness. It is a well-known fact that a few drinks can impair a person's ability to think and act. The market for pool parties tends to be the younger 20's crowd, where testosterone levels are at their highest and maturity at their lowest. Consequently, words escalate to fights. More nightclubs and bars have implemented a plastic cup policy and have done away with glass and bottles given the obvious injuries that a glass cup can do to a person's face. Metal detectors, wands, and other security screening has now become common in the casino and nightclub industry.

Over the years, we have had a tremendous amount of inquiries regarding victims of fights at clubs. They were harmed on the property and naturally feel they did not deserve the injury, as they truly may have been innocent in the scuffle. Nightclub brawls normally involve innocent passersby simply because those guests are at the wrong place and the wrong time. Unless the culprit has been arrested and has the financial wherewithal to be sued, it is unlikely that his criminal acts will be covered by any insurance (homeowner's insurance policies exclude intentional conduct), and of course, those who tend to throw the first punch often do not have any assets to legally pursue. Often, these potential clients must turn to a government agency to collect for the necessary expenses. Nevada has a fund for victims: "Nevada Victims of Crime." It was established in 1969 under NRS 217 to provide assistance to those who are victims of violent crimes or dependents of violent crimes²⁶. This agency will evaluate the needs for certain expenses; more commonly, these needs are for medical expenses, wage loss, funeral, and other expenses specified on their website. It is funded by a collective of court-ordered retribution payments and caps the payments at \$35,000.00²⁷.

- Assault Battery
- Sexual Assault
- Domestic Violence
- Physical Abuse
- Child Abuse
- Homicide
- Elder Abuse
- Drunk Driving²⁸

26. NRS. 217.010

27. https://voc.nv.gov/VOC/Covered_Expenses/

28. Id. <https://voc.nv.gov/VOC/Eligibility/>

NEGLIGENT SECURITY

Negligent security is a valid and plausible claim; however, it is a very difficult case to win. In the context of a nightclub, assume that a fight breaks out and an innocent person is hit with a bottle in the face. Bleeding profusely, she is carted off by medical personnel and further needs plastic surgery to correct her nose and deep laceration. During the incident, three security guards were standing in and around the scene and noticed an escalation of violence, but from our victim's point of view, they "stood around and did nothing to prevent the fight." She now wants to bring a negligent security case because the bouncers did not prevent something that was foreseeable when arguably they had a duty to. This fact pattern is one I have heard over and over. The case is usually a loser for the following reasons: Bouncers are employed to stop fights once they have occurred, not necessarily to prevent something that is unknown. Obviously, certain facts may skew the balance of right and wrong towards or against a case of negligent security.

Aggressive security guards do make for good cases. When they take an apprehension too far or deal personally with the culprit by punching or choking after the threat is gone, a case can be made for negligence and for the intentional tort of battery. Unless extreme conditions exist, a bouncer should never break the arm or critically injure a patron during an apprehension. Risk management departments are quick to settle such claims and with good reason. If conduct rises past the threshold of negligence to the next level of culpability, recklessness, or even further to intentional conduct, the hotel or establishment may be liable for punitive damages. These are payments a jury would award to punish the club for its "wanton and willful" misconduct. Nevada law under NRS 42.005 states that when a defendant has been guilty of "oppression, fraud, or malice, express or implied, the plaintiff, in addition to compensatory damages, may recover damages for the sake of example and by way of punishing the defendant."²⁹ The legislature further put a cap on the damages (in the case of battery) to 3 x the amount of compensatory damages (unless under \$100,000)³⁰. Thus, assuming a person was involved in a scuffle and he ran from the scene. Security catches him boarding a taxicab, yanks him out, and proceeds to beat him. He suffers a facial fracture from the guards. The guard who did this had done this previously, but the employer did not terminate him and kept him working because he liked him. In this example, the negligence against the security guard is a given. He had no right to "beat him." In fact, his conduct was such that it rose to be a battery. Assuming a jury ordered the bouncer (and his employer) to pay \$110,000 for medical expenses of \$35,000 and \$75,000 in pain and suffering damages. We call these "compensatory damages." — Designed to compensate the victim for his injuries. A jury could award in this case up to a maximum of \$330,000 in punitive damages to teach the club a lesson in how to treat people. This illustration shows the power and deterrence of the weapon of punitive damages. There are many considerations in punitive damages cases. Product's liability cases where drugs may be bad and the manufacturer knew about that could be hit with a much larger punitive damages

29. NRS 42.005(1)

30. NRS 42.005(1)(a)

verdict, as these cases are not capped³¹.

NRS42.007 Exemplary and punitive damages: Limitation on Liability by Employer for Wrongful Act of His Employee; Exception.

- Except as otherwise provided in subsection 2, in an action for the breach of an obligation in which exemplary or punitive damages are sought pursuant to subsection 1 of NRS42.005 from an employer for the wrongful act of his employee, the employer is not liable for the exemplary or punitive damages unless:
 - o The employer had advance knowledge that the employee was unfit for the purposes of the employment and employed him with a conscious disregard of the rights or safety of others;
 - o The employer expressly authorized or ratified the wrongful act of the employee for which the damages are awarded; or
 - o The employer is personally guilty of oppression, fraud, or malice, express or implied³².

It is clear from NRS 42.007(a) that the employer must have advanced notice is the key. This can make a vicarious liability (employer is liable for actions of employee) difficult in the context of punitive damages.

31. The US Supreme Court has ruled in many cases on limitations on punitive damages awards. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003) held, a ratio of 9 to 1 was fair in light of the “reprehensibility” of the defendant’s conduct. In *Phillip Morris*, 2007, the court took issue with the specific facts and reduced a 97 to 1. *Phillip Morris USA v. Williams*, 549 US 346 (2007).

32. NRS 42.007



SWIMMING POOLS, SPAS, & WET DECKS

The hotel swimming pool area is naturally an area where caution must be used. Most of the laws in effect today were established for the protection of children. Swimming pools are governed by city, state, local laws, and other applicable pool codes. Understanding these rules will make proving a case of negligence per se much easier, as the practitioner can easily recognize a violation of the code if given a certain fact pattern. With modern-day fencing, smaller hotels do not have a full-time lifeguard and always post a conspicuous sign that NO LIFEGUARD is present. Most codes require 5' tall fencing around the perimeter, available life-saving devices, clearly marked depth signs, and springs on entrance gates that must pull outward, among others. I will attempt to highlight and analyze the most relevant of the pool codes in the following discussion.

SLIP RESISTANCE REQUIREMENT

Specifically, the Nevada "Clark County Code" recognizes that slip resistance is key to preventing injuries. The pool code established by the county requires a slip-resistant surface that has been so treated or constructed as to significantly reduce the chance of a user slipping when wet³³. This is a wonderful statute to help win a case and a law that most hoteliers in Las Vegas should be aware of. Slip and fall at pools are a frequent event, and this secret code is a great weapon.

33. 2006 Southern Nevada Pool Code, p. 4, SLIP RESISTENCE



POOL FENCING

Pools must either be fenced or have a full-time lifeguard for hotel-type facilities³⁴.

POOL LIGHTING

Pools shall be equipped with lighting that illuminates the entire pool. Obviously, pool depth is an important aspect for a swimmer who may attempt a dive at night.

ENTRAPMENT ISSUES

Pools are cleaned by pumps that circulate the water through filters and chemicals (chlorine, bromine, and oxygenated water). The pumps used vary based on the pool requirements, including circulation needs and water volume. Larger pools may need more pumps or pumps with more horsepower. Self-cleaning pools use water jets that pop up from the floor and spray the debris towards a bottom drain where it is sucked out and filtered. Public pools require a 6-hour total turnover of water, so that every six hours all water in the pool has been circulated through filters and sanitized.

In 2008, all Clark County pools were required to undergo a retrofit of the suction inlet for pool and spa cleansing systems by use of an “anti-vortex” cover. Pool drains are very powerful and dangerous if not covered properly, as the suction can easily suck fingers and toes into the drain. Children have been sucked into the drains.

The main pool filters are under very high pressure as the water is pressured through the filters. Explosions of pool filters have been the subject of many lawsuits. Cracks in the plastic housing can be a starting point for a major disaster, as well as neg-

34. id at p. 21

ligent maintenance of re-assembling the locking hardware.

WATER FEATURES

Public water features are an extreme attraction for young children. Fountains, pools, ponds, and other water features must not be more than 18" deep³⁵. The measure is to attempt to prevent drownings of toddlers who may be able to climb into or may fall into the water. Water Fountains should never be made of stacking Mexican-style water dishes. These types of fountains have no support should a child make his or her way to the fountain. Inherently, these fountains look like a ladder or climbing course for young children, and one-piece fountains should be utilized. Wind sensors are now required for fountains on commercial properties so that when the wind exceeds 20 mph, the water must shut off³⁶. This is to protect unsuspecting pedestrians from slipping on floors a distance away from the fountain.

Modern hotels have removed the diving boards for apparently a couple of reasons. First, the image and design of the pools is one of relaxation and pool wading; thus, many of the pools no longer have "deep ends." The deeper pool depths are a hazard for children as well as create an opportunity for diving, which is now completely discouraged in hotel pools. The pool audience in Las Vegas is geared towards Cabana sales and mingling, not splash and play. Second, diving boards are simply a hazard that inevitably creates injuries.

Rain and Hotel "Storm" Attractions are a neat event to experience inside of a mall; however, it is imperative the flooring material choice fits such an event. Moreover, the rain attractions should be designed and constructed in such a manner as to not allow water to enter or spray beyond the attraction. In 2011, The Miracle Mile Shops within the Planet Hollywood casino and hotel had a rain attraction that every hour would cause the lights to dim, a thunderstorm sound experience would blare, and the ceiling would rain into a collection pond for a two-minute show. The ceiling had approximately 40 rain sprinklers that sprayed rain and fine mist down. The problem is that the collection pool did not collect all the rain, and the spray made itself to the outside of the collection basin onto the surrounding floor. The kicker in this design was the flooring choice: a high-gloss porcelain tile called "beige mother-of-pearl" to surround portions of the pool. This, in my opinion, is and was a recipe for disaster. No mats, no rugs, and low a coefficient of friction floor. To protect themselves (and allegedly patrons), warning signs about 2' from the floor and blended into the faux rock border read "caution, wet floor." Of course, this was not in a yellow or bright color to be read by anyone except toddlers who were at that eye level. My client, a 6' tall, sophisticated grandmother who was shopping for a sweater, walked by the event and slipped on water. To this day we have no idea how the water made itself to the floor; however, the mother of pearl floor was as slick as it sounds. My client fell and fractured her left hip. That case cost the mall \$280,000.00.

35. Id at p. 3; MAN-MADE DECORATIVE WATER FEATURE

36. Id at p. 14; WIND SENSORS

RESIDENTIAL POOL SAFETY

The Nevada Code has instituted alarms and other pool safety requirements to prevent [pool injuries](#). Barriers to entry like pool fencing, self-closing gates and doors, laser beam perimeter alarms, and complete pool and spa covers are becoming more popular. In my experience, the door alarm requirement is neither useful nor beneficial because the alarms are usually cheaply made and do not last in extreme weather conditions; moreover, most homeowners simply detach after installation because of the constant false alarms.

SPAS

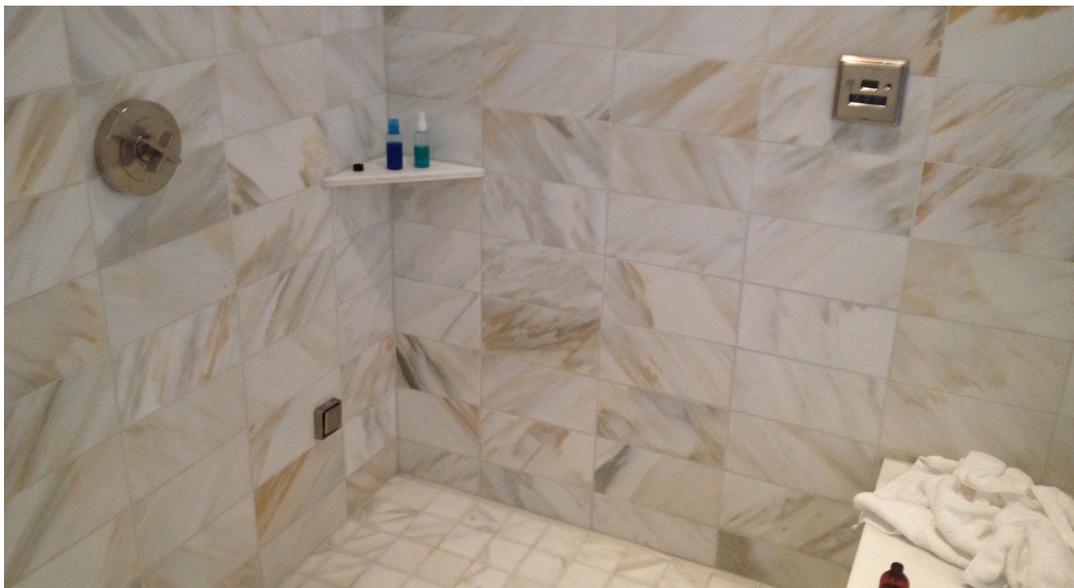
Spas are a unique water area that usually experience two kinds of issues: infant drownings and chemical burns. Spa water is usually kept between 95 and 104 degrees. The temperatures are ideal for bacterial growth given bacteria like warm water between 40 and 140 degrees³⁷. This combination of warm water and heavy human use can equate to an outbreak of different bacterial diseases and algae-borne illnesses³⁸. Thus, the need to chemically sanitize the water is critical to providing clean water for hotel guests. Bromine and chlorine are the most common chemicals used to treat water, but using too much can be a very dangerous issue. Chlorine gasses are released from chlorine evaporation, which can instantly burn human respiratory systems; moreover, chlorine in higher quantities will burn the skin. In 2011, The Hooters Casino in Las Vegas had a well-documented issue where the chlorine levels in the spa burned a group of young guests while using the outdoor spa.

SHOWERS

Below is a modern shower with a steam spa built in. An unsuspecting guest pushed the button on the wall only to find her calf and skin steamed off down below. Steam is the worst type of burn because it literally opens the pores of the skin, penetrating the dermis layers extremely fast. The theory of liability here was a failure to warn.

37. <https://www.fsis.usda.gov/food-safety/safe-food-handling-and-preparation/food-safety-basics/danger-zone-40f-140f>

38. Legionnaires disease, *Pseudomonas aeruginosa* (hot tub rash—US CDC Center for Disease Control). <https://www.cdc.gov/healthy-swimming/prevention/preventing-legionella-from-hot-tubs.html>



MARBLE SHOWER AT THE COSMOPOLITAN HOTEL AND CASINO 2013 WITH BUILT-IN STEAM DEVICE.



STEAM BURNS TO THE RIGHT LEG OF A HOTEL GUEST FROM THE SHOWER/ STEAM COMBO.

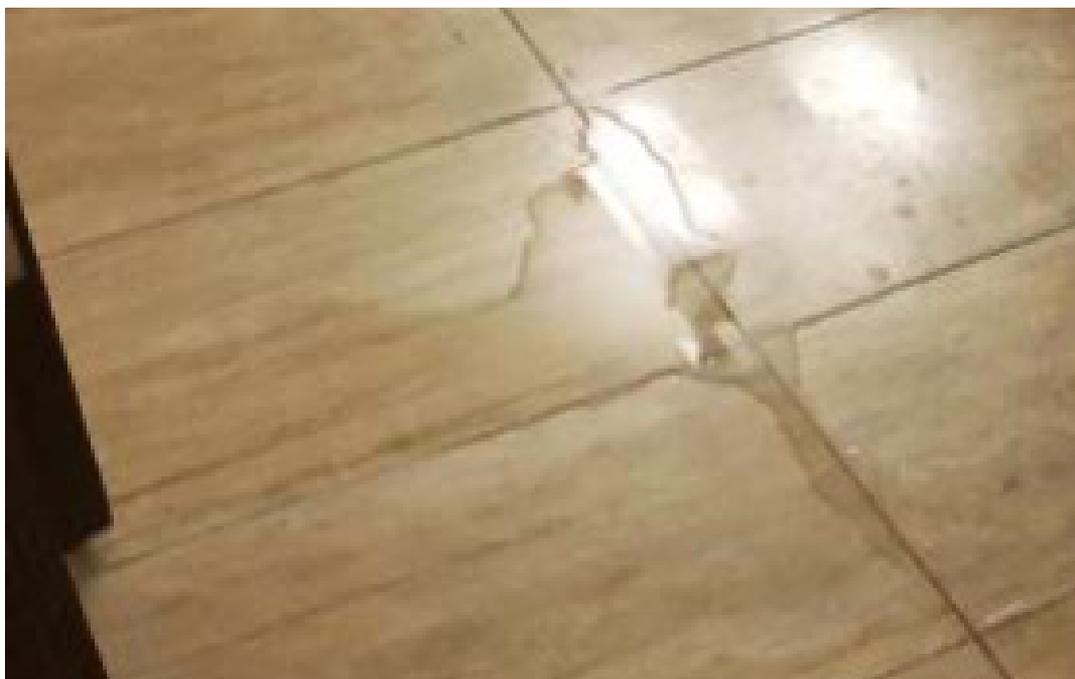
Aside from bad shower design, negligent shower maintenance can lead to unsafe conditions. Below is a photo of a poorly maintained shower perimeter. Failure to keep the shower pan and walls waterproof with silicone sealants or old grout will lead to unexpected water. Aside from the unsightly look of mold and water deposits, which can hide defects, it's a clear sign of bad maintenance. This water resulted in an elderly guest slipping and hitting his head.



POORLY MAINTAINED SHOWER PERIMETER WITH MOLDY CORNERS



IMPROVISED TOWEL BARRIER PLACED UNDER SHOWER DOOR



WATER ACCUMULATING OUTSIDE THE SHOWER AREA, CREATING A SLIPPERY SURFACE³⁹.

WATER SAFETY & LEGIONNAIRES' DISEASE

Legionnaires' disease causes fever, headaches, and flu-like symptoms⁴⁰. Common sources of contracting legionella are showers, HVAC venting, spas, and other water areas where hot mist can infiltrate the lungs. In 2011, Aria Hotel at the City Center Hotel and Casino had many reports of illness, including symptoms of respiratory and stomach sickness. The Las Vegas Valley Water District confirmed via testing that it was not their issue. (Water samples were evaluated in stations entering the city center water system.)⁴¹ Thus, the bacteria likely formed somewhere in the facility. Over six confirmed people claimed sickness. Another high-profile case popped into the news in L.A. There were confirmed reports of Legionnaires' disease stemming from participants in the Playboy Mansion in Los Angeles, California, at their Lingerie Lounge Party in 2011; however, this author is unaware if the source was ever identified. Speculation existed that the spa water or fog machines may have contributed.

39. 2019 Hilton Hotel, Waldorf Astoria, Las Vegas

40. <https://my.clevelandclinic.org/health/diseases/17750-legionnaires-disease>

41. Darlene A. Jones, confirmation microbiologist, Las Vegas Valley Water District.



FOODBORNE ILLNESS

Getting sick of poorly cooked food is a nightmare. Anyone who has ever been sick understands the nightmare of gastrointestinal issues that follow eating bacteria-ridden meat. Chicken seems to be the most common problem when dealing with foodborne illness relating to sick vacationers. It is the one product that is often undercooked and well known to carry salmonella bacteria. The problem with foodborne illness cases is usually the lack of evidence. People do not usually save leftovers that may be on vacation, and often there may not be leftovers. So proof is often left to the medical professionals who test both blood and feces to confirm foodborne bacterial presence. Jack in Box made headlines back in the 1990's for hamburger meat that was not properly cooked, causing the death of four children and sickening hundreds. Millions were paid in [wrongful death lawsuits](#)⁴². E. Coli (Escherichia coli) is one of the most deadly bacteria and must be tested if beef was consumed. E. Coli is naturally found in the human digestive tract.

Proper medical evidence included laboratory testing and clinical evaluation. Given the propensity of diarrhea, sometimes clear testing can be difficult.

In 2013, a popular Spanish Tapas Bar in Las Vegas, The Firefly, had a major episode of foodborne illness that caused the restaurant to close. Over 200 people were sickened, including much of the kitchen staff, from an outbreak of Salmonella bacteria. I represented six of the sickened persons. Many of them were treated at local hospitals for dehydration, and many were confined to their homes given they were vomiting and ill for two weeks. In those cases, the Clark County Health District found multiple health code violations, including improper food handling, food storage issues, and improper temperature control. Often "cross-contamination" is to blame in foodborne illness cases where a knife to cut chicken (that may be contaminated) is then used to cut bread, etc.

42. http://en.wikipedia.org/wiki/Jack_in_the_Box



DUTY TO HELP: 911 & BASIC ASSISTANCE

The duty to help a guest in need is a paramount concern. When a person enters a commercial premises, the duty to assist is formed. Unlike common law and statutory laws where no duty to assist is required (unless a person is involved in the action does help), the common law duty of a hotel or commercial establishment is that they must help; the degree in which help is offered is the arguable issue. The true, but accepted notion, that you can watch a person die on the street without liability is the law (unless you were somehow involved in that event, i.e., a car accident where one watched someone die without calling 911). The reason for these laws is that generally there are no duties to help strangers. “Good Samaritan laws” were put on the books to protect those who decide to help but may cause further injury. For example, if someone is involved in a car accident and the car begins to burn, a good samaritan cannot be sued if he attempts to get the victim out of the burning car and causes more injury to the victim for his efforts to save.

Most states recognize the “special duties” as codified in the Restatement of Torts; four “special relationships” have been recognized: common carrier-passenger; innkeeper-guest; custodian-ward; and business invitor-invitee. Restatement (Second) of Torts §314A (1965). Employer-employee, school-student, and landlord-tenant are three relationships that either have or will be added to that list. See Restatement (Second) of Torts § 314A, comment b (1965); Iseberg, 2007 WL 2729325, at 4, n4, citing Restatement (Third) of Torts: Liability for Physical Harm § 40, Proposed Final Draft No. 1 (April 6, 2005)⁴³.

The existence of a special relationship imposes duties upon a party where normally the law would not, such as protecting another from criminal attack by a third party or to render aid. See Restatement (Second) of Torts § 314A, Comment d (1965). (Nothing that the duty to take reasonably action to protect the latter against unreasonable risk of physical harm extends to risk arising out of the actor’s own conduct, the condition of his land or chattels, forces of nature or animals, acts of third persons be they innocent,

43. Restatement (Third) of Torts: 314(A)

negligent, intentional, or even criminal, as well as risks arising from pure accident or from the negligence of the plaintiff himself, as where a passenger is about to fall off a train or has fallen; the duty to give aid extends to cases where the illness or injury is due to natural causes, to pure accident, to the acts of third persons, or to the negligence of the plaintiff himself, as where a passenger has injured himself by clumsily bumping his head against a door).

The Nevada Supreme Court, as stated in *Lee V. GNLV Corp.*, 2001:

“ *In Nevada, as under the common law, strangers are generally under no duty to aid those in peril. See Sims v. General Telephone & Electronics, 107 Nev. 516, 525, 815 P.2d 151, 157 (1991). This court, however, has stated that, where a special relationship exists between the parties, such as with an innkeeper-guest, teacher-student or employer-employee, an affirmative duty to aid others in peril is imposed by law. See id. at 526, 815 P.2d at 157-58 (citing Keeton et al., § 56, at 376). Likewise, we have held that a party who is in “control of the premises” is required to take reasonable affirmative steps to aid the party in peril.” Id. at 526, 815 P.2d at 158 (quoting Keeton et al., § 56, at 376). Finally, while this court has not so held, other jurisdictions have expressly stated that restaurant owners and their employees owe an affirmative duty to come to the aid of patrons who become ill or are otherwise in need of medical attention. See Breaux v. Gino’s, Inc., 153 Cal.App.3d 379, 200 Cal.Rptr. 260, 261 (1984) (“It is well established that restaurants have a legal duty to come to the assistance of their customers who become ill or need medical attention.”); Drew v. LeJay’s Sportmen’s Cafe, Inc., 806 P.2d 301, 306 (Wyo.1991) (“A restaurant whose employees are reasonably on notice that a customer is in distress and in need of emergency medical attention has a legal duty to come to the assistance of that customer.”). Because a special relationship exists between a restaurateur and his patrons, and because there is no dispute that GNLV was “in control of the premises,” GNLV’s employees were under a legal duty to come to the aid of Sturms. GNLV does not dispute that a duty was owed to Sturms. Thus, the issue in this case is not whether GNLV owed a duty to Sturms. Rather, the narrower issues presented in this case concern the nature and extent of GNLV’s duty to Sturms, and whether GNLV’s employees breached that duty. The law is clear that if a legal duty exists, reasonable care under the circumstances must be exercised. See Sims, 107 Nev. at 526-27, 815 P.2d at 157-58; Keeton et al., § 37, at 237 and § 56, at 377-78. Whether a defendant’s conduct was “reasonable” under a given set of facts is generally an issue for the jury to decide. See Sims, 107 Nev. at 527, 815 P.2d at 158. Thus, Lee argues that because the issue of “reasonableness” is usually an issue for the jury to decide, summary judgment was improperly granted by the district court. While we agree with this general proposition, we note that, in some clear cases, the nature and extent of the defendant’s duty is properly decided by the*

court.² Thus, we have stated that “[c]ourts are reluctant to grant summary judgment in negligence cases because foreseeability, duty, proximate cause and reasonableness usually are questions of fact for the jury. But when plaintiff as a matter of law cannot recover, defendant is entitled to a summary judgment.” See *Van Cleave v. Kietz-Mill Minit Mart*, 97 Nev. 414, 417, 633 P.2d 1220, 1222 (1981) (quoting *Thomas v. Bokelman*, 86 Nev. 10, 13, 462 P.2d 1020, 1022 (1970)); see also *Keeton et al.*, § 37, at 237 (“It is possible to say, in many cases, that the conduct of the individual clearly has or has not conformed to what the community requires, and that no reasonable jury could reach a contrary conclusion.”). We conclude that this is such a case. Lee contends that not only did GNLV have a duty to act “reasonably,” but also that reasonableness under the circumstances of this case specifically required GNLV to administer the Heimlich maneuver to Sturms. In her brief to this court, Lee contends that “[p]roprietors of Hotel Casinos are in the best position to prevent the type of harm which befell the [d]ecedent.” Lee claims that the imposition of such a duty on parties such as GNLV is not onerous or burdensome. Lee further contends that the “reasonable” standard of care mandates the use of the Heimlich maneuver because a choking victim may have only minutes before serious injury or death results, and because the Heimlich maneuver is relatively simple to perform. This court has stated that a person who has a duty to render aid to another must “take reasonable affirmative steps to aid the party in peril.” *Sims*, 107 Nev. at 526, 815 P.2d at 157-58 (citing *Keeton et al.*, § 56, at 376). While GNLV must take “reasonable affirmative steps” to aid a patron such as Sturms who is in need of first aid, this court has never ruled on the specific question of what exactly those “reasonable affirmative steps” entail. Although this court has not spoken on this specific issue,³ four other jurisdictions have reported opinions on this subject. See *Breaux*, 200 Cal.Rptr. at 260; *Coccarello v. Round Table of Coral Gables, Inc.*, 421 So.2d 194 (Fla. Dist.Ct.App.1982); *Parra v. Tarasco, Inc.*, 230 Ill.App.3d 819, 172 Ill.Dec. 516, 595 N.E.2d 1186 (1992); *Drew*, 806 P.2d at 301. Most instructive is the decision of the Wyoming Supreme Court in *Drew*, a case remarkably similar to the case before this court, in which a patron who was arguably intoxicated choked on his meal after only a few bites. 806 P.2d at 302. Customers near the choking man laid him on the floor and proceeded to give him mouth-to-mouth resuscitation. *Id.* at 303. Eventually, medical help was summoned. *Id.* The plaintiffs in that case argued that the employees of the restaurant owed patrons who become ill a duty to render first aid. *Id.* at 301-02. Ruling against the plaintiffs, the court held that “[a restaurateur] did not owe a duty to provide medical training to its food service personnel, or medical rescue services to its customers.” *Id.* at 302. The court, noting the burden that would be placed on those in the food service industry, coupled with the low probability that this situation would occur on a regular basis,

held that summoning medical assistance within a reasonable time satisfies the requirement that a restaurateur exercise “reasonable care.” Id. at 306⁴⁴.

In the context of hotel law, the duty to act as reasonable proprietor is broadly construed, but there are limitations on liability. When an emergent situation arises, the duty to assist is incumbent upon the employees and managers to do what the reasonable, prudent owner would do. It seems like common sense, but strangely, employees fail to do basic duties.

- Calling 911
- Providing CPR (i.e., a lifeguard where CPR is required of the job description.)
- Throwing a life preserver.
- Performing the “Heimlich Maneuver” on a choking guest*
- Using a Heart Defibrillator*

There is no duty in Nevada to “provide medical aid” to patrons. There is a duty to act reasonably, but it appears the Court is not ready to say that hoteliers must learn medical techniques and apply those to their customers. However, it is not bad advice to allow managers and employees to attempt help if they feel comfortable in doing so, as the risk is very minimal that a lawsuit would be successful if something went wrong due to public policy and Good Samaritan laws.

Acting reasonably, however, means doing things fast. Below are the times that the brain will lose function if deprived of oxygen.

CPR TIMELINE

0-4 mins.	—	Brain damage unlikely
4-6 mins.	—	Brain damage possible
6-10 mins.	—	Brain damage probable
over 10 mins.	—	Probable brain death

44. Lee v. GNLV Corp. 117 Nev. Adv. Op. No. 29 92110.)



CASE EXAMPLE: FAILURE TO GIVE THE “HEIMLICH” TO A RESTAURANT GUEST

Arthur, aged 43, choked on a piece of steak while dining at a coffee shop in the Lucky Casino in Las Vegas on October 25, 2015. He turned blue. No personnel did any emergency procedures, including the Heimlich, to attempt saving his life. He died before help arrived.



IN MEMORY OF ARTHUR W. CONDRA II

“ *His Obituary:*
*Arthur W. Condra II of Bayfield, CO., passed away October 25, 2015 in Las Vegas, NV. He was 43 years old. Art was born on September 13, 1972, in Houston, TX, to parents, Arthur W. Condra and Cynthia Condra Sheetz. In addition to Bayfield, he was a prior resident of TX and FL, where he served as a deputy with Pinellas County Sheriff Department for 10 years. Art enjoyed cooking, sailing, fishing, hunting, and snow skiing and was truly an outdoorsman. He had a kind and gentle heart, and his warm smile will be missed by all. Art is survived by his mother, Cynthia C. Sheetz, and stepfather, David B. Sheetz of Bayfield, CO. Grandparents, Merle Gerstner and Vena Cronin, both of Houston, TX. Art is preceded in death by his father, Arthur W. Condra, and grandparents, Herbert Gerstner, Arthur O. Condra, and Phil Cronin. He also leaves behind very close and dear friends, Rudy and Deborah Love, Diane Sester, Chris and Heather Gilbert, and Gary Osborne.*⁴⁵

Under Nevada law, Mr. Condra's heirs did not have a viable claim, as the Heimlick, as interpreted by the Nevada Supreme Court, is not required and not the standard or duty required of innkeepers. The Supreme Court's rationale is that innkeepers duties include summoning help (i.e., calling 911), but they are not required to perform medical treatment, which would include CPR and other lifesaving techniques. The argument against this is, of course, that choking and heart attacks, if not treated quickly, will result in death, but the Court does not want to broadly construe liability as a public policy consideration that innkeepers must then be medically trained.

45. <https://www.davisfuneralservicesrainbow.com/obituaries/arthur-condraii>



THE DOCTRINE OF RES IPSA LOQUITUR

The doctrine of Res Ipsa Loquitur can help prove the essential elements of breach and causation in a negligence action. Latin for “it speaks for itself.” This doctrine is very helpful to prove certain cases that on their face seem obvious or mysterious. Often, Res ipsa loquitur is used in the context of airplane crashes, falling objects, and medical malpractice cases. The common law case illustrative of this principle is *Byrne v. Boadle*⁴⁶. In that case, a barrel of flour rolled out from the second story of a building and fell upon another walking below. It was a mystery as to what happened exactly other than that the fact of the barrel left the second story and fell down. Given this obvious careless act by some unknown person, the law will help infer negligence by satisfying the duty/breach elements. Thus, the bakery owner’s shop is negligent, as the facts speak for themselves. In order to prove a case of res ipsa loquitur, three essential prongs must fit the fact pattern. 1.) The accident is the kind that would normally be caused by negligence; 2.) The instrumentality was in the exclusive control of the defendant; and 3.) the defendant is in a better position to explain what happened given the plaintiff’s inherent lack of knowledge⁴⁷.

Thus, in airplane crashes, it is often very difficult to ascertain what exactly happened, and since airplanes don’t usually go down in the absence of some type of negligence (pilot error or airplane maintenance), the doctrine may be explored in that type of case. Similarly, in the case of falling pictures in hotel rooms or bed headboards that may be fastened improperly to the wall, a res ipsa theory may suffice in the pleading without the need to hire an expert to show the mechanics of the adhesion failed. In medical malpractice cases, you may see where a physician or nurse gets sued because he or she left a sponge or scalpel in the body after surgery. Given no other person could have caused this (but the medical staff), and the facts speak for themselves; therefore, negligence will be imputed.

In Nevada, and in the context of hotel law, we find that the doctrine is well sup-

46. *Byrne v. Boadle*, 2H.&C. 722 159 Eng. Rep. 299 (1863).

47. *Elevator Co. v. Reid*, 101 Nev. 515, 519 (1985).

ported. In Judson⁴⁸, a wooden bench broke in a Round Table pizza restaurant when a guest sat down and injured herself. The Court found the pizza restaurant was in exclusive control of the bench and that benches absent some type of problem do not ordinarily break. The Court went on to give rationale with the following support: “[i]n *Otis Elevator Co. v. Reid*, 101 Nev. 515, 706 P.2d 1378 (1985), we held that ‘A res ipsa inference of negligence is permitted when one entity is shown to be in exclusive control of the instrumentality causing harm, where the accident is one that does not ordinarily occur in the absence of negligence, and where the defendant is in a better position to explain the cause of the accident.’ 101 Nev. at 519, 706 P.2d. at 1380... We noted that ‘Proof of exclusive control, the first element listed above, substitutes for proof of the specific act constituting the breach when the latter two elements are also satisfied.’ 101 Nev. at 519, 706 P.2d at 1380 (emphasis added). Consequently, pursuant to the facts of the instant case, Audre [the injured guest at the pizza parlor] should have been allowed to place the issue of res ipsa before a jury. First, Roundtable presents no argument that it is not in a better position than Audrey to explain the cause of the accident. It seems self-evident that a restaurant is in a better position than its customers to explain the cause of one of its seats collapsing without warning. As far as selection, maintenance, and inspection of its seats are concerned, the restaurant has exclusive control. Second, seats designed for use by patrons of commercial establishments do not ordinarily collapse without negligence in their construction, maintenance, or use. *Husketh v. Convenient Systems, Inc.*, 245 S.E.2d 507, 509 (N.C. 1978). 2

Finally, we reject Round Table’s contention that it was not in the ‘exclusive control’ of its benches. A business proprietor retains exclusive control of seating while it is being properly used by patrons. While it has been argued that a restaurant loses “exclusive control” over a seat when it is used by a customer, and one court has held (*Kilgore v. Shephard Co.*, 158 A. 720, 721 (R.I. 1932)), “this argument has been soundly criticized. 3 For example, in *Rose v. Melody Lane of Wilshire*, 247 P.2d 335 (Cal. 1952), plaintiff brought an action for personal injuries sustained when the stool on which he was sitting in the defendant’s cocktail lounge collapsed. In holding that plaintiff was entitled to rely upon res ipsa, the *Rose* Court noted: Defendant and its agents were in exclusive control of the stool up to the time plaintiff sat upon it. It is true that in one sense the plaintiff was in control of the stool while he was using it. . . . Such a view is artificial and ignores the purpose of the requirement that the defendant have exclusive control. . . . Here it was the condition of the stool, not the use made of it, that was responsible for the fall. Plaintiff had done no more than sit upon it when it gave way, and there is no suggestion that his conduct was improper. So far as construction, inspection, or maintenance of the stool were concerned, the defendant had exclusive control.”⁴⁹

In sum, Res ipsa is a nice tool for the plaintiff’s lawyer and puts an additional responsibility upon the hospitality management to secure items from falling and do constant safety inspections around the property.

48. *Judson v. Camelot Food, Inc.*, 104 Nev. 324 (1988).

49. *Id.* at 328-329



FIRE SAFETY AND BUILDING CODES

Fire code has evolved tremendously over the years. The advent of fire sprinklers has saved many lives. Hotels were forced to retrofit existing buildings and even historic ones if they were opened for business. The famous MGM fire in Las Vegas in 1980 killed 85 people⁵⁰. I vividly recall this fire even though I was only 8 years old, as the smoke billowed up the sky on Flamingo Road. Subsequently, another fire broke out at the Las Vegas Hilton and killed 5 people. These fires led to a major overhaul of the fire code, and in 1981 the Clark County Building Department adopted sweeping codes that all public buildings were to have fire sprinklers, smoke detection systems, and fire maps posted in all rooms.

Over the years, residential buildings began enforcement of fire sprinkler systems. In 2006 Clark County required all residential homes over 4,000 square feet to have sprinkler systems. In 2018, the City of Las Vegas passed a code that all homes must have systems.

50. https://en.wikipedia.org/wiki/MGM_Grand_fire



PRODUCT LIABILITY & DEFECTIVE PRODUCTS

ESCALATORS AND ELEVATORS

Electric transports, including escalators and elevators, cause numerous injuries each year. Either electric or mechanical malfunction or maintenance issues cause these machines to operate improperly.

ESCALATORS

Escalators transport passengers from floor to floor in a convenient and effortless fashion. Sudden stops, unexpected increases in speed, and safety concerns with children make up the bulk of these accidents. Pileups of passengers unloading (especially on rides going down) can be a complete disaster as people are crushed and squeezed with no exit opportunity. Passengers imbalance issues are another cause of accidents on escalators. From luggage that begins a domino effect of tumbling to the elderly who lose balance, finding the culprit and liable party can be challenging. Shoe laces have been known to get caught in the stair mechanism, causing children to severely injure themselves.

ESCALATOR SAFETY TIPS



HOLD THE HANDRAIL

Always grip the handrail to maintain balance.



STAND FACING FORWARD

Stand still, face forward, and keep feet away from the edges.



STEP CAREFULLY

Enter and exit carefully, ensuring your foot is fully on the step.



SUPERVISE CHILDREN

Always hold a child's hand and ensure they stand properly.



AVOID LOOSE CLOTHING

Ensure shoelaces and loose clothing are secured to prevent entanglement.

ESCALATOR SAFETY TIPS—INFOGRAPHIC BY BENSON & BINGHAM

Passengers have been severely injured from the stair grooves, which act as teeth when the stairs lower. Injuries include major lacerations, as represented in the above photo, when a forward passenger fell backwards, pinning this lady on the escalator.

Out of sync handrails with the stairs also cause riders to lose their balance. The railings should be in sync with the stairs.



SEVERE LEG LACERATIONS CAUSED BY ESCALATOR GROOVES AFTER A FALL.

ELEVATORS

Opportunity Cost of Litigation.

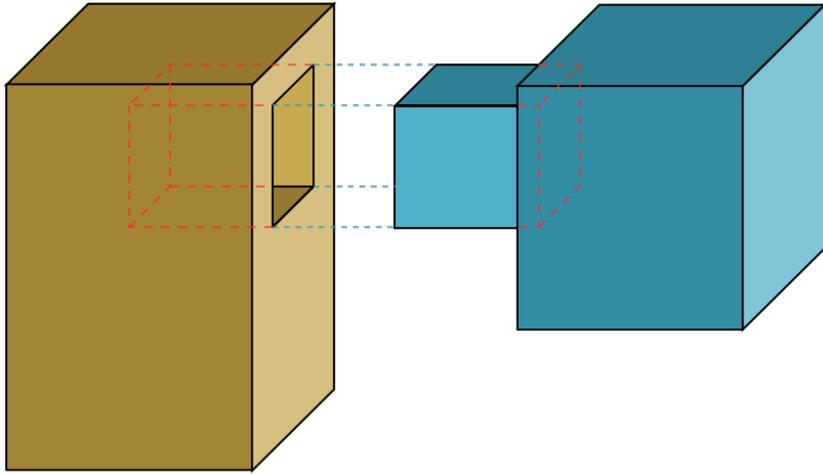
Consumer Product's Safety

SEATING ACCIDENTS: CHAIRS, BARSTOOLS, AND LOUNGES

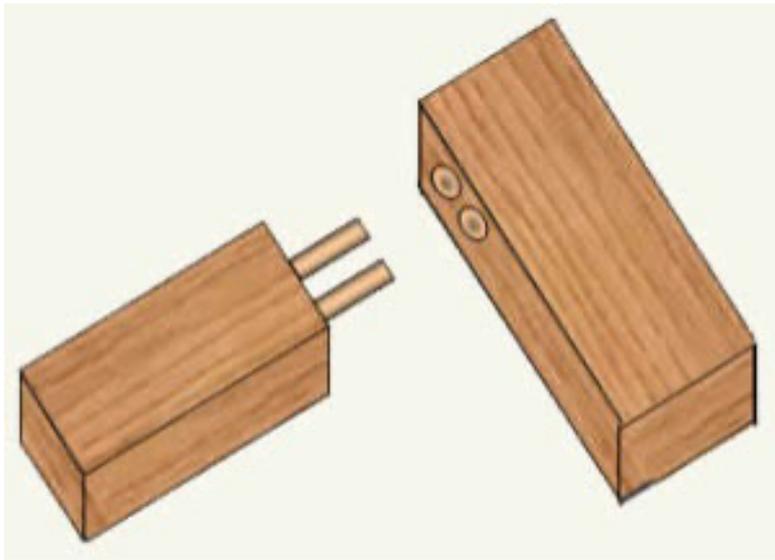
Chairs and barstools make up much of the furniture in the hospitality industry. Consequently, maintenance and replacement of this equipment is often overlooked. The materials can break, separate, and may have latent hazards such as exposed steel staples or improper assemblage. Routine maintenance of chairs is often not done as the chairs are in constant use and are rarely replaced until they are in obvious disrepair. Chairs are present in buffets, blackjack and gaming table areas, restaurants, hotel rooms, banquet areas, stadiums and events, showrooms, lobbies, and other hotel areas and often become worn out from overuse. Chairs are made from plastic, leather, faux leather, fabric, wood, and natural and artificial materials. The glue in chairs can become brittle, the joints can get loose, and the support rails can break, causing a catastrophic collapse of the chair. Screws or bolts may become loose, causing an unstable chair, which can lead to a fall over or outright collapse.

Unstable chair legs can make the chair tip or fall upon seating. Often hotels may blame the size of the person, arguing the chair could not support the weight. A chair should support the weight of an average human and should never collapse. The wood joints in chairs are usually mortise and tenon, dovetail, or dowel style joints. They should last the life of the chair--the question becomes, how many people have put this chair to use? A commercial-grade chair is governed by the BIFMA⁵¹ and gives certain strength standards for chairs, including leg, seat, and seat cycle strength. The BIFMA is The Business and Institutional Furniture Manufacturer's Association and has set the standard for a normal use chair at 225 pounds and a heavy load chair at 375 pounds (believed to be raising this to 400 pounds) with a standard pan width of 22 inches.

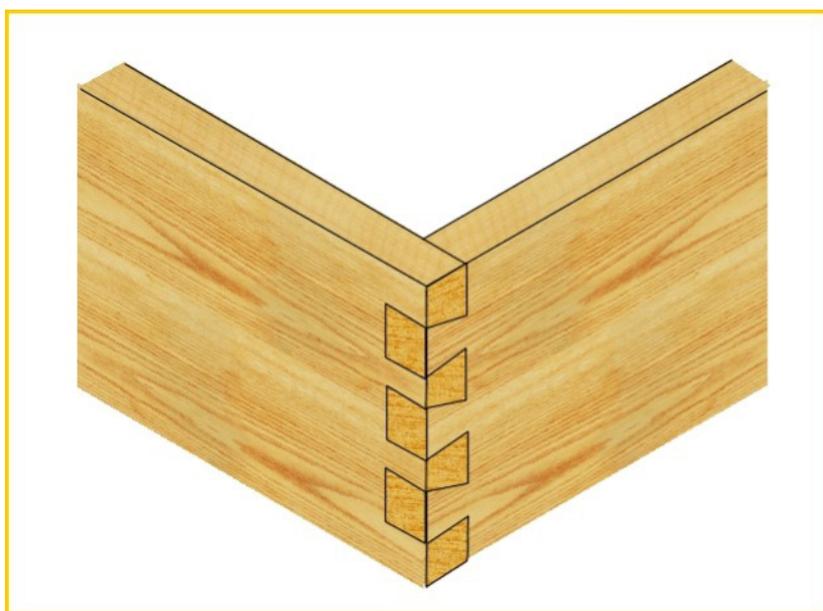
51. <https://www.cpsc.gov/Newsroom/Video/TV-and-Furniture-Tip-Over-Tragedies>



MORTISE AND TENON



DOWEL



DOVETAIL JOINTS

A case can be made for the negligent maintenance of the hotel chair, failure to replace the aging chair, or a direct claim against the chair manufacturer for a product's liability case, depending on the facts. Most of the time, when a hotel is sued for the equipment, a third-party claim is made against the manufacturer of the chair. The issue then becomes: is it a defect in the chair or has the chair simply worn out? This evaluation will most likely be one of expert testimony, where hired engineers will examine the fault and opine as to the cause of the failure. Thus, a lawsuit might allege both negligence against the hotel for its failure to maintain an outdoor piece of furniture and a product's liability case against the manufacturer. for a mismanufactured product in either design or faulty construction.

Injuries range from low back, neck, and head injuries to hips and hands, given all the moving parts on some chairs. Hotels often argue the guest on the chair is to blame for the incident, as they should have realized the chair was broken before using it, or they will point to the alcoholic beverages consumed as the culprit for the bar stool collapse. Video footage is often available for such incidents if they occurred in a casino. In my years of practice, I have seen everything from injured clients tipping a blackjack stool, jumping on the slot chairs, to rocking a chair sideways, causing collapses. This raises the question of whether the operator of the chair had any blame. Videos often will show whether a patron used the chair in a reasonable manner as it was intended or whether their own behavior had an impact on the accident. More often than not, chair accidents are the result of manufacturing defects, and thus hotel equipment managers should regularly inspect the furniture for obvious and not so obvious signs of structural instability. Just using a chair will often show signs that something is loose, but sometimes the freak thing happens and the material or hardware fails. The best prevention is a hotel system of communication between front-line employees, guests, and management so that proactive steps can be implemented to prevent seating failures.

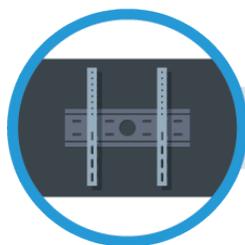
CHILDHOOD DANGERS: HOTEL FURNITURE, FIXTURES, AND EQUIPMENT

Improperly installed hotel furniture has caused many injuries—many to young people. Before the age of flat-screen televisions, heavy TV sets were often located on dressers or armoires that became death traps for children who often climbed the drawers, causing a tipping of the furniture and a fall of the TV onto the minor child. Deaths have been reported just from bumping the dressers. Shockingly, according to the US Government’s consumer product safety commission, “One child dies every two weeks when a TV, furniture, or appliance falls on him.” Each year, more than 18,000 children 8 years and younger are injured.⁵² They recommend the following:

- Anchor dressers, chests, and TV stands to the floor or attach to the wall.
- Place TV’s on a low-rise base, pushing back as far as possible.
- Keep remotes away from the dresser to keep children from attempting to grab them, which may cause a TV to fall.
- Make sure ranges and stoves are installed with anti-tip brackets.

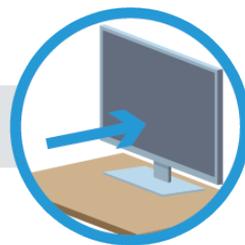
SAFEGUARDING YOUR CHILDREN

A GUIDE TO TV AND FURNITURE SAFETY



Anchor dressers, chests, and TV stands to the floor or attach to the wall.

Place TV’s on a low-rise base, pushing back as far as possible.



Keep remotes away from the dresser to keep children from attempting to grab them, which may cause a TV to fall.

Make sure ranges and stoves are installed with anti-tip brackets.



SAFEGUARDING YOUR CHILDREN—INFOGRAPHIC BY BENSON & BINGHAM

Given the nature of furniture design, it is not always compatible with safety. Tall, slender pieces are unstable, and shifting of weight to either side will cause it to fall. Securing such items is crucial to avoiding lawsuits. It is best not to use such furniture. The photo below shows how a major Las Vegas casino hotel chose to secure a chest. Notice the secure bracket attached to the wall. This was a defective chest that fell on an infant when the doors opened. What is improper about the bracket is that it was installed backwards. The 45-degree angle of the wood allows the chest to still fall forward. Two words properly describe the hotel's liability: Negligent installation. This error cost the Mandalay Bay Hotel and Casino \$20,000 for the fractured femur of a one-year-old.

In 2017, IKEA, the Swedish company, recalled a variety of chests and drawers because they were not designed to stand upright and had a propensity to fall when drawers opened or when children may have pulled on them. Below is a recall off of their website as posted in 2018⁵³:

IKEA REANNOUNCES RECALL OF MALM AND OTHER MODELS OF CHESTS AND DRESSERS DUE TO SERIOUS TIP-OVER HAZARD; 8TH CHILD FATALITY REPORTED; CONSUMERS URGED TO CHOOSE BETWEEN REFUND OR REPAIR

“ Tue Nov 21 10:00:00 UTC 2017
Product Recalls
Subscribe To Product Recalls
[National] Recall Date: November 21, 2017
Recall Number: 18-040



Recall Summary

Name of Product: Children's and adult chests and dressers

Hazard: The recalled chests and dressers are unstable if they are not properly anchored to the wall, posing serious tip-over and entrapment hazards that can result in injuries or death to children.

53. <https://www.ikea.com/us/en/customer-service/product-support/recalls/ikea-chest-and-dresser-safety-recall-pub4b96e3c0>

Remedy: Refund or Repair

Consumers should immediately stop using any recalled chest or dresser that is not properly anchored to the wall and place it in an area that children cannot access. Contact IKEA for a choice between two options: refund or a free wall-anchoring kit. IKEA will pick up the recalled dressers free of charge or provide a one-time, free in-home wall-anchoring service for consumers upon request. Consumers can obtain assistance from IKEA through its website [IKEA](#) or [RECALLS](#). Consumers with chests and dressers manufactured prior to January 2002 are eligible for a partial store credit.

Consumer Contact: IKEA toll-free at 866-856-4532 anytime, or online at [IKEA](#) or [RECALLS](#) for more information and to participate in the recall.

Recall Details

Units: About 17.3 million (Based on updated information from IKEA, the number of U.S. units has been revised downward from June 2016.)

Description: This recall reannouncement involves MALM and other IKEA chests and dressers that do not comply with the requirements of the U.S. voluntary industry standard (ASTM F2057-14). The recalled children's and adult chests and dressers include the MALM 3-drawer, 4-drawer, 5-drawer and three 6-drawer models and other non-MALM models. The recalled children's chests and dressers are taller than 23.5 inches; recalled adult chests and dressers are taller than 29.5 inches. The MALM chests and dressers are constructed of particleboard or fiberboard and are white, birch (veneer), medium brown, black-brown, white stained oak (veneer), oak (veneer), pink, turquoise, grey, grey-turquoise, lilac, green, brown stained ash (veneer), and black. A 5-digit supplier number, 4-digit date stamp, IKEA logo, country of origin and "MALM" are printed on the underside of the top panel or inside the side panel.

RECALLED MALM CHESTS AND DRESSERS

NAMES	SOLD DATES	MEASUREMENTS
MALM 3	10/2002 to 6/2016	31½" x 18⅞" x 30¾"
MALM 4	6/2002 to 6/2016	31½" x 18⅞" x 39½"
MALM 5	10/2002 to 4/2006	15⅞" x 19" x 48¼"
MALM 6	6/2002 to 6/2016	31½" x 18⅞" x 48⅜"
MALM 6 Long	11/2002 to 6/2016	63" x 18⅞" x 30¾"
MALM 6	4/2006 to 6/2016	153/4" x 191/8" x 48⅜"

OTHER CHESTS AND DRESSERS INCLUDED IN THIS RECALL

To see a complete list of other non-MALM chests and dressers included in

this recall, access this link for [IKEA](#) or [RECALLS](#) on IKEA's website.

Since 1996, IKEA chests and dressers have been labeled to identify IKEA, the model name and the manufacturing date.

Incidents/Injuries: IKEA has received 186 reports of tip-over incidents involving the MALM chests and dressers, including 91 reports of injuries to children. In addition, IKEA has received 113 reports of tip-overs with other recalled IKEA chests and dressers, including 53 reports of injuries to children:

There have been eight reports of child tip-over related deaths with the recalled chests and dressers.

- The most recent reported death in May 2017 involved a 2-year-old boy in Buena Park, Calif. after he became trapped beneath an unanchored MALM 3-drawer chest that tipped over.*

Previously reported deaths with MALM dressers or chests include:

- February 2016: A 22-month-old boy from Apple Valley, Minn. died after an unanchored MALM 6-drawer chest fell on top of him.*
- June 2014: A 23-month-old boy from Snohomish, Wash. died after he became trapped beneath an unanchored MALM 3-drawer chest that tipped over.*
- February 2014: A 2-year-old boy from West Chester, Pa. died after an unanchored MALM 6-drawer chest tipped over fatally pinning him against his bed.*
- September 2011: A 2-year-old boy from Woodbridge, Va. died after an unanchored MALM 3-drawer chest tipped over and trapped him between the dresser drawers.*

Previously reported deaths with other model IKEA chests and dressers include:

- July 1989: A 20-month-old girl from Mt. Vernon, Va. died after an unanchored GUTE 4-drawer chest tipped over and pinned her against the footboard of a youth bed.*
- March 2002: A 2½-year-old boy from Cranford, N.J. died after an unanchored RAKKE 5-drawer chest tipped over and fatally pinned him to the floor.*
- October 2007, a 3-year-old girl from Chula Vista, Calif. died after a KURS 3-drawer chest tipped over and fatally pinned her to the floor. It is unknown whether the dresser was anchored or not.*

Sold at: IKEA stores nationwide and online at www.IKEA.com from January 2002 through June 2016 for between \$70 and \$200. Other chests and dressers subject to this recall were sold between approximately 1985 and June

2016.

Importer: IKEA Supply AG, of Switzerland (May 2009 – present) and predecessors to IKEA Supply AG (1985 – May 2009)

Manufactured in: Various countries

Note: Dangerous tip-over incidents often occur when curious kids climb on furniture in an attempt to access TVs, toys, remotes or other desired items. While the threat is serious, the solution is simple. Anchor TVs, furniture and appliances in the home. And when product recalls are announced, act on them immediately. Visit AnchorIt.gov to see how TV and furniture tip-over incidents occur and the simple steps to prevent them.

About U.S. CPSC:

The U.S. Consumer Product Safety Commission is charged with protecting the public from unreasonable risks of injury or death associated with the use of thousands of types of consumer products under the agency's jurisdiction. Deaths, injuries, and property damage from consumer product incidents cost the nation more than \$1 trillion annually. CPSC is committed to protecting consumers and families from products that pose a fire, electrical, chemical or mechanical hazard. CPSC's work to ensure the safety of consumer products - such as toys, cribs, power tools, cigarette lighters and household chemicals - contributed to a decline in the rate of deaths and injuries associated with consumer products over the past 40 years.

Federal law bars any person from selling products subject to a publicly-announced voluntary recall by a manufacturer or a mandatory recall ordered by the Commission.

For more lifesaving information, follow us on Facebook, Instagram @US-CPSC and Twitter @USCPSC or sign up to receive our e-mail alerts. To report a dangerous product or a product-related injury go online to www.SaferProducts.gov or call CPSC's Hotline at 800-638-2772 or teletypewriter at 301-595-7054 for the hearing impaired.

CPSC Consumer Information Hotline

*Contact us at this toll-free number if you have questions about a recall:
800-638-2772 (TTY 301-595-7054)*

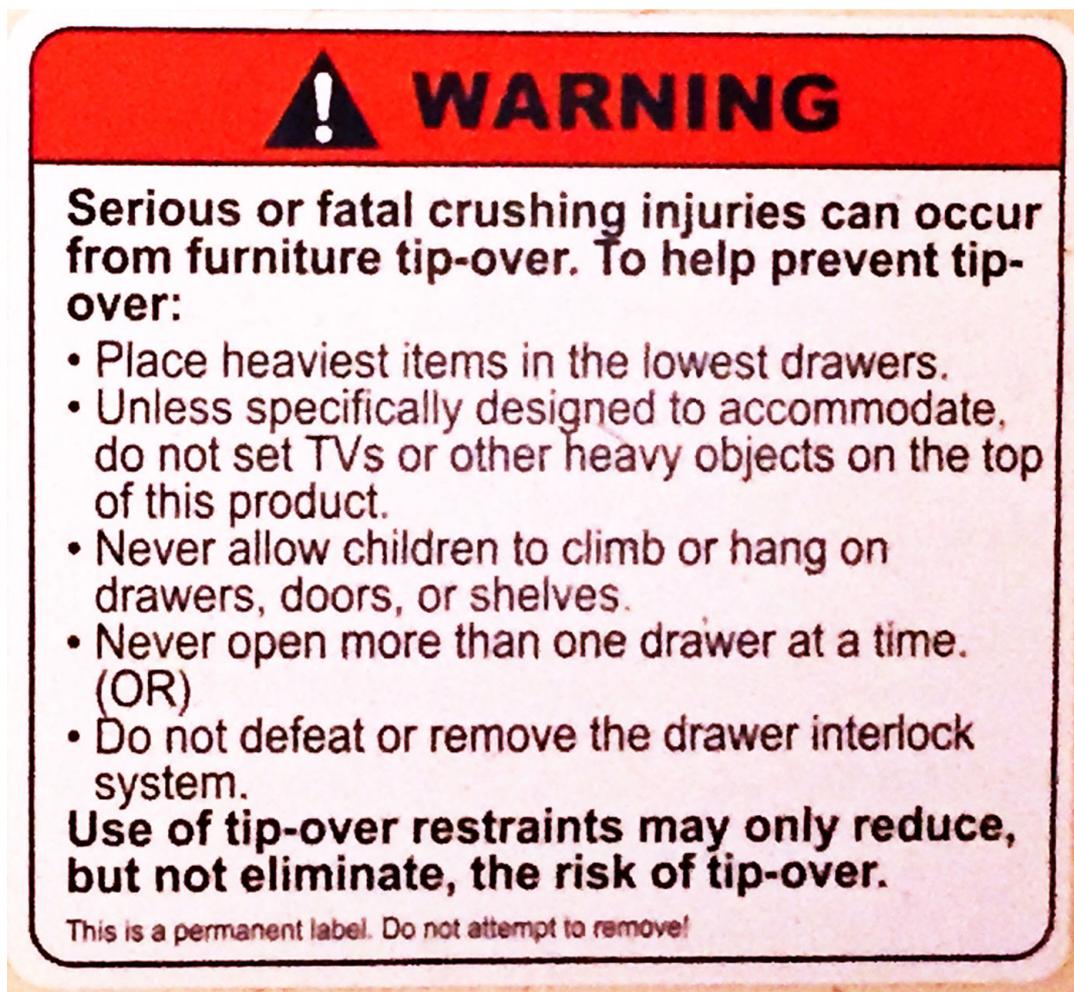
Times: 8 a.m. – 5:30 p.m. ET; Messages can be left anytime

Call to get product safety and other agency information and to report unsafe products.

Media Contact

Please use the phone numbers below for all media requests.

Phone: 301-504-7908



A COMMON WARNING LABEL FOUND IN US-MADE FURNITURE TO PREVENT TIP-OVER ACCIDENTS AND SERIOUS INJURIES.



FURNITURE BEING MOVED, HIGHLIGHTING A POTENTIAL TIP-OVER HAZARD⁵⁴.



TOWEL RACK FASTENED AT THE TOP TO AVOID TIPPING.

54. Taken from one of the MGM International resorts in Las Vegas circa 2012; case settled in March of 2013.



CLOSE-UP “L”-BRACKET MOUNTED TO TOWEL RACK

FENCES AND RAILINGS



LADDER-STYLE BALCONY RAILING, A HAZARDOUS DESIGN FOR YOUNG CHILDREN⁵⁵.

The above fence is a “no no” for hotel construction. Ladder-style fencing is a huge problem for toddlers and active kids who can easily climb to their death on any 2nd or upper floor balcony. Most architects will not do this type of design for obvious reasons. A simple fix is to make the horizontal beams go vertical.

55. Hyatt Lake Tahoe, Incline Village Cottage Beach Suite



THIS PHOTO ILLUSTRATES HOW A RAISED PATHWAY SHOULD BE SECURED, AS EVIDENCED BY THE RAILING.



BALCONY AT FAIRMONT KEA LANI WITH UNSAFE RAILING, CREATING A FALL RISK FOR YOUNG CHILDREN⁵⁶.

56. The photo above is of the Fairmont Kea Lani in Wailea, Maui, HI. The property was built in 1991. Surprisingly, the fence has a toddler's attraction—one step up and a child could go 7 stories down. There is no reason this railing should be at any family-style hotel.

PLAYGROUNDS

Playgrounds are unique liability risks for business owners and municipalities. Playgrounds involve minor children and sometimes infants as they navigate uniquely built structures and obstacle courses. These structures are often built for little people and rarely think about safety. Most people have experienced the “slide head hit” when attempting to follow their child up a giant slide and they get to the top, smacking their head in the short opening. Consistently, I’ve wondered why they can’t make that taller! Merry-go-rounds, teeter-totters, and other toys that have moveable parts are inherently dangerous. Most parks have nice warning signs: “Ride or play at your own risk.” But rarely do people read these warnings, and certainly minor children can’t appreciate that warning or know how to read it. Merely putting a sign in front of consumers does not eliminate liability. The risk of harm by falling off a merry-go-round, falling off the monkey bars, or failing to land perfectly down a slide may be assumed, but the duty to protect children is not only obvious; it is required. Discussed below are some examples in my practice where we have encountered playground injuries and creative ways we argue liability. The common defense to playground accidents is “parental comparative negligence,” which shifts the liability to the supervising parent for their failures to monitor their children, especially in potentially harmful environments. The younger the child, the more burden on the parent to supervise. Supervision, however, does not prevent certain accidents from occurring, and thus operators and owners of playgrounds should take much precaution in designing rides and structures.

The U.S. government provides some guidelines to playground architects and child toy manufacturers in their playground safety publication, *Public Playground Safety Handbook*⁵⁷. This is published by the Consumer Product Safety Commission (CPSC), and the first issue came out in 1981. The book can be a fantastic resource for the practicing [personal injury attorney](#), as many of the safety tips and guidelines are not adhered to in playground construction. Issues range from strangulation from cargo nets to burn safety and overall issues of general maintenance. The government claims over 200,000 injuries occur annually from public playgrounds. Nearly 50,000 children go to emergency rooms annually because of home play equipment⁵⁸. Many of these injuries can be avoided with common sense and straightforward adherence to the CPSC and the ASTM (the American Society for Testing and Materials), which sets thousands of standards for products and machinery.

Not surprising, trampolines are not recommended for public play areas. The risk of injury has proven itself over the years. Play surfaces, including rubber, wood chips, and sand, are easy construction materials that help absorb injury from falls.

57. <https://www.cpsc.gov/s3fs-public/325.pdf>

58. https://www.cpsc.gov/s3fs-public/pdfs/blk_pdf_324.pdf

CASE EXAMPLE: STEEP STAIRS



STEEP STAIRS IN A CHILDREN'S PLAY AREA, INCREASING THE RISK OF FALLS FOR TODDLERS.

This violates the U.S. government's Safety Guidelines for Construction of Children's Play Areas; see attached Public Playground Safety Handbook at p. 23, where it indicates that the slope for a toddler should be no more than 35 degrees.

35 degrees is the standard for children's toy systems. Town Square stairs are a 9 x 4 rise and run. This equates to a 66-degree slope. This is extremely unsafe and doubles the guideline.

One may even argue the building code was violated, although this is not as persuasive as building codes are not applicable to uniquely designed childhood play systems that are designed to help children develop certain motor skills and coordination.

THE BUILDING CODE:

1009.4 Width. The width of stairways shall be determined as specified in section 1005.1, but such width shall not be less than 44 inches (1118mm). See section 1007.3 for accessible means of egress stairways.

Exceptions:

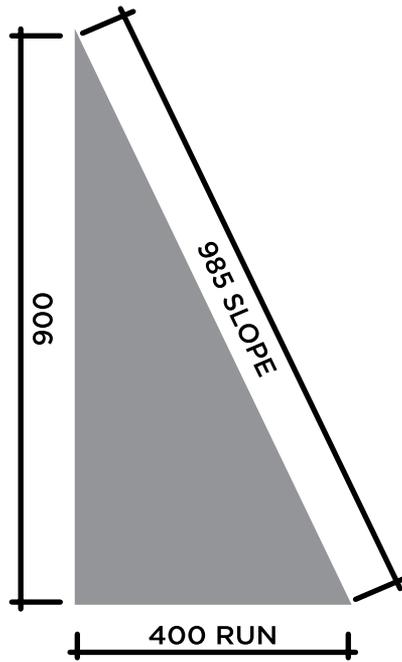
Stairways serving an occupant load of less than 50 shall have a width of not less than 36 inches (914 mm).

1009.7.2 Riser height and tread depth. Stair riser heights shall be 7 inches (178mm) maximum and 4 inches (102mm) minimum. The riser height shall be measured vertically between the nosings of adjacent treads. Rectangular tread depths shall be 11 inches (279 mm) minimum measured horizontally between the vertical planes of the foremost projection of adjacent treads and at a right angle to the tread's nosing.

1009.7.4 Dimensional uniformity. Stair tread and risers shall be of uniform size and shape. The tolerance between the largest and smallest riser height or between the largest and smallest tread depth shall not exceed 3/8 inch (9.5 mm) in any flight of stairs.

1009.7.5.3 Solid risers. Risers shall be solid. [International Building Code as adopted by the Clark County Building Department, Clark County, Nevada.]

Because the rise and run of the subject stairs are 9' RISE and 4" RUN. They are unsafe as a matter of law, as the rise shall not be more than 7 inches and the run shall be 11 minimum. These are 7 inches short of what is required.



TOWN SQUARE SLOPE VISUALIZED.

CASE EXAMPLE: OUT OF ORDER (OOO) PLAY EQUIPMENT

The following case derived from a California school district's failure to promptly fix a swing. The district merely put yellow caution tape up so, of course, most kids have no idea what it means.



PLAYGROUND EQUIPMENT WITH CAUTION TAPE

Pursuant to California Law, the doctrine of attractive nuisance is still a viable legal theory, and the elements are as follows:

- The place where the condition exists is one upon which you know or should have reason to know that children are likely to trespass; and
- The condition is one of which you know or have reason to know and which you realize or should realize will involve an unreasonable risk of death or serious bodily harm to such children; and
- Children, because of their youth, do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it; and
- The utility to you of maintaining the condition and the burden of eliminating the danger are slight compared with the risk to children involved; and
- One fails to exercise reasonable care to eliminate the danger or to otherwise protect the children.

Restatement of Law 2nd Torts (1965) Section 339. and Puchta v. Rothman 99 Cal. App. 2d 285

Evaluation under this theory is easy to analyze:

- A playground is certainly a location where children would be expected to play.
- Broken equipment, including a broken swing step, is certainly known to be a hazard, and in fact became a trap for danger.
- Kaiden is a minor child, only eight (8) years old, and because of his youth, he did not appreciate the hazards.
- The utility of fixing the condition was minor; including removing the specific broken piece was not a large burden, nor were the other options of securing the equipment, including, but not limited to, placing large signs that the playground is CLOSED.
- The Del Mar School District failed to exercise due care to the public, including Master Kaiden, as the danger was not eliminated and the protection offered was negligible.

Given the above arguments, it is clear that under a negligence and/or attractive nuisance theory, liability can be established against the school district for the harm caused. The school district's employees (including the staff that attempted to put a caution ribbon on a broken ride) had other options that should have been implemented. At this time, it is "unknown" exactly who may be responsible for the inadequate fix, however.

ASSUMPTION OF THE RISK

Assumption of the risk is a defense to Negligence and [Product Liability](#) actions in certain circumstances.

- Rides: roller coasters, water slides, and helicopters
- Events & Shows: Blue Man Group, getting wet.
- Waivers: Express and Implied
- Nevada Law

In order for an Assumption of Risk doctrine to be established in a product liability action, the following elements must be met:

- The plaintiff actually knew and appreciated the particular risk or danger created by the defect;
- The plaintiff voluntarily encountered this risk while realizing the danger; and
- The plaintiff's decision to voluntarily encounter the known risk was reasonable.

A person who thus assumes the risk is not entitled to recover for damages that resulted from the danger to which he exposed himself⁵⁹.

In *Central Telephone*, the defendant was barred from using the Assumption of the Risk defense because the plaintiff did not "know and appreciate" the danger. In *Central Telephone*, two employees were involved in a couch incident. One employee realized a couch was defective and removed the seat cushion; later, another employee came and sat on that same couch when the couch gave way, injuring her. The plaintiff testified she did not know the couch was defective at the time she sat down. The Court reasoned, "No employee voluntarily encountered the risk while realizing the danger. Consequently, assumption of the risk is not a defense to *Central Telephone's* cause of action based upon a strict liability theory."⁶⁰

To analogize, there are many examples where a person may use a product.

- Jumping out of an airplane using a safety device such as a parachute. One might assume many risks: that the parachute may not open or that he hit the plane jumping out of the plane, but a jumper does not presume his parachute is defective.
- It may be very risky to drive a motorcycle, but one does not assume the risk that the motorcycle itself will malfunction or the frame will crack when driving. He might assume the risk of other bad drivers causing an accident or that road hazards may be present that could cause the bike to lose control.
- Testing a liferaft or life preserver in the ocean. One might expect that testing a life preserver, that a shark might attack, or that water may be too cold, that one could drift away from his test boat, but certainly one would not expect the

59. See *Central Telephone Co. V. Fixtures Mfg. Corp.*, 103 Nev. 298, 738 P.2d 510 (1987).

60. ID at 299-300.

safety device to fail. A person does not assume the risk unless they know that the product itself has a defect. Here, if the life vest had a tear or rip in the vest prior to using, and they tested it anyway—that would fall into assumption of the risk.

AMUSEMENT RIDES

Dangers abound at [amusement rides](#). Often the situation might not be a direct result of the amusement park but the carelessness of other riders.

A roller coaster ride caused this victim a severe head injury when a cell phone became dislodged from another rider's pocket.



VICTIM OF HEAD TRAUMA AFTER BEING STRUCK BY A CELL PHONE ON AN AMUSEMENT RIDE.



VENUE

Venue refers to the location where a plaintiff can bring a lawsuit. If a tourist gets injured in Las Vegas, can they sue in their home state of Ohio? Why does this matter? Where a plaintiff brings the lawsuit may make a huge difference in the ultimate outcome given certain areas of the country are more conservative, and thus a lower verdict may be the result. However, those contemplations are quite limited depending on the facts of the case and primarily who is involved in the litigation. The law simply requires fairness so that a cause of action is brought at the defendant's headquarters or at the location of the accident. This limits the location that the litigation will be held in, but in a large damages case, this might be a consideration for the attorney. Venue overlaps with a larger area of law called jurisdiction, which is not the focus of this book. Jurisdiction is whether the court has the power to hear the matter. Many US Supreme Court decisions have carved out the rules for "in personam jurisdiction," or jurisdiction over the person. Whole books are dedicated to that particular subject, which is totally constitutionally based and can be quite complicated. The law requires that defendants have "minimum contacts" with the home forum as to not offend traditional notions of fair play and substantial justice⁶¹. Thus, the law will ask, "Is it fair to make the defendant litigate a matter in the venue chosen by the plaintiff?" This usually requires a hotel to be sued in the location of the event or its corporate headquarters. Venue is also narrowed to the district in which the lawsuit must be filed. So, filing a lawsuit in Northern Nevada for an accident in Southern Nevada is not appropriate. It should be filed in the county where the incident took place.

VICARIOUS LIABILITY & RESPONDEAT SUPERIOR

Vicarious liability is the legal term referring to holding a person liable who may not have directly done the tortious or bad deed—often referred to as secondary liability; because the enterprise profits from the actions of the employees, the enterprise must pay for

61. *International Shoe Co. v. Washington*, 326 US 310 (1945).

the acts of those who make mistakes below. Normally this refers to suing an employer for acts of the employee as the employee was carrying out the business interests of the employer. There are a few distinguishing issues that are not relevant to this book, but the poignant thing to remember is that this type of liability is usually limited to negligent acts, not intentional acts (although there are arguments such as employer ratification, etc.). So, if an employee does something criminal on the job—such as stabbing a guest without justification—then arguably the employer may avoid liability if the event was so beyond comprehension or was simply unforeseen. Obviously, most acts of employees will be argued as foreseeable given the reality of today’s society. Below is the Nevada Statute with the elements of the cause of action:

NRS 41.745 LIABILITY OF EMPLOYER FOR INTENTIONAL CONDUCT OF EMPLOYEE; LIMITATIONS

- An employer is not liable for harm or injury caused by the intentional conduct of an employee if the conduct of the employee:
 - Was a truly independent venture of the employee;
 - Was not committed in the course of the very task assigned to the employee; and
 - Was not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his or her employment.

For the purposes of this subsection, conduct of an employee is reasonably foreseeable if a person of ordinary intelligence and prudence could have reasonably anticipated the conduct and the probability of injury.

- Nothing in this section imposes strict liability on an employer for any unforeseeable intentional act of an employee.
- For the purposes of this section:
 - “Employee” means any person who is employed by an employer, including, without limitation, any present or former officer or employee, immune contractor, an employee of a university school for profoundly gifted pupils described in chapter 392A of NRS or a member of a board or commission or legislator in this State.
 - “Employer” means any public or private employer in this State, including, without limitation, the State of Nevada, a university school for profoundly gifted pupils described in chapter 392A of NRS, any agency of this State and any political subdivision of the State.
 - “Immune contractor” has the meaning ascribed to it in subsection 3 of NRS 41.0307.
 - “Officer” has the meaning ascribed to it in subsection 4 of NRS 41.0307.

(Added to NRS by 1997, 1357; A 2005, 2430)⁶²

Vicarious liability is pleaded very frequently in legal complaints in the hotel industry because of the acts of the employees. The employees are the ones who forget to put out signs when they mop, spill the liquids on the floor, and so on.

BAILEE, BAILOR & THEFT

Under Nevada law, if a hotel provides a safe, then they basically relieve themselves of liability. If the goods do not fit in a safe, the liability is capped at \$750.00. Theft does not apply to the stealing of a motor vehicle, such as a van⁶³.

NRS 651.010 provides:

- An owner or keeper of any hotel, inn, motel, motor court, boardinghouse, or lodging house in this state is not civilly liable for the theft, loss, damage, or destruction of any property brought by a patron upon the premises or left in a motor vehicle upon the premises because of theft, burglary, fire, or otherwise, in the absence of gross neglect by the owner or keeper.
- An owner or keeper of any hotel, inn, motel, motor court, boardinghouse, or lodging house in this state is not civilly liable for the theft, loss, damage, or destruction of any property of a guest left in a guest room if:
 - The owner or keeper provides a fireproof safe or vault in which guests may deposit property for safekeeping;
 - Notice of this service is personally given to a guest or posted in the office and the guest's room; and
 - The property is not offered for deposit in the safe or vault by a guest, unless the owner or keeper is grossly negligent.
- An owner or keeper is not obligated to receive property to deposit for safekeeping that exceeds \$750 in value or is of a size that cannot easily fit within the safe or vault.
- The liability of the owner or keeper does not exceed the sum of \$750 for any property, including, but not limited to, property which is not deposited in a safe or vault because it cannot easily fit within the safe or vault of an individual patron or guest, unless the owner or keeper receives the property for deposit for safekeeping and consents to assume a liability greater than \$750 for its theft, loss, damage or destruction in a written agreement in which the patron or guest specifies the value of the property.

We have not had occasion to construe the most recent amendment to NRS 651.010,

62. Nevada Revised Statutes 41.745 CHAPTER 41 - ACTIONS AND PROCEEDINGS IN PARTICULAR CASES CONCERNING PERSONS

63. Arguello v. Sunset Station, Inc., 127 Nev. Adv. Op. No. 29

which revised the language of subsection 1 to provide that it covers “any property brought by a patron upon the premises or left in a motor vehicle upon the premises.” 1995 Nev. Stat., ch. 691, § 9, at 2670.



JURY INSTRUCTIONS: THE LAW READ TO JURIES

The following instructions are read to juries in various cases. Specific instructions apply to specific facts and legal issues. Prudent attorneys will reference the jury instructions early on in a case to help understand the legal issues they must prove, and review of such instructions can help frame the case early on. Both sides should agree on what instructions are read to the jury, and those that are not are decided ultimately by the presiding judge. Basically, if the instruction is on point or relevant, the judge will normally allow. Jury instructions are nothing more than summaries of the law, both statutory and common law, that are condensed and given as an instruction of the law.



PREMISES LIABILITY INSTRUCTIONS

PREMISES LIABILITY INSTRUCTION 8PML.1 LANDOWNER LIABILITY: OWNER REASONABLE CARE

An owner of land must exercise reasonable care not to subject others to an unreasonable risk of harm. An owner of land must act as a reasonable person under all the circumstances.

SOURCE/AUTHORITY

Riley v. OPP IX, L.P., 112 Nev. 826, 919 P.2d 1071 (1996).

PREMISES LIABILITY INSTRUCTION 8PML.2 LANDOWNER LIABILITY: OWNER DUTY TO INSPECT

The owner of land has a duty to inspect the premises to discover dangerous conditions not known to the plaintiff and to take reasonable precautions to protect the invitee from dangers that are foreseeable from the arrangement or use.

SOURCE/AUTHORITY

Hotels El Rancho, Inc. v. Pray, 64 Nev. 591, 187 P.2d 568 (1947).

PREMISES LIABILITY INSTRUCTION 8PML.3 LANDOWNER LIABILITY: OPEN & OBVIOUS

The owner or occupier of property is not liable to one injured on the property where the injury resulted from a danger which was obvious or should have been observed in the exercise of reasonable care.

PREMISES LIABILITY INSTRUCTION 8PML.4 LANDOWNER LIABILITY: LACK OF PRIOR ACCIDENTS

The lack of prior accidents attributable to similar conditions may be considered by you as evidence that the landowner or occupier had no notice or knowledge of any dangerous condition in the floor where plaintiff's accident occurred.

SOURCE/AUTHORITY

Galloway v. McDonalds Restaurants of Nevada, Inc., 102 Nev. 534, 537, 728 P.2d 826 (1986).

PREMISES LIABILITY INSTRUCTION 8PML.5 LANDOWNER LIABILITY: FOREIGN SUBSTANCE ON FLOOR

Where a foreign substance on the floor causes a patron to slip and fall, and the business owner or one of its agents caused the substance to be on the floor, liability will lie, as a foreign substance on the floor is usually not consistent with the standard of ordinary care.

SOURCE/AUTHORITY

Sprague v. Lucky Stores, Inc., 109 Nev. 247, 250, 849 P.2d 320, 322 (1993).

PREMISES LIABILITY INSTRUCTION 8PML.6 LANDOWNER LIABILITY: FOREIGN SUBSTANCE ON FLOOR FAILURE TO REMEDY

Where the foreign substance is the result of the actions of persons other than the business or its employees, liability will lie only if the business had actual or constructive notice of the condition and failed to remedy it, or failed to reasonably prevent or inspect or discover the condition.

SOURCE/AUTHORITY

Sprague v. Lucky Stores, Inc., 109 Nev. 247, 250, 849 P.2d 320, 322 (1993).

PREMISES LIABILITY INSTRUCTION 8PML.7 LANDOWNER LIABILITY: REASONABLE CONDUCT WHEN WALKING

Depending on the circumstances, it may be reasonable conduct for a customer of a business establishment to walk and not constantly watch where he or she is going.

SOURCE/AUTHORITY

Joynt v. California Hotel & Casino, 108 Nev. 539, 835 P.2d 799 (1992).

PREMISES LIABILITY INSTRUCTION 8PML.8: LANDOWNER LIABILITY: NEGLIGENCE

In the context of premises liability law, negligence is a store owner's failure to exercise that degree of care and prudence to render the premises reasonably safe for its customers or patrons. Ordinary care requires the store owner to warn customers or patrons of dangerous or unsafe conditions existing on the premises where such conditions are hidden, latent, or concealed, or of which the customers are without knowledge, if the store owner, through one of its employees or management, creates or knows of, or in the exercise of reasonable care, should know of, the dangerous or unsafe condition.

SOURCE/AUTHORITY

Galloway v. McDonalds Restaurants of Nevada, Inc., 102 Nev. 534, 537, 728 P.2d 826 (1986). Sprague v. Lucky Stores, Inc., 109 Nev. 247, 250, 849 P.2d 320, 322 (1993).

PREMISES LIABILITY INSTRUCTION 8PML.9 LANDOWNER LIABILITY: LATENT DEFECT

A "latent" defect is one that is hidden, not visible, or not readily apparent to the view of the ordinary prudent person.

SOURCE/AUTHORITY

Galloway v. McDonalds Restaurants of Nevada, Inc., 102 Nev. 534, 537, 728 P.2d 826 (1986).



NEGLIGENT SECURITY INSTRUCTIONS

PREMISES LIABILITY INSTRUCTION 8PML.10 NEGLIGENT SECURITY: ESTABLISHING A CLAIM

In order to establish a claim of negligence, the plaintiff must prove the following elements by a preponderance of the evidence:

- That criminal conduct was foreseeable to the defendant;
- That defendant owed a duty of care to the plaintiff;
- That the defendant breached that duty;
- That defendant's breach of that duty was the proximate cause of the plaintiff's death or injury.

SOURCE/AUTHORITY

Doud v. Las Vegas Hilton Corp., 109 Nev. 1096, 864 P.2d 796 (1993); RESTATEMENT (SECOND) OF TORTS § 344 cmt. F. (1965).

PREMISES LIABILITY INSTRUCTION 8PML.11 NEGLIGENT SECURITY: FORESEEABILITY (TOTALITY OF CIRCUMSTANCES)

To determine whether the defendant provided adequate security, you must first determine that a crime was foreseeable to the defendant landowner.

To determine foreseeability, you may consider the information known to the defendant, and including the nature and location of the defendant's property and the criminal history, or lack of history, of similar criminal conduct.

SOURCE/AUTHORITY

Doud v. Las Vegas Hilton Corp., 109 Nev. 1096, 864 P.2d 796 (1993); RESTATEMENT (SECOND) OF TORTS § 344 cmt. F. (1965).

**PREMISES LIABILITY INSTRUCTION 8PML.12
NEGLIGENT SECURITY: INTERVENING AND
SUPERSEDING CRIMINAL ACTS**

A third-party crime is a superseding cause of negligence of the land possessor who created the situation and afforded the criminal the opportunity to commit the crime, unless the land possessor at the time of the negligence realized or should have realized the likelihood that such a situation might be created and that the criminal might avail himself or herself to the opportunity. Further, if the likelihood that a criminal might commit an attack is one of the hazards, which makes the land possessor negligent, the land possessor is not relieved of liability.

SOURCE/AUTHORITY

Doud v. Las Vegas Hilton Corp., 109 Nev. 1096, 864 P.2d 796 (1993); Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3rd 1026 (2005). RESTATEMENT (SECOND) OF TORTS § 344 cmt. F. (1965).



GENERAL NEGLIGENCE INSTRUCTIONS

NEGLIGENCE INSTRUCTION 4NG.1 PLAINTIFF RIGHTS

The rights of the plaintiffs [plaintiffs' names] are separate and distinct. Each is entitled to fair consideration of [his] [her] own case, and you will decide each plaintiff's case as if it were a separate lawsuit. Each plaintiff's case must be governed by the instructions applicable to that case.

SOURCE/AUTHORITY

CABAJI 15.00; 9th Circuit Fed. J.I. 1.5.

NEGLIGENCE INSTRUCTION 4NG.2 BURDEN OF PROOF: PREPONDERANCE OF THE EVIDENCE

Whenever in these instructions I state that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him] [her], the meaning of such an instruction is this: that unless the truth of the allegation is proved by a preponderance of the evidence, you shall find the same to be not true. The term "preponderance of the evidence" means such evidence as, when weighed with that opposed to it, has more convincing force, and from which it appears that the greater probability of truth lies therein.

SOURCE/AUTHORITY

RESTATEMENT (SECOND) OF TORTS § 433B (Burden of Proof); Spaulding v. United States., 455 F.2d 222, 225-226 (9th Cir. 1972).

NEGLIGENCE INSTRUCTION 4NG.3 NUMBER OF WITNESSES

The preponderance, or weight of evidence, is not necessarily with the greater number of witnesses. The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary. If, from the whole case, considering the credibility of witnesses, and after weighing the various factors of evidence, you believe that there is a balance of probability pointing to the accuracy and honesty of the one witness, you should accept [his][her] testimony.

SOURCE/AUTHORITY

Baker v. Morton, 79 U.S. 150 (1870).

NEGLIGENCE INSTRUCTION 4NG.4 CONCLUSIVE PRESUMPTION; JURY QUESTION AS TO EXISTENCE OF BASIC FACTS

If you find by a preponderance of the evidence that [insert controverted basic facts], then you must also find that [insert presumed fact]. If you do not find by a preponderance of the evidence that [insert controverted basic facts], then you must find that [insert nonexistence of presumed fact].

SOURCE/AUTHORITY

Clark v. State, 95 Nev. 24, 588 P.2d 1027 (1979); NRS 47.230(2).

NEGLIGENCE INSTRUCTION 4NG.5 DISPUTABLE PRESUMPTION; BASIC FACTS ESTABLISHED AS A MATTER OF LAW; JURY QUESTION AS TO PRESUMED FACT

The law provides for a disputable presumption that [insert disputable presumption]. In this action, it has been established that [insert basic facts]. The effect of this disputable presumption is that it places upon [insert name of party against whom presumption is directed] the burden of proving, by a preponderance of the other evidence, that [insert nonexistence of presumed fact].

SOURCE/AUTHORITY

CA BAJI 2.60; Radius v. Travelers Ins. Co., 87 F.2d 412 (9th Cir. 1937); Clark v. State, 95 Nev. 24, 588 P.2d 1027 (1979); NRS 47.180.

NEGLIGENCE INSTRUCTION 4NG.6 DISPUTABLE PRESUMPTION; JURY QUESTION AS TO BASIC FACTS AND PRESUMED FACT

The law provides for a disputable presumption that [insert disputable presumption]. If you find by a preponderance of evidence that [insert basic facts], then the disputable presumption operates to shift to [insert name of party against whom presumption is directed] the burden of proving by a preponderance of the other evidence, that [insert nonexistence of presumed fact]. If, on the other hand, you do not find by a preponderance of the evidence that [insert basic facts], then the burden of proving, by a preponderance of the evidence, that [insert existence of presumed fact] remains with [insert name of party attempting to invoke presumption).

SOURCE/AUTHORITY

Radius v. Travelers Ins. Co., 87 F.2d 412 (9th Cir. 1937); Clark v. State, 95 Nev. 24, 588 P.2d 1027 (1979); NRS 47.180.

NEGLIGENCE INSTRUCTION 4NG.7 RESPECTIVE BURDENS OF PLAINTIFF AND DEFENDANT; GENERAL

[Except as I have already instructed you upon the law relative to presumptions,] The plaintiff has the burden of proving by a preponderance of the evidence all of the facts necessary to establish the following: [list items]. [Except as I have already instructed you upon the law relative to presumptions,] The defendant has the burden of proving by a preponderance of the evidence all of the facts necessary to establish the following: [list items].

SOURCE/AUTHORITY

CA BAJI 2.60; Radius v. Travelers Ins. Co., 87 F.2d 412 (9th Cir. 1937); Clark v. State, 95 Nev. 24, 588 P.2d 1027 (1979); NRS 47.180.

NEGLIGENCE INSTRUCTION 4NG.8 RESPECTIVE BURDENS OF PLAINTIFF AND DEFENDANT; NEGLIGENCE AND COMPARATIVE NEGLIGENCE

The plaintiff has the burden to prove:

- That the defendant was negligent,
- That the plaintiff sustained damage, and
- That such negligence was a [proximate] [legal] cause of the damage sustained by the plaintiff.

The defendant has the burden of proving, as an affirmative defense:

- That the plaintiff was negligent, and
- That plaintiff's negligence was a [proximate] [legal] cause of any damage the plaintiff may have sustained.

SOURCE/AUTHORITY

Clark County School Dist. v. Richardson Const., Inc., 123 Nev. 382, 168 P.3d 87 (2007).

NEGLIGENCE INSTRUCTION 4NG.9 INTRODUCTORY INSTRUCTION; SINGLE LEGAL BASIS

The plaintiff seeks to establish a claim of negligence. I will now instruct on the law relating to this claim.

SOURCE/AUTHORITY

RESTATEMENT (SECOND) OF TORTS §§ 281, 284.

NEGLIGENCE INSTRUCTION 4NG.10 INTRODUCTORY INSTRUCTION; MULTIPLE LEGAL BASES

The plaintiff seeks to establish liability on one or more of [insert appropriate] different legal bases.

One of the plaintiff's claims is negligence. I will now instruct on the law relating to this claim.

SOURCE/AUTHORITY

RESTATEMENT (SECOND) OF TORTS §§ 281-284.

NEGLIGENCE INSTRUCTION 4NG.11 RES IPSA LOQUITUR; NECESSARY CONDITIONS FOR APPLICATION

On the issue of negligence, one of the questions for you to decide in this case is whether the [accident] [injury] occurred under the following conditions:

- First, that it is the kind of [accident] [injury] which ordinarily does not happen unless someone is negligent;
- Second, that it was caused by an agency or instrumentality [in the exclusive control of the defendant] [over which the defendant had the exclusive right of control] at the time the negligence occurred;
- Third, that the [accident] [injury] was not due to any voluntary action or con-

tribution on the part of the plaintiff, which was the [proximate] [legal] cause of [his][her] injury.

If you should find all these conditions exist, you are instructed as follows:

From the happening of the [accident] [injury] involved in this case, you may, but need not, draw an inference that a [proximate] [legal] cause of the occurrence was some negligent conduct on the part of the defendant.

SOURCE/AUTHORITY

CA BAJI 4.00 & CA BAJI 4.01 (modified); NRS 41A.100; Cook v. Sunrise Hosp. and Med. Ctr., LLC, 194 P.3d 1214, 1218 (Nev. 2008); Szydel v. Markman, 121 Nev. 453, 117 P.3d 200 (2005).

NEGLIGENCE INSTRUCTION 4NG.12 NEGLIGENCE: ADULT: DEFINITION

When I use the word “negligence” in these instructions, I mean the failure to do something, which a reasonably careful person would do, or the doing of something, which a reasonably careful person would not do, to avoid injury to themselves or others, under circumstances similar to those shown by the evidence.

It is the failure to use ordinary or reasonable care. Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.

[You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skilled one, but a person of reasonable and ordinary prudence.]

SOURCE/AUTHORITY

RESTATEMENT (SECOND) OF TORTS § 283; Spaulding v. United States., 455 F.2d 222 (9th Cir. 1972).
CABAJI 3.10.

“ *Author’s note: Proximate cause is a difficult concept for some laypersons to grasp; consequently, many judges have now opted to simply call it “legal cause”, and substitute such language as to not confuse juries.*

NEGLIGENCE INSTRUCTION 4NG.13 NEGLIGENCE: PROXIMATE CAUSE: DEFINITION

When I use the expression “proximate cause,” I mean [that] [a] [any] cause which, in natural [foreseeable] and continuous sequence, unbroken by any efficient intervening

cause, produces the injury complained of and without which the result would not have occurred. [It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which, in combination with it, causes the injury.]

SOURCE/AUTHORITY

Goodrich & Pennington Mortgage Fund, Inc. v. J.R. Woolard Inc., 120 Nev. 777, 784, 101 P.3d 792, 797 (2004), citing Taylor v. Silva, 96 Nev. 738, 741, 615 P.2d 970, 971 (1980) (quoting Mahan v. Hafen, 76 Nev. 220, 225, 351 P.2d 617, 620 (1960)); Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1481, 970 P.2d 98, 107 (1998); RESTATEMENT (SECOND) OF TORTS § 431.

NEGLIGENCE INSTRUCTION 4NG.14 NEGLIGENCE: LEGAL CAUSE; DEFINITION

A legal cause of injury, damage, loss or harm is a cause, which is a substantial factor in bringing about the injury, damage, loss or harm.

SOURCE/AUTHORITY

County of Clark, ex rel. University Medical Center v. Upchurch, 114 Nev. 749, 961 P.2d 754 (1998); RESTATEMENT (SECOND) OF TORTS § 431.

USE NOTE

This instruction is intended as an alternate for the jury instruction titled Negligence: Proximate Cause: Definition.

NEGLIGENCE INSTRUCTION 4NG.15 ORDINARY CARE: ADULT: DEFINITION

When I use the words “ordinary care,” I mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.

SOURCE/AUTHORITY

RESTATEMENT (THIRD) OF TORTS § 7; RESTATEMENT (SECOND) OF TORTS § 283 Comment C; CA BAJI 3.00.

Negligence Instruction 4NG.16

STANDARD OF CONDUCT FOR MINOR

A minor is not held to the same standard of conduct as an adult. [He] [She] is only required to exercise the degree of care, which ordinarily is exercised by minors of similar age, intelligence, and experience under similar circumstances. It is for you to determine whether the conduct of [name of minor] was such as might reasonably have been expected of a minor of [his] [her] age, intelligence, and experience, acting under similar

circumstances. [The rule just stated applies even when the evidence shows a minor may have violated an ordinance. The question of whether or not the minor was negligent must still be answered by the above standard, as I have stated it to you.]

SOURCE/AUTHORITY

Clark v. Circus-Circus, Inc., 525 F.2d 1328, 1330 (9th Cir. 1975); Galloway v. McDonald's Restaurants of Nevada, Inc., 102 Nev. 534, 728 P.2d 826, 831-32 (1986); RESTATEMENT (SECOND) OF TORTS § 283A.

NEGLIGENCE INSTRUCTION 4NG.17 CONCURRENT CAUSE

More than one person may be to blame for causing an injury. If you decide that the defendant[s] [was] [were] negligent and that [his] [her] [their] negligence was a proximate cause of injury to the plaintiff, it is not a defense that some third person who is not a party to the suit may also have been to blame. [However, if you decide that the sole proximate cause of injury to the plaintiff was the conduct of some person other than the defendant, then your verdict should be for the defendant.]

SOURCE/AUTHORITY

RESTATEMENT (SECOND) OF TORTS §§ 439, 390, 442B, 495; CA BAJI 3.77.

NEGLIGENCE INSTRUCTION 4NG.18 GROSS NEGLIGENCE

Gross negligence is much more than ordinary negligence. Gross negligence demonstrates a failure to exercise even a slight amount of care. Gross negligence is very aggravated and extreme negligence that demonstrates the person gave little, if any, thought to the consequences of his behavior.

SOURCE/AUTHORITY

RESTATEMENT (SECOND) OF TORTS § 500; NRS 41.505.

NEGLIGENCE INSTRUCTION 4NG.19 WANTON AND RECKLESS MISCONDUCT

Plaintiffs claim wanton and reckless misconduct of defendants. Before you can find defendants liable for wanton and reckless misconduct, you must find:

- An intention to perform an act that the defendant knows, or should know, will probably cause harm, and
- Harm to the plaintiffs resulting therefrom.

SOURCE/AUTHORITY

RESTATEMENT (SECOND) OF TORTS § 500.

NEGLIGENCE INSTRUCTION 4NG.20

COMPARATIVE NEGLIGENCE: DEFINITION; EFFECT

The plaintiff may not recover damages if his [her] comparative negligence is greater than the negligence of the defendant [combined negligence of all the defendants in the case]. However, if the plaintiff is negligent, the plaintiff may still recover a reduced sum so long as his [her] comparative negligence was not greater than the negligence of the defendant [combined negligence of all the defendants]. If you determine that the plaintiff is entitled to recover, you shall return by general verdict the total amount of damages sustained by the plaintiff without regard to his [her] comparative negligence and you shall return a special verdict indicating the percentage of negligence attributable to each party. The percentage of negligence attributable to the plaintiff shall reduce the amount of such recovery by the proportionate amount of such negligence and the reduction will be made by the Court.

SOURCE/AUTHORITY

NRS 41.141

NEGLIGENCE INSTRUCTION 4NG.21

COMPARATIVE NEGLIGENCE: WRONGFUL DEATH

The plaintiff may not recover damages if the comparative negligence of the plaintiff's decedent contributed more to his [her] death than the negligence of the defendant [combined negligence of all the defendants in the case]. However, if the plaintiff's decedent was negligent, the plaintiff may still recover a reduced sum so long as the comparative negligence of the plaintiff's decedent was not greater than the negligence of the defendant [combined negligence of all the defendants].

If you determine that the plaintiff is entitled to recover, you shall return by general verdict the total amount of damages sustained by the plaintiff without regard to the comparative negligence of the plaintiff's decedent, and you shall return a special verdict indicating the percentage of negligence attributable to the plaintiff's decedent and to the defendant [combined negligence of all the defendants]. The percentage of negligence attributable to plaintiff's decedent shall reduce the amount of plaintiff's recovery by the proportionate amount of such negligence, and the reduction will be made by the court.

SOURCE/AUTHORITY

NRS 41.141; *Martin v. U.S.*, 546 F.2d 1355 (9th Cir. 1976); *Young v. Aeroil Products Co.*, 248 F.2d 185 (9th Cir. 1957).

NEGLIGENCE INSTRUCTION 4NG.22

NEGLIGENCE OF PARENTS NOT IMPUTED

If you find that the [mother] [father] [parents] of [child's name] [was] [were] negligent, that negligence shall not be charged against [child's name], and it does not prevent or

reduce a recovery by [child's name] if [he] [she] is otherwise entitled to recover.

SOURCE/AUTHORITY

NRS 41.470; CA BAJI 3.60, 3.62.

NEGLIGENCE INSTRUCTION 4NG.23 COMPARATIVE NEGLIGENCE CLAIMED: PARENTS, CHILD, PARENT'S CAUSE OF ACTION NOT ASSIGNED TO CHILD

This lawsuit involves two distinct but related claims. The first is brought by the child who seeks damages for [his] [her] injuries. The second claim is brought by [his] [her] [father] [mother], who seeks compensation for money spent or amounts for which [he] [she] has become liable for reasonably necessary [expenses] [and for loss of earnings of the child during his/her minority].

Child's Claim

If you should find that the child was negligent and if the negligence of the child was 50% or less of the total proximate cause of the child's injury, then the damages to which the child would otherwise be entitled must be reduced in proportion to the amount of negligence attributable to the child.

If the negligence of the child was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then the defendant shall be found not liable on both claims. [The [father's] [mother's] negligence, if any, does not affect the amount, if any, to which the child is entitled on [his] [her] own claim.]

Parent's Claim

As to the [father's] [mother's] claim, the [father's] [mother's] damages must [first] [also] be reduced by the percentage of negligence of the child, if any. [If you find that the [father] [mother] was negligent and that the [father's] [mother's] negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then the [father's] [mother's] negligence proportionately further reduces the damages to which the [father] [mother] would have been entitled. If you find that the [father] [mother] was negligent and that the [father's] [mother's] negligence was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then the defendant shall be found not liable on the [father's] [mother's] claim.]

SOURCE/AUTHORITY

RESTATEMENT (SECOND) OF TORTS §§ 283A, 496; CA BAJI 3.60/3.62 (modified); Galloway v. McDonald's Restaurants of Nevada, Inc., 102 Nev. 534, 542, 728 P.2d 826, 831, 832 (1986).

NEGLIGENCE INSTRUCTION 4NG.24: COMPARATIVE NEGLIGENCE CLAIMED: PARENT'S CAUSE OF ACTION ASSIGNED TO CHILD

This lawsuit involves two distinct but related claims. The first is brought by the child who seeks damages for [his][her] injuries. The second claim originally belonged to the child's [father][mother] but it has been assigned to the child for recovery by the child in this lawsuit. This second claim, called the parent's claim, is also brought by the child and seeks compensation for money spent or amounts for which the [father][mother] has become liable for reasonably necessary [expenses][and for loss of earnings of the child during [his][her] minority].

Child's Claim

As to the child's claim for damages, if you should find that the child was negligent and if the negligence of the child was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then the damages to which the child would otherwise be entitled must be reduced in proportion to the amount of negligence attributable to the child. If you should find that the negligence of the child was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then the defendant shall be found not liable on both claims. [The [father's][mother's] negligence, if any, does not affect the amount, if any, to which the child is entitled on [his][her] own claim.]

Parent's Claim

As to the parent's claim brought by the child in this case, those damages must first be reduced by the percentage of negligence of the child, if any. If you find that the [father][mother] was negligent and that the [father's][mother's] negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then the [father's][mother's] negligence proportionately further reduces the damages, if any, to which the parent would have been entitled, and thus the parent's claim must be reduced accordingly. If you find that the [father][mother] was negligent and that the [father's][mother's] negligence was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then the defendant shall be found not liable on the [father's][mother's] claim.

SOURCE/AUTHORITY

RESTATEMENT (SECOND) OF TORTS § 283A: Comments, § 496;
CA BAJI 3.60/3.62 (modified); Galloway v. McDonalds Restaurants of Nevada, Inc.,
102 Nev. 534, 542, 728 P.2d 826, 831-32 (1986).

NEGLIGENCE INSTRUCTION 4NG.25 DUTY OF ONE IN IMMINENT PERIL

A person who, without negligence on [his] [her] part, is suddenly and unexpectedly confronted with peril arising from either the actual presence of, or the appearance of, imminent danger to [himself] [herself] or to others, is not expected nor required to use the same judgment and prudence that is required of [him] [her] in the exercise of ordinary care in calmer and more deliberate moments. [His] [Her] duty is to exercise only the care that an ordinarily prudent person would exercise in the same situation. If at that moment [he] [she] does what appears to [him] [her] to be the best thing to do, and if [his] [her] choice and manner of action are the same as might have been followed by any ordinarily prudent person under the same conditions, [he] [she] does all the law requires of [him] [her]; although in the light of after-events, it should appear that a different course would have been better and safer.

SOURCE/AUTHORITY

RESTATEMENT (SECOND) OF TORTS §479; *Styris v. Folk*, 62 Nev. 208, 216, 146 P.2d 782, 785 (1944); *Deiss v. Southern Pac. Co.*, 56 Nev. 151, 47 P.2d 928, 931 (1935); CA BAJI 4.40.

NEGLIGENCE INSTRUCTION 4NG.26 EXPRESS ASSUMPTION OF RISK: CONTRACTUAL RELATIONSHIP: BURDEN OF PROOF

[As to count [count number],] The defendant has raised the affirmative defense that the plaintiff assumed the risk of injury from the danger, which the plaintiff claims, caused [his] [her] injury. To prove this defense, the defendant has the burden of proving each of the following propositions:

- First, that the defendant and the plaintiff had [an agreement] [a contract] under which the plaintiff was to participate in activities which exposed [him] [her] to the danger that resulted in the injury of which [he] [she] complains [,] [namely, [describe danger]].
- Second, that the danger was one that ordinarily accompanies the activities contemplated in the [agreement] [contract].
- Third, that the plaintiff had actual knowledge of this danger and understood and appreciated the nature and extent of the risk;
- Fourth, that the plaintiff voluntarily subjected [himself] [herself] to this danger; and
- Fifth, that this danger was the cause of the plaintiff's [alleged] [injuries] [damages].

If you decide that each of these propositions has been proved, then your verdict should be for the defendant [as to count [count number]]. If, on the other hand, you decide that any of these propositions has not been proved, then the defendant has not proved the affirmative defense of assumption of the risk.

SOURCE/AUTHORITY

RESTATEMENT (SECOND) OF TORTS § 496A-E; CA BAJI 4.30;
Mizushima v. Sunset Ranch, Inc., 103 Nev. 259, 737 P.2d 1158 (1987) (note: this case has been overruled by Turner v. Mandalay Sports Entertainment, LLC, 180 P.3d 1172 (2008)).

NEGLIGENCE INSTRUCTION 4NG.27 RIGHT TO ASSUME OTHERS WILL EXERCISE DUE CARE

A person who, [himself] [herself], is exercising ordinary care, has a right to assume that every other person will perform [his] [her] duty under the law; and in the absence of reasonable cause for thinking otherwise, it is not negligence for such a person to fail to anticipate injury which can come to [him] [her] only from a violation of law or duty by another.

SOURCE/AUTHORITY

McCready v. Southern Pac. Co., 26 F.2d 569 (9th Cir. 1928);
Los Angeles & S.L.R. Co. v. Umbaugh, 61 Nev. 214, 123 P.2d 224 (1942).

NEGLIGENCE INSTRUCTION 4NG.28 EVIDENCE OF CUSTOM IN RELATION TO ORDINARY CARE

Evidence as to whether or not a person conformed to a custom that has grown up in a given locality or business is relevant and ought to be considered, but is not controlling on the question of whether or not [he] [she] exercised ordinary care; for that question must be determined by the standard of care that has been stated to you.

SOURCE/AUTHORITY

Johnson v. U.S., 270 F.2d 488 (9th Cir. 1959); Young v. Aeroil Products Co., 248 F.2d 185 (9th Cir. 1957); Corrigan v. San Marcos Hotel Co., 182 F.2d 719 (9th Cir. 1950).

NEGLIGENCE INSTRUCTION 4NG.29 VIOLATION OF LAW AS NEGLIGENCE PER SE; NO EVIDENCE OF EXCUSE OR JUSTIFICATION

There was in force at the time of the occurrence in question [a law] [laws] which read as follows: [Read applicable law.]

A violation of the law[s] just read to you constitutes negligence as a matter of law. If you find that a party violated a law just read to you, it is your duty to find such violation to be negligence, and you should then consider the issue of whether that negligence was a [proximate] [legal] cause of injury or damage to the plaintiff.

SOURCE/AUTHORITY

Ashwood v. Clark County, 113 Nev. 80, 930 P.2d 740 (1997); Doe v. Nevada, 356 F.Supp. 2d 1123 (D. Nev. 2004).

NEGLIGENCE INSTRUCTION 4NG.30 VIOLATION OF LAW AS NEGLIGENCE PER SE; JURY ISSUE AS TO EXCUSE OR JUSTIFICATION

There was in force at the time of the occurrence in question [a law] [laws] which read as follows:

[Read applicable law.] An unexcused violation of the law[s] just read to you constitutes negligence as a matter of law. If you find that a party, without excuse or justification, violated a law just read to you, it is your duty to find such violation to be negligence, and you should then consider the issue of whether that negligence was a [proximate] [legal] cause of injury or damage to the plaintiff.

The burden of proof is upon the person who violated the law to show by a preponderance of the evidence that such violation was excusable or justifiable. A violation of law is excusable or justifiable only if you find that the person who violated the law did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.

SOURCE/AUTHORITY

Ashwood v. Clark County, 113 Nev. 80, 930 P.2d 740 (1997);
Doe v. Nevada, 356 F.Supp. 2d 1123 (D. Nev. 2004).

NEGLIGENCE INSTRUCTION 4NG.31 DUTY: VOLUNTEER

One who is under no duty to care for or render service to another, but who voluntarily assumes such duty, is subject to liability to the other for injury proximately caused by a failure to exercise ordinary or reasonable care in the performance of such assumed duty.

SOURCE/AUTHORITY

Buck by Buck v. Greyhound Lines, Inc., 105 Nev. 756, 783 P.2d 437 (1989).

USE NOTE

This instruction is not applicable in most emergency care cases. NRS 41.500

“ *Author’s Note below instruction was added to the book to show an example of negligence in context of driver of vehicle including: limo, bus, taxi, and or hotel shuttle; common carrier and higher duty of care jury instructions would also apply which has also been included below.*”

NEGLIGENCE INSTRUCTION 4NG.32 DUTY OF THE DRIVER OF VEHICLE ON PUBLIC HIGHWAY [OTHERWISE KNOWN AS FAILURE TO USE DUE CARE]

It is the duty of the driver of any vehicle using a public highway to avoid placing [himself] [herself] or others in danger; [and] to use like care to avoid an accident; [to keep a proper lookout for traffic and other conditions to be reasonably anticipated] [and] [to maintain proper control of [his] [her] vehicle].

SOURCE/AUTHORITY

NRS 41.440; *Arata v. Faubion*, 123 Nev. 19, 161 P.3d 244 (2007);
CABAJI 13.50-13.53.

NEGLIGENCE INSTRUCTION 4NG.34 ORDINARY CARE: EMERGENCY: DEFINITION

Whether the plaintiff was confronted with a sudden emergency caused by defendant's conduct is a factor you may consider in determining whether [his] [her] choice of action was reasonable, and whether [he] [she] was negligent. Under the law, "emergency" has the ordinary meaning of that noun: an unforeseen combination of circumstances calling for immediate action, or action within the space of a few seconds. A person confronted with a sudden emergency is only required to use that degree of care, which an ordinarily prudent person would exercise under circumstances of a similar emergency. When confronted with a sudden emergency, a person is not held to the standard of judgment, which might be required where an opportunity for reflection is available before action is taken.

SOURCE/AUTHORITY

Vascacillas v. Southern Pac. Co., 247 F. 8 (9th Cir. 1918); *Brascia v. Johnson*, 105 Nev. 592, 781 P.2d 765 (1989).

USE NOTE

The sudden-emergency instruction is only appropriate when unexpected conditions confront the actor requesting the instruction and the actor was otherwise exercising reasonable care. *Posas v. Horton*, 228 P.3d 457, 126 Nev. Adv. Op. 12 (2010).

NEGLIGENCE INSTRUCTION 4NG.42 DUTY OF COMMON CARRIER TO PASSENGER

At the time of the occurrence in question, the defendant [name of carrier] was a common carrier. A common carrier has a duty to its passengers to use the highest degree of care consistent with the mode of conveyance used and the practical operation of its business as a common carrier by [mode of transportation]. Its failure to fulfill this

duty is negligence.

SOURCE/AUTHORITY

Groomes v. Fox, 96 Nev. 457, 611 P.2d 208 (1980).

**NEGLIGENCE INSTRUCTION 4NG.43
DUTY OF CARRIER TO PROTECT PASSENGERS FROM
INJURY BY THIRD PERSONS**

It was the duty of the defendant to exercise the highest degree of care consistent with the type of vehicle used and the practical operation of its business as a common carrier by [mode of transportation] to protect its passengers from the danger of injury from [e.g., stone throwing], of which it knew or should have anticipated from facts and circumstances known to it while the passengers were on its [mode of transportation/vehicle] or while boarding or alighting therefrom. The failure of the defendant to fulfill this duty is negligence.

SOURCE/AUTHORITY

Illinois Cent. R. Co. v. Barron, 72 U.S. 90 (1866); Arnold v. Amtrak, 13 Fed. Appx. 573 (9th Cir. 2001).

**NEGLIGENCE INSTRUCTION 4NG.44
DUTY OF CARRIER TO PROTECT PASSENGERS FROM
OTHER PASSENGERS**

It was the duty of the defendant to exercise the highest degree of care consistent with the type of vehicle used and the practical operation of its business as a common carrier by [mode of transportation] to protect its passengers while they were on its [mode of transportation/vehicle] or while boarding or alighting therefrom, from [assault,] [injury,] [and] [abuse] from fellow passengers, of which it knew, or should have anticipated, from facts and circumstances known to it. The failure of the defendant to fulfill this duty is negligence. [This obligation cannot be delegated to another. It is therefore not a defense for the defendant that another person, including [e.g., police department] failed to protect the defendant's passengers while they were on the defendant's [mode of transportation/vehicle] from assault, injury, and abuse from fellow passengers, of which the defendant knew, or should have anticipated from facts and circumstances known to it. Now, when I use the term "cannot be delegated" in these instructions, I mean that the duty must be performed by the defendant and cannot be left to some other person.]

SOURCE/AUTHORITY

Arnold v. Amtrak, 13 Fed. Appx. 573 (9th Cir. 2001).

NEGLIGENCE INSTRUCTION 4NG.45 DUTY TO A DISABLED, INFIRM, OR INTOXICATED PERSON, OR TO A CHILD

When a carrier is aware that a passenger is [mentally or physically disabled] [feeble or infirm] [intoxicated] [a child traveling alone] so that the hazards of travel are increased as to [him] [her], it is the duty of the carrier to provide that additional care which the circumstances reasonably require. The failure of the defendant to fulfill this duty is negligence.

SOURCE/AUTHORITY

American President Lines, Ltd. v. Lundstrom, 323 F.2d 817 (9th Cir. 1963).

NEGLIGENCE INSTRUCTION 4NG.48 PLACE TO BOARD AND ALIGHT

In selecting a place for the plaintiff to [board] [alight from] its vehicles, it was the duty of the defendant, as a common carrier, to exercise the highest degree of care consistent with the mode of conveyance used and the practical operation of its business as a common carrier by [mode of transportation]. The failure of the defendant to fulfill this duty is negligence.

SOURCE/AUTHORITY

Warner v. Baltimore & O.R. Co., 168 U.S. 339, 18 S.Ct. 68 (1897).

NEGLIGENCE INSTRUCTION 4NG.49 INSTALLER OF PRODUCT

An installer of a product has a duty to exercise reasonable care in the installation of that product so that it may be safely used in a manner and for a purpose for which it was intended. A failure to fulfill that duty is negligence.

SOURCE/AUTHORITY

Lindgren v. U.S., 281 U.S. 38, 50 S. Ct. 207 (1930); Montgomery Ward & Co. v. Stevens, 60 Nev. 358, 109 P.2d 895 (1941); CA BAJI 6.43 (modified); CA BAJI 3.42 (modified); CA BAJI 9.20-9.24 (modified).

NEGLIGENCE INSTRUCTION 4NG.53 ADMITTED LIABILITY

The defendant has admitted liability for any [injury] [damages] which may have proximately resulted from the occurrence. You need only decide [what [injuries] [damages] to the plaintiff resulted from this occurrence and] what amount of money will reasonably and fairly compensate the plaintiff for those [injuries] [damages].

SOURCE / AUTHORITY

Sierra Pac. Power Co. v. Anderson, 77 Nev. 68, 73, 358 P.2d 892, 895 (1961);
Walden v. United States, 31 F.Supp.2d 1230, 1235 (S.D.Cal. 1998);
Gargir v. Akiva, 66 Ca.App.4th 1269, 1279, 78 Cal.Rptr.2d 557 (1998);
Lawrence v. Norfolk Dredging Co., 319 F.2d 805, 809 (4th Cir. 1963);
Motter v. Snell, 250 Iowa 1247, 95 N.W.2d 735, 741 (1959);
Chavez v. U.S., 192 F.Supp. 263, 270 (D.C. Mont. 1961).

TYPICAL JURY VERDICT FORM

DISTRICT COURT
CLARK COUNTY NEVADA

Plaintiffs,

CASE NO.

DEPT. NO.

v.

Defendants.

VERDICT FOR PLAINTIFF

We, the jury in the above-entitled action, find for Plaintiffs, individually _____ and as Special Administratrix of the Estate of _____, and against Defendants, _____, and _____, and without reduction for Plaintiffs' contributory negligence, if any, assess the total amount of the Plaintiffs' damages as follows:

Medical and Funeral Expenses of	\$ _____
Pain and Suffering of	\$ _____
Past Grief and Sorrow of	\$ _____
Future Grief and Sorrow of	\$ _____
Past and Future Loss of Income and Impairment of Earning Capacity of	\$ _____
TOTAL	\$ _____

Having found for Plaintiffs and against Defendants, we further find:

1. The Percentage of negligence on the part of Plaintiffs which was the proximate cause of Plaintiffs' injury was % _____
 2. The Percentage of negligence on the part of Defendant, _____, which was the proximate cause of Plaintiffs' Injury, was % _____
- TOTAL % _____

DATED this ____ day of _____, 20__.

FOREPERSON

ACTUAL EXCERPTS FROM HOTEL GUESTS

After his wife slipped on stairs, fracturing her tibia/fibula while carrying her infant child...

“ *I do. Honestly, my full intention while dealing with them was to let them decide to what degree but after their reaction I am appalled. I called to check up with the investigation and before I finished saying hello the lady said they decided to deny any claims. I didn't make a threat or claim at all. What upsets me the most is that it is almost two weeks after the incident they have not called to see if my wife or child is ok.*”

Sent from my Droid Charge on Verizon 4G LTE

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