

# DIGEST OF INSURANCE LAW

## ALBERTA

Not Revised for this Edition

### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

The Court of Queen's Bench is constituted by the Court of Queen's Bench Act and generally has jurisdiction over all civil, criminal, surrogate, and constitutional matters. Province is divided into 11 judicial districts. Judges of Court of Queen's Bench have unlimited jurisdiction throughout Alberta in all matters and periodically sit at different judicial centers of judicial districts.

The Provincial Court of Alberta is constituted by Provincial Court Act which creates Civil Division of the Provincial Court of Alberta. Civil claims are dealt with in Part 4 of Act. Section 9.6 gives the Court specific statutory jurisdiction over, among others, debt and damage claims. The regulations allow adjudication of claims equal to or less than \$25,000. Informal procedure applies. Court not bound by rules of evidence. Mediation may be ordered. Right of appeal from decision of Court to Court of Queen's Bench (§46). Decision of Court of Queen's Bench on appeal is final (§53 (2)).

#### Appellate Courts

Court of Appeal of Alberta is constituted by Court of Appeal Act as superior court of record with general jurisdiction over civil, criminal and constitutional matters. General right of appeal of judgments and orders of Court of Queen's Bench to Court of Appeal (Rule 505 Alberta Rules of Court). Court has Chief Justice and twelve other judges. However, judges of Court of Queen's Bench by their office are also judges of Court of Appeal (§3). Quorum of Court constituted by 3 judges (§7). In important cases, court sits in panels of five.

Note: Jurisdiction of Alberta courts is subject to Federal Court Act giving Federal Court of Canada concurrent jurisdiction over actions against federal crown, judicial review of federal regulatory bodies, admiralty and certain intellectual property matters.

Supreme Court of Canada is constituted by the Supreme Court of Canada Act. Court has final appellate jurisdiction over all appeals from provincial courts and Federal Court of Canada on all civil, criminal and constitutional matters. Quorum for hearing an appeal is five

judges (§25). However, Court may also sit in panels of seven or nine depending on importance of issue on appeal. No right of appeal to Supreme Court. Leave must be given by Court of Appeal (§37) or granted by Supreme Court itself (§40).

### LAW

#### Abbreviations

- A.C. – Appeal Cases (English Privy Council).
- A.J. – Alberta Judgments.
- A.L.R. – Alberta Law Reports.
- A.R. – Alberta Reports.
- A.W.L.D. – Alberta Weekly Law Digest.
- All E.R. – All England Reports.
- Alta D. – Alberta Decisions.
- Alta. L.R. (2d) – Alberta Law Reports, Second Series.
- Alta. L.R. (3d) – Alberta Law Reports, Third Series.
- C.C.L.I. – Canadian Cases on Law of Insurance.
- C.C.L.T. – Canadian Cases on Law of Torts.
- C.P.C. – Carswells Practice Cases.
- C.R.C. – Consolidate Regulations of Canada.
- D.L.R. – Dominion Law Reports.
- F.T.R. – Federal Trial Report.
- I.L.R. – Insurance Law Reports.
- N.R. – National Reporter.
- O.R.2d – Ontario Reports, Second Series.
- Q.B. – Queens Bench.
- R.S.A. – Revised Statutes of Alberta.
- R.S.C. – Revised Statutes of Canada.
- S.A. – Statutes of Alberta.
- S.C.C.D. – Supreme Court of Canada Decisions.
- S.C.R. – Supreme Court of Canada Reports.
- S.O.R. – Statutory Order and Regulations.
- W.W.D. – Western Weekly Digest.
- W.W.R. – Western Weekly Reports.

#### Statutes

- Aeronautics Act, R.S.C. 1985, c.A-2; Age of Majority Act, R.S.A. 2000, c.A-6; Air Regulations C.R.C. 1978, c.3; Alberta Health Care Insurance Act, R.S.A. 2000, c.A-20; Hospitals Act, R.S.A.



1980, c.H-12; Alberta Rules of Court, Alta. Reg. 390/68; Arbitration Act, R.S.A. 2000, c.A-43; Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3; Business Corporations Act, R.S.A. 2000, c.B-9; Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B. of the Canada Act 1982 (U.K.) 1982, c.11; Carriage by Air Act, R.S.C., c.C-26; Contributory Negligence Act, R.S.A. 2000, c.C-27; Court of Appeal Act, R.S.A. 2000, c.C-30; Criminal Code, R.S.C. 1985, c.C-46; Fatal Accidents Act, R.S.A. 2000, c.F-5; Federal Court Act, R.S.C. 1985, c.F-8; Insurance Act, R.S.A. 2000, c.I-3; Jury Act, R.S.A. 2000, c.J-3; Legal Profession Act, R.S.A. 2000, c.L-8; Limitations Act R.S.A. 2000, c.L-12; Married Women's Act, R.S.A. 2000, c.M-6; Minor's Property Act, S.A. 2004, c.M-18.1; Motor Vehicle Accident Claims Act, R.S.A. 2000, c.M-22; Municipal Government Act, R.S.A. 2000, c.M-26; Occupiers Liability Act, R.S.A. 2000, c.O-4; Provincial Court Act, R.S.A. 2000, c.P-31; Public Highways Development Act, R.S.A. 2000, c.P-38; Supreme Court Act, R.S.C. 1985, c.S-26; Survivorship Act, R.S.A. 2000, c.S-28; Survival of Actions Act, R.S.A. 2000, c.S-27; Tortfeasors Act, R.S.A. 2000, c.T-5; Traffic Safety Act, R.S.A. 2000 c.T-6; Workers' Compensation Act, R.S.A. 2000, c.W-15.

## ACCIDENT AND HEALTH INSURANCE

See "ACCIDENTAL MEANS" and "DISABILITY."

**Contract Law.** This type of insurance is subject to provisions of Subpart 6 of Part 5 of Insurance Act which deals with accident and sickness insurance rather than accident and health insurance. Act provides that no officer or agent etc., of insurer shall be deemed to be agent of insured, to prejudice of insured in respect of any question arising out of contract of insurance (§701).

Section 671 enacts statutory conditions which are deemed part of every contract of accident and sickness insurance (other than contract of group insurance) and requires statutory conditions to be printed on, or attached to every policy unless conditions are specifically omitted or varied in particular manner as permitted under §672. Statutory conditions deal generally with contract, and among other things with termination by insurer or insured, requirements of notice, proof of claim, rights of examination and time in which benefits must be paid.

**Cancellation.** Termination by insured is governed by statutory condition 5 allowing insured to terminate by registered mail to insured's head office or chief agency in Province, or by delivery of notice to authorized agent of insurer in Province and on surrender of policy insurer shall refund excess premium calculated to date of receipt of notice according to table used by insurer at time of termination.

Termination by insurer is governed by statutory condition 6. Insurer may terminate by giving notice and refunding concurrently with notice amount of excess premium. Notice may be delivered to insured or sent by registered mail to latest address of insured on insurer's records. Termination effective five days after notice of termination given or when registered mail used ten days after mailing of notice. Insurer may also terminate for non-payment of premium upon mailing written notice to insured and termination shall be effective ten days after date of mailing of notice. (§674). Renewal. Upon issuance of the renewal certificate contract is binding upon insurer notwithstanding non-payment of renewal premium. (§674 (1) (a)).

Renewal is continuance of existing contract and not new contract itself: *Zappone v. Mutual of Omaha*, (1983) 2 C.C.L.I. 159 (Ont. H.C.).

**Disease Induced by Accident.** Disease induced by accident will not be covered unless injury was solely caused by accidental means. Disease cannot be caused by voluntary act of insured when foreseeable consequence of act is injury sustained. Death by infection caused by blister resulting from shoe rubbing is not disease induced by accident. *Sloboda v. Continental Cas.*, (1938) 3 D.L.R. 166 (Alta. S.C.A.D.). When insured hospitalized for three months as result of heart attack after curling caused by 1) over-exertion while curling 2) slip and fall while curling, heart attack found not solely caused by accidental means because over-exertion was voluntary and partial cause of heart attack. Only one of the contributing causes was accidental and this was not sufficient. *Harmon v. Travelers Ins.*, (1937) 1 W.W.R. 424 (Alta. S.C.T.D.). Explosion of aerosol can aggravating pre-existing heart condition precipitating fatal heart attack found to be accidental by Court. *Milashenko v. Co-operative Fire & Cas.*, [1970] I.L.R. para. 1-326 at 925 (S.C.C.).

**Excepted Risks.** Insured hospitalized after being shot by one of his enemies. Court held that shooting constituted accident. *Istvan v. Merchant's Casualty Ins.*, (1940) 7 I.L.R. 273 (Alta. S.C.T.D.). For different conclusion on similar facts. *King's Crew Motorcycle Club v. Manufacturers Life Ins.*, (1990) 73 Alta. L.R. (2d) 435 (Q.B.).

Insured had pre-existing heart condition and was stuck in snow storm. Insured over-exerted self and died of heart attack. Supreme Court of Canada holding that exertion was deliberate and not accidental even though circumstances giving rise to exertion were accidental. *Smith v. British Pacific Lines Ins.*, (1965) 51 W.W.R. 417 (S.C.C.). Insured was drinking and driving. This amounted to a criminal offence and there was no coverage for him. *Franta v. North America Life Assur. Co.*, (1983) 26 Alta. L.R. (2d) 169 (Q.B.).

Notice and Proof of Loss. Under statutory condition 7 written notice required within 30 days of claim arising and proof of loss required within 90 days of claim arising. However, claim not invalidated if not reasonably possible to give notice or proof within prescribed period as long as notice and proof given within one year from date of claim arising.

Damages. Double indemnity available in some cases of accidental means. For what constitutes accidental means see "ACCIDENTAL MEANS" below.

### ACCIDENTAL MEANS

There is a difference between "accidental means" and "accidental result." Where insured died of respiratory failure due to excessive consumption of alcohol, Court found that there was no coverage because, although result was unanticipated and therefore accidental, consumption of alcohol was not accidental and therefore there were no accidental means. *Leontowicz v. Seaboard Life Ins.*, (1985) 36 Alta. L.R. (2d) 65 (C.A.).

"Accidental means" has been defined by case law as "unintended and unexpected means." *Harmon v. Travelers Ins.*, (1937) 1 W.W.R. 424 (Alta. S.C.A.D.).

For cases dealing with meaning of word "accident" see *Canadian Indemnity Co. v. Walkem Machinery*, (1975) 53 D.L.R. (3d) 1 (S.C.C.); *Sirois v. Saindon*, (1976) 1 S.C.R. 735 and *Mutual of Omaha v. Stats*, (1978) 2 S.C.R. 1153.

Cases Finding Accidental Means. Taking overdose of insulin. *Price v. Dominion of Canada General Ins.*, (1938) S.C.R. 234. Injury while lifting object frequently lifted in ordinary course of duties. *Semkow v. Merchant's Cas.*, [1937] 2 W.W.R. 669 (Alta. D.C.). Death of driver due to accumulation of CO gas resulting from vehicle's immobilization in snow drift. *Sklar v. Sask. Govt. Ins. Office*, (1965) 52 W.W.R. 264 (Sask. Q.B.).

Cases Finding No Accidental Means. See also "ACCIDENT AND HEALTH INSURANCE." Presumption against suicide will establish death by accident on a balance of probabilities unless insurer can, by cogent evidence, establish probability of suicide. *Beischel*

*v. Mutual of Omaha* (1991), 122 A.R. 32 (QB). Notwithstanding presumption against taking one's life, court found suicide when insured consumed a toxic level of antidepressants. *Anderson Estate v. London & Midland Gen. Ins.*, (1998) Alta. unreported (Q.B.).

### ADJUSTERS

Definition. Section 2 defines "adjuster" as person who (not being lawyer when practicing law or trustee of property insured or agent of owner or person having insurable interest in property insured, or insurer or an employee of insured), for compensation, directly or indirectly solicits the right to negotiate or negotiates settlement of a loss under contract of insurance on behalf of insurer or insured.

Licensing Requirements. Section 460 of Insurance Act requires persons who act or offer to act as adjuster to hold certificate of authority issued by Minister of Finance. An application for certificate of authority must include financial guarantee (§467). Minister may refuse application for certificate where applicant guilty of misrepresentation, fraud, untrustworthiness or dishonesty (§480 (1)). Minister's refusal to issue certificate may be appealed (§482).

When adjustment of loss has been made, a copy of adjustment signed by adjuster and insured must be given to the insured (§726).

### AGE

See also "AUTOMOBILES, Age"; "LIABILITY INSURANCE, Infants" and "NEGLIGENCE."

Age of Majority. Is set at 18 years by Age of Majority Act (§1).

Under Insurance Contracts. Minor who has obtained the age of 16 years has capacity of adult to make enforceable life insurance contract (§586 of Insurance Act). Parent has insurable interest in life of child (§563).

Minor obtaining age of 16 years has capacity of adult to make enforceable accident and sickness insurance contract (§678). Premium rate based on the age, sex and marital status of the insured although discriminatory are allowable. *Co-operators General Ins. Co. v. Alta Human Rights Comm'n*, (1993) 145 A.R. 132 (C.A.)

### AGENTS AND BROKERS

Definition. "Agent" means person who, for compensation, solicits insurance on behalf of any insurer, insured, or potential insured or transmits application for, or policy of insurance to or from insurer or negotiates or offers to negotiate insurance or its continuance or renewal (§1 (bb) Insurance Act).

Broker is an agent that is party to two or more subsisting agency contracts with different insurers and none of agency contracts require the agent to deal with insurance offered by one insurer (§488).

For Whom. Section 503 of Insurance Act provides that agent or broker shall be deemed agent of insurer, notwithstanding any conditions or stipulations to contrary, for purpose of receiving any premium for insurance contract, except for life insurance contract which only agent of insurer may receive (§502). In contract of accident and sickness insurance no person to be deemed agent of insured to insured's prejudice (§701).

Fraud by Agent. Acting within scope of authority results in liability of insurer. *Bank of Montreal v. Young*, [1970] S.C.R. 328. Although insurer is liable for fraud committed by agent while acting in scope of authority, the agent is required to indemnify insurer for damage incurred. *Crawford Ditching & Dozing Ltd. v. Canadian Surety Co.*, (1985) 67 A.R. 241 (Q.B.). Under §509 (1) of Insurance Act it is an offence for agent to commit any unfair, coercive or deceptive practice. Under §510(2) agent is personally liable to insured under contract of insurance made in Alberta with an unauthorized insurer as if the agent were a licensed insurer. Under §509 (2) it is an offence for any person by means of misleading or false statements to induce or attempt to induce person to forfeit surrender or allow lapse of any policy.

Knowledge of Agent. Is imputed to insurer such that where insured tells agent information and agent improperly records it in application signed by insured insurer cannot rely on incorrect information because knowledge of agent imputed to it. *Smith v. Co-operative Fire & Cas.*, (1977) 5 A.R. 116 (D.C.). But where the authority of the agent does not extend to accepting applications and he fills in an application which he knows to be incorrect, the knowledge of the agent is not imputed to the insurer. *Salata v. Continental Ins.*, (1948) O.R. 270 (Ont. C.A.).

Liability of Agent. Where 85% of insured's business included subleased equipment, broker who knew this and obtained coverage with exclusion for subleased equipment held liable to insured. *All Lift Consultants Ltd. v. Adam Crane Service (1990) Ltd.*, (1988) 59 Alta. L.R. (2d) 392 (Q.B.).

Failure to Procure Policy. Agent liable for failing to procure policy or alternatively failing to inform plaintiff that coverage not placed. *Quick Aviation Ltd. v. British Aviation Ins.*, (1981) 23 A.R. 451 (Q.B.).

There is duty on broker to apply for insurance requested, fact client does not read policy does not exonerate agent in this regard. *Peter Unruh Constr. Co. Ltd. v. Kelly-Lucy & Cameron Adjusters Ltd.*, [1976] 4 W.W.R.

419 (Alta. S.C.) and *Neil's Tractor v. Butler*, (1977) 2 Alta. L.R. (2d) 187 (S.C.).

For Insolvent Company. No cases.

Licensing and Regulation. Agents and brokers must be licensed to carry on business in Alberta. Part 3 of Insurance Act deals with licensing and regulation of agents and brokers.

## ARBITRATION

See also "DAMAGES, Arbitration Awards."

Arbitration Act applies to voluntary submissions of disputes to arbitration. Also, certain other statutes provide for mandatory submission of disputes to arbitration under Arbitration Act. However, Insurance Act has own arbitration procedure known as appraisal with respect to certain types of insurance. If submission to arbitration would deny one of the parties substantial justice, the matter is not a "fit and proper" case for arbitration. *Fluor Canada v. Lethbridge*, (1989) 68 Alta. L.R. (2d) 340 (Q.B.).

Statutory condition 15 of the hail insurance conditions under §728 of Insurance Act provide for appraisal procedure in case of disagreement. Statutory condition 4 (8) dealing with automobile conditions pursuant to §614 of Insurance Act and statutory condition 11 under fire provisions enacted pursuant to §549 of Act gives right of appraisal upon demand in writing and there is no right of recovery under contract until appraisal has taken place. Appraisals under auto and fire provisions are governed by procedures set out in §514 of Act. Procedure calls for each of insured and insurer to appoint appraiser and two appraisers to appoint umpire. In event of failure to appoint appraiser or agreement upon an umpire Court may make appointments. Where arbitration is a statutory condition of the policy, the result is binding unless the party challenging it can show fraud, collusion, bias or disqualification by way of interest or lack of impartiality of the appraiser. *O'Brien v. Madill*, (1991) 85 Alta. L.R. (2d) 358 (Q.B.).

Once appraisal procedure invoked Court proceedings commenced, either before or after invocation of appraisal procedure may be stayed. *Sadema Lumber Products Ltd. v. Hanover Ins.*, [1981] I.L.R. para. 1-1381 at 279 (Ont. S.C.) and *Chateau Ins. v. Rocca*, [1986] I.L.R. para. 1-2008 at 7740 (Ont. S.C.). But see *O'Hara v. Wawanesa Mutual Ins.*, (1990) Alta. D. 1956-01 (C.A.) where the insurer failed in an application to have the matter determined by arbitration once it had filed a statement of Defense on the basis it had waived its right to arbitration.

## ATTORNEYS

Proper term is barrister and solicitor.

Appointment and Authority. "The solicitor acting under retainer has in absence of any restriction, whole charge of conduct of action and of all things incidental thereto. Authority includes right to compromise action, negotiate settlement and do all things which may be necessary in action, provided he does so with honest belief that he is acting in best interests of client. This may not absolve solicitor from liability to client if he has exceeded his instructions but certainly opposing solicitors with whom he deals and negotiates are entitled to rely upon fact that he is solicitor of record." *C & M Farms Ltd. v. Rottacker Farms Ltd.*, (1977) 1 Alta. L.R. (2d) 126 (C.A.). Court has held lawyer for insured to have apparent authority to renew and cancel policy. *Edelson Libin Ins. v. Lino Catering Ltd.*, (1978) I.L.R. 1-934 (Alta. D.C.).

Conflict of Interest. Relationship between lawyer and client is fiduciary one and thus lawyer must not let own interest conflict with those of clients. As well, lawyer must not put self in position where interests of two or more clients conflict with one another.

Chapter 6 of the Law Society of Alberta Code of Professional Conduct provides that lawyer must not advise or represent opposing parties to a dispute, unless all such parties consent and it is in the best interests of such parties. In *Penkala v. Lockwood*, (1991) 118 A.R. 132 (Q.B.) lawyer acted for lender in placing motel in receivership. Lawyer later acting for purchasers of motel without revealing retainer by lender on receivership. Lawyer breached fiduciary duty to the purchaser.

Rule 3 of Chap 6 states: "Except with consent of the client or former client, a lawyer must not act against client or former client if the lawyer has confidential information that could be used to that person's disadvantage in the new representation."

In *McDonald Estate v. Martin*, (1990) 3 S.C.R. 1235 (S.C.C.) junior lawyer worked with firm that was acting for Defendant. Junior lawyer then transferred employment to firm which was acting for Plaintiff. Although she had worked on file when with firm acting for Defendant, after moving to Plaintiff's firm she was removed from file and had undertaken not to discuss file at all with new firm. Supreme Court of Canada held was conflict of interest and Plaintiff's firm must withdraw from file. The test used was "once it is shown that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no relevant information was imparted."

Legal Malpractice. Duty of lawyer to client is not that of insurer, but to exercise reasonable degree of care, skill and knowledge. *DeJong v. Weeks*, (1984) 55 A.R. 305 (C.A.). A legal secretary's negligence is imputed to lawyer where error falls below standard of care and skill expected of reasonably competent and diligent lawyer. *Aetna Roofing (1975) Ltd. v. Conradi*, (1984) 52 A.R. 369 (Q.B.).

Liability of lawyer to client is concurrent in both tort and contract. Client will have the right to assert most advantageous cause of action in circumstances. *Central Trust Co. v. Rafuse*, (1986) 31 D.L.R. (4th) 481 (S.C.C.).

The Legal Profession Act R.S.A. 2000 c.L-8 requires mandatory liability insurance for Alberta Lawyers. Part 5 of Act provides for insurance program to be administered by Law Society of Alberta. Currently mandatory limits are \$1M per occurrence. However, excess liability insurance is available through private insurers to limit of \$5M.

Part 4 of Act creates "Assurance Fund" which is source of compensation where lawyer misappropriates or wrongfully converts money or property lawyer receives from client while acting in capacity of lawyer.

Fees. Chapter 13 of Law Society of Alberta Code of Professional Conduct provides that fees must not exceed fair and reasonable amount. Rule 3 of Chapter 13 provides that "lawyer and client may agree that the lawyer's fee will be contingent on the outcome of matter, provided that the matter is not in the area of criminal, divorce or custody."

Alberta Rules of Court 616-619 deal with contingency fee arrangements. Contingency agreement must be evidenced in writing, signed by and served upon client. Agreement is ultimately subject to review by judge.

## AUTOMOBILES

See also "NEGLIGENCE."

Age requirements for license and learner's permit. Section 12 (1) of Operator Licensing and Vehicle Control Regulation of Traffic Safety Act provides that person who is 16 years old may obtain an operator's license with parental consent. However, §11(1) provides for issuance of a learner's license allowing operation of specified motor vehicles at age of 14.

Agency. See also "Family Purpose Doctrine" and "Imputed Negligence." Everyone is vicariously liable for acts of servants or agents acting in course of employment including cases where motor vehicles are driven by servants, agents or employees in course of employment. This is well recognized principle of common law and not statutory.

Comparative/Contributory Negligence. See “NEGLIGENCE.”

Compulsory Insurance Coverage. See also “No-fault.” Automobile insurance is governable by Subpart 5 of Part 5 of Insurance Act. Under Act there are two principal types of motor vehicle liability policies: 1) Owner’s policy covering owner and driver driving with owner’s consent (§616) and 2) Non-owner’s policy covering person named therein for all liability arising from use or operation of automobiles specified in contract that are not owned by such person (§617).

Section 52 (1) of Traffic Safety Act prohibits anyone from driving motor vehicle on highway, having motor vehicle on highway, and applying for registration of motor vehicle and obtaining registration of motor vehicle unless motor vehicle is insured. Section 55 (2) of Act requires production of financial responsibility card as evidence of insurance prior to issuance of certificate of registration for motor vehicle and §56 of Act deals with insurer’s obligations to issue financial responsibility cards.

Under §623 of Insurance Act insurer not liable under driver or owner policy for any liability imposed by worker’s compensation law or resulting from bodily injury or death to employee of any person insured by contract while engaged in operation or repair of automobile.

Sections 624 and 626 provide that insurer may exclude liability for (a) indemnification of any person engaged in business of selling, repairing, maintaining, servicing, storing or parking automobiles for any loss sustained while engaged in use or operation or while working on automobile in course of business unless person is owner of automobile or his employee; (b) for loss of or damage to property carried in or on automobile or to any property owned or rented by or in care, custody or control of insured; (c) while automobile is rented or leased to another person; (d) while automobile is used to carry explosives or to carry radioactive material for research, education, development or industrial purposes; (e) while automobile is used as taxicab, public omnibus, livery, jitney or sight-seeing conveyance or for carrying passengers for compensation or hire. Under §625 of Insurance Act insurer may provide by endorsement that it shall not be liable for loss or damage resulting from ownership, use or operation of any machinery or apparatus, including its equipment, mounted on or attached to automobile while that automobile is at a site of use or operation of that machinery or apparatus.

Section 627 of the Insurance Act currently sets out minimum liability coverage of \$200K, exclusive of interest and costs for liability resulting from bodily injury, death or damage to property as a result of any one acci-

dent. Claims for injury or death have priority to \$190K. As to meaning of phrase “any one accident” for purposes of liability coverage limits phrase has been interpreted in *Nims v. Perth Ins.*, (1979) 10 Alta. L.R. (2d) 161 (S.C.T.D.).

Standard conditions for every automobile policy are enacted under §614 of the Insurance Act. Statutory condition No. 2 provides that the insured shall not drive or operate a vehicle or commit, suffer, allow or connive that use of automobile by another person unless insured or other person is for time being either authorized by law or qualified to drive or operate automobile. In this regard it has been determined by courts that qualified means capable, one can be capable and not have license. *Schawerte v. Wawanesa Mutual*, (1959) 27 W.W.R. 618 (Alta. S.C.T.D.); *Holmlund v. Co-op Fire*, (1962) 41 W.W.R. 61 (Alta. S.C.T.D.) and *Virostek v. Co-op Fire & Cas.*, (1984) 5 C.C.L.I. 320 (Alta. Q.B.). Insured shall not drive or operate automobile while his license to drive or operate automobile is suspended or while his right to obtain license is suspended or while he is prohibited under order of any court from driving or operating automobile. Neither insured or any other person shall operate automobile while he is under age of 16 years or under such other age as is prescribed by law of province in which he resides at time, as being minimum age at which license or permit to drive automobile may be issued to him. Automobile shall not be used for any illicit or prohibited trade or transportation or any race or speed test.

Alcohol/DWI. Section 253 (a) of Criminal Code makes it offence to operate or assist in operation of motor vehicle while ability to operate a vehicle is impaired by alcohol or drugs and §253 (b) makes it offence to operate or assist in operation of motor vehicle while having a blood alcohol content greater than .08. Section 254 (5) of Criminal Code makes it offence for person to refuse to comply with demand by peace officer to take breath sample in order to determine blood alcohol content.

Exclusion exists under Section C coverage under standard form of automobile insurance (Section C coverage being property as opposed to liability coverage which is Section A of standard auto policy). This excludes insurer from all liability for loss to insured motor vehicle where insured operates automobile while under influence of intoxicating liquor or drugs to such an extent as to be for time being incapable of proper control of automobile or while in condition for which insured is convicted under §253 or 254 of Criminal Code; *Taylor v. Cooperators*, (1994) 163 A.R. 362 (QB). Similar exclusion is found with respect to Section B coverage (no-fault benefits) for death and disability. Insurer will not be liable for death or disability benefits where insured

sustained injury where he was convicted of offence under §253 (a) or (b) of Criminal Code.

**Damages.** See also “DAMAGES.” Section 102 of Traffic Safety Act provides that Minister of Highways may suspend license of operator and registration of owner of automobile if final judgment for damages arising out of motor vehicle accident remains outstanding for 15 days. Provision applies to judgment rendered by any Canadian court, and Court of any American State which has mutually applicable provisions. Such license and registration shall remain suspended until judgment is satisfied or discharged to the extent of mandatory insurance coverage limits applicable at time of accident (e.g. since January 1, 1986 \$200K).

**Family Purpose Doctrine.** Under §187 (1) of Traffic Safety Act owner is vicariously liable for person driving motor vehicle if that person was living with owner as family member at time of accident.

**Guests.** Ordinary law of negligence applies to actions by guest passengers.

**Imputed Negligence.** In form of vicarious liability exists under §187 (2) of Traffic Safety Act which imposes liability on owner of motor vehicle where motor vehicle being driven with owner’s consent, express or implied at time of accident.

**Last Clear Chance Doctrine.** See “NEGLIGENCE.”

**Ownership/Title.** See also “Family Purpose Doctrine” and “Imputed Negligence.” Section 52 of Traffic Safety Act requires that motor vehicle operated on highway be registered and have subsisting certificate of registration under Act. No actual registration of title to motor vehicles in Alberta. Only registration of ownership for administrative purposes. Registered ownership does not represent title to motor vehicle.

**Pedestrians.** Rules of road as they pertain to pedestrians set out in Part 3 of Use of Highway and Rules of Road Regulations. Section 186 of Traffic Safety Act provides that onus is upon driver or owner of motor vehicle to disprove negligence where motor vehicle causes damage in a collision with something other than another vehicle (e.g. a pedestrian).

**No-fault.** Every policy of automobile insurance written within Alberta must contain compulsory limited no-fault accident and death benefits (referred to as Section B coverage because it appears in Section B of standard automobile insurance).

Presently limits to coverage are set out in §627 of Insurance Act. Replacement §629 provides for the limits to Section B benefits to be set out in regulations. The regulations state that Section B insurer will pay with re-

spect to each “insured” person, who sustains bodily injury or death directly and independently of all other causes by accident arising out of use or operation of automobile following amounts: 1) funeral expenses up to amount of \$5K in respect of death of any one person; 2) all reasonable expenses incurred within two years from date of accident as a result of injury for necessary medical, surgical, dental, hospital and other services and supplies essential for treatment or rehabilitation of insured and deemed necessary by medical advisors to maximum of \$50K per person, with a specific limitation on chiropractic services of \$750 per person; 3) death benefits to dependents with amounts depending on age and status which vary from \$1K where deceased is dependant relative 4 years of age to \$10K where deceased is head of household with additional payments with respect of head of household where there are two or more survivors being spouse and/or dependant relatives; and 4) where there has been total disability, weekly benefit for period during which injury shall wholly and continuously disable “insured” person, and where (a) insured was employed at date of accident, (b) within 60 days from date of accident such injury prevents him from performing any and every duty pertaining to his occupation or employment and, (c) no benefit shall be payable for seven days of such disability or for period in excess of 104 weeks. Weekly benefits payable are the lesser of \$400 per week or 80% of average gross earnings of insured. In addition, the standard auto policy, which is enacted by regulation provides that where insured is spouse not engaged in occupation or employment if completely incapacitated and unable to perform household duties such insured spouse will be eligible for \$135 per week to a maximum of 26 weeks.

Additionally, each insured has uninsured motorist coverage under standard auto policy for bodily injury sustained when accident is fault of another motorist who has no automobile insurance. This coverage does not apply where there is a right of recovery under unsatisfied judgment fund or similar legislation. Consequently the uninsured coverage applies when Alberta policy holder is traveling in certain states in the U.S.A. where no such fund exist.

Definition of insured under Section B covers all occupants of described automobile in policy, insured and his family residing in same dwelling house and dependant relative when riding in another automobile or when struck by another automobile, and all persons struck by described automobile. A person standing outside his own vehicle and struck by a second vehicle is not an “occupant” but is a pedestrian, so the second vehicle’s insurer must pay Section B, benefits. *Wells v. Metropolitan Ins.*, (1989) 94 A.R. 209 (Q.B.).

Section B benefits do not deny insured common-law right to sue responsible party for damage. However, payments made under Section B will be deducted from any judgment recovered. *Sale v. Wills*, [1972] 1 W.W.R. 138 (Alta. S.C.T.D.). It is unclear whether payments under no-fault policy issued in another jurisdiction are deductible. *Gervais v. Ash*, (1978) 5 Alta. L.R. (2d) 306 (S.C.T.D.). Insurer had no right of subrogation after payment was made under Section B for death benefits as this was not considered an indemnification of the insured. *Canwest Geophysical Ltd. v. Brown*, [1972] 3 W.W.R. 23 (Alta S.C.T.D.). But where an insurer is compellable by law under the contract to pay Section B Benefits, and legally liable to pay, that insurer can subrogate against another insurer to recover the payment. *Federal Fire Ins. v. McCabe*, [1981] I.L.R. para. 1-1388 at 297 (Ont. Co. Ct.), *aff'd*, [1982] I.L.R. para. 1-1551 at 954 (Ont. C.A.).

**Motorized Bicycles.** Are specifically dealt with in Part 2 of Use of Highway and Rules of Road Regulations. Section 111 of Act imposes general rules of road on drivers of bicycles, power bicycles and motorcycles. For purposes of the Act mopeds and motorcycles come within the definition of motor vehicle in §1 (x) of the Act. However, reference to motor vehicle in life insurance policy does not include motorcycle. Definition of motor vehicle in Highway Traffic Act does not apply to interpretation of policy. *Thomeus v. Mutual of Omaha*, (1978) 5 Alta. L.R. (2d) 168 (C.A.).

Under §97 (1) of the Regulations use of helmets required for operation of motorcycles, mopeds or power bicycles.

**Seat Belts.** Use is mandatory pursuant to §78 of Vehicle Equipment Regulations of Traffic Safety Act. Failure to use seat belts may constitute contributory negligence, but defendant must prove that plaintiff's injuries were caused or aggravated by failure to wear seat belts. *Galaske v. O'Donnell* (1994), 112 D.L.R. (4th) 109 S.C.C. and *Labbee v. Peters* (1999), 237 A.R. 382 (Alta. C.A.). Range for contributory negligence for failure to wear a seatbelt is between 10 and 50 percent. Failure to wear a seat belt is contributory negligence even when there is no statutory duty to wear one, with the damages decreased by 10-75%. *Jivraj v. Fischer*, (1992) 124 A.R. 81 (Q.S.). A finding of 50% contributory negligence was found in *Haydu v. Calgary*, (1991) 81 Alta L.R. (2d) 107 (Q.B.).

**Service of Process.** See "SERVICE OF PROCESS."

**Speed Limit.** Section 106, 107 and 108 of the Traffic Safety Act set out speed limits and empower Provincial Minister and "road authority" to prescribe speed

limits in addition to those set out in Act. Section 2 of Use of Highway and Rules of Road Regulations provides, notwithstanding any prescribed speed limit, no driver can drive at rate of speed that is unreasonable having regard to circumstances. Exceeding posted limit is inherently unreasonably. *R. v. Fedoruk*, (1960) 32 W.W.R. 675 (Alta. S.C.A.D.). Where a person has been found to be driving at excessive rate of speed over or under prescribed limit, Courts have found to be negligent. *Marchuk v. Scott*, (1978) 8 Alta. L.R. (2d) 237 (D.C.).

**Trailers/Weight Limits.** Are governed by Commercial Vehicle Dimension and Weight Regulations of Traffic Safety Act.

**Uninsured and Underinsured Endorsements.** Motor Vehicle Accident Claims Act establishes fund known as Motor Vehicle Accident Claims Fund. Claims may be made against Fund either before or after judgment depending on circumstances, for bodily injury to or death of person or loss of or damage to property in amount exceeding \$200K. No payments will be made out of Fund to indemnify persons with claims under existing contract of automobile insurance. Insurer cannot exercise subrogated rights against Fund, nor will payments be made out of Fund to reimburse persons who are liable as a result of ownership, use or operation of motor vehicles owned by them. No payments are made out of Fund if such payment could be in respect to amounts which they could be recovered from another person by way of indemnity or contribution, nor are payments made to indemnify owner of motor vehicle for loss or damage to property of owner arising out of use or operation of motor vehicle and for which operator is responsible. Payments are not made to persons entering, descending from, or riding in buses or other public vehicles owned and operated by municipalities, or for damages to aircraft, public utility distribution systems, or railway or railway operation equipment. Payments are not made to non-residents unless they reside in jurisdiction with similar legislation (§14).

If action for damages is not defended, notice must be given to the Administrator of Fund before final judgment is entered. Procedure for making claims against Fund, either before or after judgment, is set out in Act.

Maximum amount payable under Act is \$200K with \$190K priority for personal injury. Fund limits parallel mandatory liability insurance coverage limits.

If a person has cause of action against uninsured motorist and payment is made out of Fund, Administrator is subrogated to rights of person to whom payment was made. Driver's license of uninsured person is suspended.

Aside from Fund there is private coverage available under Standard Endorsement Form 44 (S.E.F. 44). This is insured's own coverage against uninsured and underinsured motorists. S.E.F. 44 coverage is excess to all sources of recovery of insured including any claim against Fund. Limits of S.E.F. 44 coverage are set out in application may vary.

SEF 44 may assist the insurer in being added as a party, as the contract provides that the insurer is not bound by any judgment unless it has had a reasonable opportunity to participate in the proceedings. *Kramchynski v. Co-operators General Ins.*, (1990) 46 C.C.L.I. 279 (Alta M.) Pursuant to SEF 44 the insurer cannot third party others in its own name, as the third party notice is to enforce a duty which the third party owes to the defendant. *Metz v. Breland*, (1990) 47 C.C.L.I. 107 (Alta. C.A.).

### AVIATION

Uniform Act. Aviation in Alberta is controlled by federal statute. Aeronautics Act and regulations thereunder govern aviation in Canada generally. International aviation is governed by Carriage By Air Act and its accompanying regulations. Carriage By Air Act gives Warsaw Convention force in Canada.

Action for Wrongful Death. Under Article 17 of Warsaw Convention carrier is responsible for damage sustained in event of death or wounding of passenger or other bodily injury of passenger if accident which caused damage took place on board aircraft or in the course of operation or embarking or disembarking. Section 2 (5) of Carriage By Air Act substitutes liability imposed by Article 17 for any liability under law of Canada. Courts have held that federal crown may be liable if accident occurs and it was negligent in inspecting or regulating air carrier. *Swanson v. Canada*, (1990) 32 F.T.R. 129 (T.D.).

Limits to Liability. Article 22 of Warsaw Convention as amended by Hague Protocol, 1955 and Guatemala Protocol limits liability for each passenger to 1.5M francs. Article 22 of Warsaw Convention as amended by two above protocols limits liability for loss of damage to baggage to 15K francs and liability for cargo remains unamended under Warsaw Convention at 250 francs per kilogram. Section 2 (6) of Carriage By Air Act allows for conversion of francs to Canadian dollars at exchange rate at date of judgment. NOTE: Warsaw Convention amended by Protocol No. 4 of Montreal 1975 as well and says: aggregate liability is \$100K special drawing rights for aggregate of claims and \$1K special drawing rights for liability to baggage.

Limitation under Article 22 applies to both direct and consequential loss. Passenger who had to return home from trip because luggage was lost could only claim consequential loss subject to Article 22 limits. *Friesen v. Air Canada*, (1981) 30 A.R. 527 (C.A.). Article 4 of Warsaw Convention provides that ticket must indicate limitations upon liability. Article 23 of Warsaw Convention prohibits contracting out of this liability.

Domestic flights are not subject to Warsaw Convention, but limits to liability are governed by federal regulations. Under Canadian Aviation Regulations, S.O.R/96-433, aircraft cannot operate without minimum liability insurance. Amount which must be carried for liability for injury to or death of passengers must be \$300K per passenger on board.

Service of Process. See "SERVICE OF PROCESS."

### BROKERS

See "AGENTS AND BROKERS."

### BURGLARY INSURANCE

Insurance falling within class of "theft insurance" is specifically excluded from Subpart 3 Part 5 of Insurance Act dealing with fire insurance (543 (1(a))). As to non-application of fire provisions to all risks policy because such policy is primarily one of theft insurance see *Personal Ins. Co. of Canada v. Ross*, (1988) 61 Alta. L.R. (2d) 283 (Q.B.).

Insurance coverage including loss from "malicious acts" held to cover theft: *Brian v. Can. Home Assur.*, (1984) 50 A.R. 240 (Q.B.).

### CANCELLATION

See also "ACCIDENT AND HEALTH INSURANCE, Cancellation" and "FIRE INSURANCE, Cancellation."

Termination of auto policy is governed by statutory condition 8 enacted under §614 of Insurance Act. Under 8 (1) contract of auto insurance may be terminated (a) by insurer giving insured 15 days notice of termination by registered mail or five days written notice of termination personally delivered; (b) by insured at any time on request. 8 (2) where contract is terminated by insurer, (a) insurer shall refund excess of premium actually paid by insured over pro rata premium for expired time, but in no event shall pro rata premium for expired time be deemed to be less than any minimum retained premiums specified; and (b) refund shall accompany notice unless premium is subject to the adjustment or determination as to amount in which case refund shall be made as soon as

practicable. 8 (3) where a contract is terminated by insured, insurer shall refund as soon as practicable excess of premium actually paid by insured over short rate premium for expired time, but in no event shall short rate premium for expired term be deemed to be less than any minimum retained premiums specified. 8 (4) refund may be made by money, postal or express company money order or cheque payable at par. 8 (5) fifteen days mentioned in clause (a) of subcondition (1) commences to run on day following receipt of registered letter at post office to which it is addressed. This means fifteen days following day of receipt by post office of destination and not from where registered letter is sent. *McLaughlin & Sons Oil & Watering Hauling Ltd. v. Zurich Ins.*, (1989) 102 A.R. 133 (Q.B.).

Statutory condition 9 under §614 of Insurance Act provides: "any written notice to insurer may be delivered at, or sent by registered mail to, chief agency or head office of insurer in province. Written notice may be given to insured named in contract by letter personally delivered to him or by registered mail addressed to him at his latest post office address as notified to insurer. In this condition, expression "registered" means registered in or outside Canada."

Insurance policy containing conditions such as statutory conditions 8 and 9 may be cancelled on behalf of insurer by notice sent by registered mail to insured at his last post office address notified to insurer even if notice does not in fact reach insured. *Lumbermen's Mut. Cas. v. Stone*, (1955) 4 D.L.R. 167 (S.C.C.).

Where mortgagee clause appearing in policy, policy cannot be terminated by insurer without notice to mortgagee. *Bank of N.S. v. Scottish & York Ins.*, (1989) 56 Alta. L.R. (2d) 426 (Q.B.).

### CHATTEL MORTGAGE

See "FIRE INSURANCE" and "CHATTEL MORTGAGE."

### CONSTRUCTION OF THE POLICY

Ambiguity of Terms. Ambiguities in insurance contracts are construed against insurer. *Dodge v. Western Can. Fire*, (1912) 5 A.L.R. 294 (S.C.A.D.) and *Koch v. Empire Life*, (1981) 29 A.R. 49 (Q.B.). However, Alberta courts have cautioned that contra proferentum rule should only be applied in cases of real ambiguity. *Continental Ins. v. Alta. Law Society*, (1984) 56 A.R. 98 (C.A.) and *New Forty Four Mines v. St. Paul Fire*, (1984) 56 A.R. 335 (Q.B.). But what amounts to ambiguity may also be contentious. Supreme Court of Canada recently split in *Scott v. Wawanesa Mut.*, (1989) 1 S.C.R. 1445, on question of whether policy was ambigu-

ous. Majority held that meaning of terms perfectly clear, minority holding operation of same terms contrary to reasonable expectation of policy holder and therefore ambiguous and warranting application of contra proferentum rule.

Generally, provisions providing coverage are interpreted broadly in insured's favor, and exclusions interpreted narrowly against insurer. *P.C.S. Investments v. Dominion*, (1994) 178 A.R. 274 (Q.B.). This has even been held to be case where insured's agent has drafted policy. *British Columbia Ferry Corp. v. Commonwealth Ins.*, (1987) 40 D.L.R. (4th) 766 (C.A.).

Conditional Receipt of Application. Conditional life insurance coverage is precluded by §249 (1) of Insurance Act: no contract can exist before policy delivered to insured, or insured's assign, agent or beneficiary.

Whether or not cover note amounts to agreement to insure is matter of construction. An interim agreement need not be in writing if insurer's agent empowered to make oral contracts. *Hochbaum v. Pioneer Ins.*, (1933) 1 W.W.R. 403 (B.C.S.C.).

The principle of uberrima fides imposes upon applicant duty to disclose any material change in risk which comes to notice from time of application up to conclusion of contract. The objective test of materiality is whether, if the matter concealed had been disclosed, it would on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or stipulate for a higher premium. *V.K. Mason Constr. v. Hanover Ins.*, (1991) 91 A.R. 186 (Q.B.). Coverage is usually defined as being company's usual terms (excluding terms which would be unreasonable to impose on applicant without express notification).

Inconsistent Policy Terms and Endorsements. Where standard printed clause within contract cannot be reconciled with expressed objects and subject matter of insurance Court will ignore the clause as being inapplicable. *Dominion of Canada Gen. Ins. Co. v. Wawanesa Mut.*, (1985) 16 C.C.L.I. 69 (B.C.S.C.).

Section 513 (1) of Insurance Act states terms included in policy can be enforced against insured and §513 (6) states that proposal or application will not be deemed, as against insured, to be part of contract unless it contains material misrepresentations which induced insurer to contract. In *High Noon Holdings Ltd. v. Commonwealth Ins.*, (1986) 70 A.R. 137 (Q.B.) conditions precedent which were stipulated orally by insurer were held to have been waived because were not incorporated into policy.

Where application conflicts with policy §547 of Insurance Act gives precedence to application in cases of

fire insurance and §720 gives such precedence in cases of hail insurance. In *Robitaille v. Madill*, (1990) 1 S.C.R. 985, Supreme Court of Canada interpreted similar provisions in Quebec legislation and gave priority to application over policy where there was inconsistency in terms.

Courts have held that standard terms in policy are overridden by specific terms in endorsement. *Bar Don Holdings Ltd. v. Reed Stenhouse Ltd.*, (1983) 24 Alta. L.R. (2d) 248 (C.A.).

Oral Binders. Agent may bind principal (insurer) by oral binder, notwithstanding what face of policy may indicate. *Carr v. Wawanesa Mut.*, (1985) 65 A.R. 315 (Q.B.). However, question of whether express acceptance or confirmation of oral binder (by agent of insurer) is necessary to create binding contract is not settled. It is difficult to predict what degree of consensus ad idem between agent and insurer will be demanded by court in order to find valid acceptance. Alberta courts have come to conflicting conclusions upon issue. *Quick Way Aviation Ltd. v. British Aviation Ins.*, (1981) 28 A.R. 355 (C.A.) and *Timcon Construction Ltd. v. Riddle*, (1981) 16 Alta. L.R. (2d) 134 (Q.B.).

Similarly, it must be determined whether there was sufficient consensus ad idem between agent and insured to create binding contract. Cases have shown insured can be quite vague in communicating type of coverage sought and can rely on duty of professional agent to client. *Chocian v. Stoney Plain Agencies Ltd.*, (1985) 60 A.R. 134 (Q.B.) and *Neil's Tractor & Equipment Ltd. v. Butler, Maverty & Meldrum Ltd.*, (1977) 2 Alta. L.R. (2d) 187 (S.C.T.D.).

## DAMAGES

Special damages must be specifically pleaded and proved under Alberta Rules of Court (Rule 606) and include actual out-of-pocket expenses and such items as medical and hospital accounts, expenses for nursing, therapy, drugs and household help and accrued loss of earnings. General damages have been broadly stated as those damages flowing from, and being probable and natural consequence of wrong complained of. General damages have been held to include loss of future earnings, cost of future expenses, and loss of profits resulting from loss complained of. Courts in awarding general damages for non-pecuniary loss take into consideration nature and effect of injury, pain and suffering, inconvenience and loss of amenities and loss of expectation of life. For principles involved in calculating damages in serious injury cases see *Thorton v. School District No. 57*, (1978) 83 D.L.R. (3d) 480 (S.C.C.) and *Arnold v. Teno*, (1978) 83 D.L.R.(3d) 609 (S.C.C.).

Appellate Review/Excessive Verdicts. Alberta Court of Appeal will not interfere with lower court award of damages unless damages are so generous as to be inordinately high and warrant intervention on appeal. *McGrath v. Pendergras*, (1988) 60 Alta. L.R. 276 (C.A.). Injury damages awarded may be varied where award is out of all proportion to injury suffered as a result of jury taking improper factors into account. *D'Andrade v. Mohamed & Mohamed*, (1983) 43 A.R. 334 (C.A.). Alberta Court of Appeal will increase damage award where award at trial is inordinately low. *Grandbois v. Alta. (Pub. Trustee)*, (1989) 65 Alta. L.R. (2d) 55 (C.A.).

Arbitration Awards/Collateral Estoppel. Parties submitting matter to arbitration/appraisal under Insurance Act will be bound by decision and courts will not interfere with damage assessment. *Smith v. Glasgow Underwriters*, (1923) 20 Alta. L.R. 114 (S.C.A.D.) and *L & A Holdings Ltd. v. Prudential Assur. Co.* (1978) 6 Alta. L.R. (2d) 125 (D.C.).

Comparative Negligence. See "NEGLIGENCE."

Indemnification. See "NEGLIGENCE."

Psychic Injuries/Mental Pain and Suffering. Are compensable even where no evidence of physical injury. Dramatic neurosis or accident neurosis resulting in mental anguish, fear, anxiety is compensable. Damages will be awarded for neurotic illness resulting from accident. *Del Bello v. Hagel*, (1978) 34 A.R. 242 (C.A.). A plaintiff suffering from drug addiction as consequence of treatment for injuries caused by a defendant can also recover damages. *Senger v. Fidelak & PTF Constr. Ltd.*, (1987) 50 Alta. L.R. (2d) 302 (Q.B.).

Punitive Damages. Punitive or exemplary damages are awarded against a defendant in exceptional circumstances for "malicious, oppressive and high-handed" misconduct that offends the court's sense of decency. *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 (S.C.C.). The defendant's misconduct must be a marked departure from ordinary standards of decent behavior. *Whiten v. Pilot Insurance*, (2002) 209 D.L.R. (4th) 257 (S.C.C.).

In Alberta liability coverage for punitive damages is matter of contract between insurer and insured and not subject to statute; however, such coverage could be questionable as void against public policy.

Collateral Source Rule. Generally, established principle of common law applied by Alberta courts is that wrongdoer cannot hold plaintiff to account for benefits from collateral sources. However, principle may be slightly eroding. In *Ratyeh v. Bloomer*, (1990) 107 N.R. 335 (S.C.C.) police officer's claim for damages for acci-

dent caused by drunk driver was denied with respect to amount of fully compensated sick leave benefits under collective agreement. As a general rule, wage benefits paid while plaintiff unable to work must be brought into account and deducted from claim for lost earnings. Unless employer or fund which paid wage benefits is entitled to be reimbursed on principle of subrogation or there is some type of consideration given up by employee in return for benefit. *Cunningham v. Wheeler*, (1994) 1 S.C.R. 360.

Wages paid by employer held to be collateral benefit deductible from damage award where employee merely making gratuitous promise to reimburse employer upon recovery of damages. *Tanasichuk v. Workun*, (1980) 29 A.R. 1 (Q.B.). Disability benefits which were part of the total compensation package paid for by the employer were not deducted from the damage award as they were considered private insurance. *Smith v. Millington*, (1991) 2 O.R. (3d) 545 (Gen. Div.).

Statutory Caps on Awards. Since October 2004, general statutory caps on damage awards for "minor injury" defined by the Insurance Act, §650.1. However, Supreme Court of Canada has created judicial cap on pain and suffering awards. In *Andrews v. Grand & Toy Alberta Ltd.*, (1978) 83 D.L.R. (3d) 452 (S.C.C.) Supreme Court set rough upper limit for non-pecuniary general damages for severe personal injuries at \$100K. Alberta Courts have considered that this rough upper limit should be indexed for inflation. As at 1999 inflation adjusted judicial limit for non-pecuniary general damages was \$252,300 in Alberta. *O'Connor v. Mahabir*, (1999) 243 A.R. 11 (Q.B.)

## DEATH

Abatement and Survival. Under §1 of Survivorship Act there is presumption that where two or more people die at same time or in circumstances rendering it uncertain who died first, older person is presumed to have predeceased younger. Section 4 of Act states that Act is subject to §599 and 690 of Insurance Act. Section 599 provides that where insured and beneficiary died together or circumstances rendering it uncertain as to which died first, beneficiary is presumed to have predeceased insured. Section 690 makes same presumption with respect to group plans.

Action for Wrongful Death. Actions for wrongful death are governed by Fatal Accidents Act.

Damages. Under Fatal Accidents Act there is no recovery for non-pecuniary damages due to wrongful death except for bereavement loss. Section 8 of Act provides that Court shall award, without reference to other damages, damages for bereavement of \$75K to spouse,

\$75K to parents of deceased minor children and \$45,000 to each minor or unmarried child of deceased.

In asserting damages in any action brought under Fatal Accidents Act, monies payable on death of deceased under any contract of insurance shall not be taken into account. Claimant under Act must be able to establish reasonable expectation of financial benefit from continued life of deceased. *Lerman v. MacLean*, (1978) 6 Alta. L.R. (2d) 68 (T.D.). Mental anguish of dependents is not element. In *Croston v. Canada*, [1948] 2 D.L.R. 248 (Ex. Ct.) it was held that the death of an 11 year old girl gives rise to mere speculative possibility as to any pecuniary loss to her parents, with result that no damages were awarded in this instance under Fatal Accidents Act.

Survival of Actions Act provides that any cause of action vested in deceased survives for benefit of or against their respective estates. Only those damages that resulted in actual financial loss to deceased or his estate are recoverable, punitive or exemplary damages, and damages for loss of expectation of life, pain and suffering, physical disfigurement or loss of amenities are not recoverable.

Parties in Interest. Under Fatal Accidents Act action lies for benefit of spouse or cohabitant, parent, child, of deceased person for pecuniary loss suffered by such individual because of death of deceased as well as loss for bereavement discussed above. Action must be brought by and in name of executor or administrator of deceased person, or if there is no executor or administrator, or if executor or administrator does not bring action within one year after death of deceased, then action may be brought by and in name of all or any of persons for whose benefit action would have been brought if it had been brought by executor or administrator.

Fatal Accidents Act provides that if person liable for damages dies before, after, or at same time as person whose death was caused by his wrongful act, neglect or default, action under Act may be maintained against executor or administrator of deceased.

Statute of Limitations. Not more than one action shall lie under Fatal Accidents Act for death of any one person and every such action shall be commenced within two years. §2 of Limitations Act.

Unexplained Absence. In absence of direct evidence of death sufficient evidence must be shown in all circumstances that such inference should be drawn. If court can reasonably infer on balance of probabilities that person is dead court will grant leave to swear a person is dead. *Re Butterworth Estate*, [1920] 1 W.W.R. 852 (Alta. S.C.A.D.).

Where insured belonged to motorcycle gang which was involved in gang warfare and mysteriously disappeared Court concluded that insured had been killed and allowed recovery under life policy. *King's Crew Motorcycle Club v. Manufacturers Life*, (1990) 106 A.R. 82 (Q.B.).

Where person has been missing for a period in excess of seven years presumption will arise that person is dead. *Re Jelfs*, [1925] 1 W.W.R. 735 (Alta. S.C.).

### DISABILITY

Disability insurance is no longer defined by Insurance Act but ought to be defined by individual policy.

Classifications. Partial Disability. Not specifically defined in Alberta case law. Often reference is made to definitions provided in individual policies. In *Paul Revere Life v. Sucharov*, [1983] 2 S.C.R. 451 Supreme Court of Canada dealt with whether lower court erred in using legal test to distinguish total disability from partial disability. Court examined insurance policy definitions and found that plaintiff suffered total disability.

Total Disability. Definition provided in each policy must be considered. In *Paul Revere Life v. Sucharov*, [1983] 2 S.C.R. 451 owner/manager was totally disabled from performing work when he was "unable to perform substantially all of the duties of that position." In *Millward v. Maritime Life Assur.*, (1988) 90 A.R. 41 (Q.B.), *aff'd*, (1989) 98 A.R. 362 (C.A.) Court referred to following test for determining total disability: "person is considered not to be totally disabled from engaging in 'any' occupation if his condition would enable him to enter into occupation reasonably comparable to old occupation in status and reward, and reasonably suitable in work activity in light of his education, training and experience.

Fact that income from substitute occupation may not be equal to former occupation may be factor considered when applying foregoing test; but does not of itself mean that substitute employment fails to meet test. *Brooks v. London Life*, [1980] 2 W.W.R. 205 (Alta. C.A.). Unavailability of employment or inability to find suitable employment is not normally factor in determining total disability. *McCulloch v. Calgary*, (1985) 62 A.R. 209 (Q.B.). Ability to perform some duties does not necessarily disentitle insured from claiming benefits for total disability. *McCann v. Canadian Gen. Life*, (1980) 27 A.R. 201 (Q.B.). Where the insured also received Workers Compensation and Canada Pension disability benefits, the insurer was not allowed to deduct these from benefits owing provided total benefits did not exceed the stated maximum percentage of weekly earned

income. *Zotzman v. Mutual Life*, (1991) 79 Alta. L.R. (2d) 67 Q.B.

Proof of Condition. Policy may dictate who has burden of proving disability, but usually plaintiff has burden of proving that he is unable to perform duties covered by policy. *Millward v. Maritime Life Assur.*, (1988) 90 A.R. 41 (Q.B.), *aff'd*, (1989) 98 A.R. 362 (C.A.). However, in *McCulloch v. Calgary*, (1985) 62 A.R. 209 (Q.B.) plaintiff had been receiving temporary disability benefits and Court held that when benefit society tried to terminate benefits, it had burden of proving the balance of probabilities that plaintiff was not totally disabled. Even where the insured was found not to have mitigated his loss of income in a personal injury action, he was not estopped from bringing an action against the insurer to determine whether he was disabled. *Altobelli v. Pilot Ins.*, (1989) 34 C.P.C. (2d) 193 (Ont. C.A.), *aff'd*, (1991) 3 S.C.R. 132 (S.C.C.).

### FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables and "AUTOMOBILES, Compulsory Coverage."

### FIRE INSURANCE

Fire insurance is defined in §543 (1) of Insurance Act as "insurance against loss of or damage to property arising from the peril of fire."

Subpart 3 of Part 5 of Insurance Act deals with fire insurance. However, §543 of Act sets out exceptions. Subpart 3 does not apply to (a) insurance falling within classes of aircraft, automobile, boiler and machinery, in land transportation, marine, plate glass, sprinkler leakage and theft insurance; (b) where subject matter of insurance is rents, charges or loss of profits; (c) when peril of fire is incidental to coverage provided and (d) when such matter of insurance is property that is insured by insurer or group of insurers primarily as nuclear risk under a policy covering against loss or damage to property resulting from nuclear reaction or nuclear radiation and from other perils. Since Subpart 3 places statutory conditions setting out duties and obligations of both insured and insurer it is critical to determine whether one is dealing with policy of fire insurance covered by Subpart 3.

Arson. To prove arson and avoid liability under fire policy it must be shown that (a) fire was incendiary in nature; (b) insured had sufficient motive to destroy property; and (c) in absence of specific proof of identity of arsonist, that insured had exclusive opportunity to start fire.

In *Fairview Cycle Ltd. v. Gore Mut.*, (1987) 79 A.R. 325 (Q.B.) Court denied insured's claim after finding arson on basis of insured's motive (financial diffi-

culty) and exclusive opportunity. Case also highlights importance of disproving all potential accidental causes of fire in order to show that fire was incendiary in nature. In *Vidakovic v. Portage La Prairie Mut. Assur.*, (1985) 40 Alta. L.R. (2d) 417 (C.A.) Court found that although insurer established motive it did not establish exclusive opportunity and allowed insured's action to succeed. In *Royal Ins. v. Smith*, (1983) 25 Alta. L.R. (2d) 48 (C.A.) Court found proof of motive alone is not very persuasive and exclusive opportunity must be shown. In case it was critical to show that all other individuals with opportunity to start fire had no motive. Since insurer did not do this Court allowed action.

**Assignment.** Contract of Insurance is mere personal contract between insurer and insured for payment of money and as such cannot in case of building insured against fire run with land so as to pass benefit of insurance to assignee of land from original owner. *Caledonian Ins. v. Montreal Trust*, [1932] S.C.R. 581. Section 738 of Insurance Act deals with insurer's entitlement to avoid policy or affirm policy with assignee upon alienation or partial alienation of insured property.

Statutory condition 3 to fire insurance policies enacted under §549 of Insurance Act provides that: "insurer shall be liable for loss or damage occurring after authorized assignment under Bankruptcy Act or change of title by succession, by operation of law or by death." Provision implies that other assignment will avoid liability of insurer.

Courts have held that insurer only able to avoid policy on assignment if assignment is absolute and insured has no remaining interest in property. *Trotter v. Calgary Fire Ins.*, (1910) 3 Alta. L.R. 12 (S.C.A.D.) and *Enright v. Sun Ins. Office of England*, (1923) 19 Alta. L.R. 699 (S.C.A.D.).

**Chattel Mortgages.** Statutory Condition 2 of fire policy under §549 of Insurance Act provides that "unless otherwise specifically stated in contract, insurer is not liable for loss or damage to property owned by any person other than insured, unless interest of insured therein is stated in contract. Although no cases on chattel mortgages court dealing with conditional sales contract held that provision does not apply so as to exclude coverage of property held by insured subject to conditional sales contract. *Rockmaker v. Motor Union Ins.*, (1922) 70 D.L.R. 360 (C.A.). Presumably property held by insured subject to chattel mortgage would also not fall within condition so as to preclude coverage.

**Contract-Policy.** Binder is application which is contract of "stop gap" insurance. Statutory conditions governing termination do not apply to binder. *Wilcox v.*

*Norberg & Wiggins Ins. Agencies Ltd.*, [1981] I.L.R. para 1-1375 at 256 (B.C.C.A.)

Terms of oral binder prevail over terms of policy ultimately issued. *Piggot Construction (1969) Ltd. v. SGI*, [1986] I.L.R. para. 1-2039 at 7841 (C.A.).

Cancellation. See also "CANCELLATION."

Statutory condition 5 applicable to fire insurance policies under §549 of Insurance Act is identical to statutory condition 8 applicable to auto policies under §614 of the Insurance Act. Auto condition was discussed above under heading "CANCELLATION."

Insurer terminating fire policy must tender premium with notice of termination or termination invalid. *Nakata v. Dominion Fire Ins.*, (1915) 9 Alta. L.R. 47 (S.C.A.D.).

**Mortgage Clause.** Question in application for fire insurance as to whether property is mortgaged if answered untruthfully will avoid policy. *Fodorchuk v. Car & General Ins. Corp.*, [1931] 2 W.W.R. 586 (Alta. S.C.T.D.). Unless policy requires that interest of insured be disclosed failure to divulge nature of the interest or existence of encumbrance is not fraudulent concealment. *Keefer v. Phoenix Ins. Co. of Hartford*, (1901) 31 S.C.R. 144 (S.C.C.). Mortgage clause creates separate contract between insurer and mortgagee. *Co-operators General Ins. v. National Bank of Canada*, (1988) 62 Alta. L.R. (2d) 289 (C.A.).

Mortgagee knowing property vacant for 4½ months prior to fire and not giving notice of fire until 2½ months after loss. Court held vacancy created change material to the risk which insurer had not consented to and 2½ months delay in reporting loss was not reporting forthwith and therefore mortgagee was not entitled for relief from forfeiture. *Royal Bank v. Safeco Ins. Co. of America*, (1988) 58 Alta. L.R. (2d) 239 (Q.B.).

**Reformation.** Doctrine known as Rectification and not Reformation under Alberta law.

Mortgagee requesting policy with mortgage clause and policy issued without. Mortgagee entitled to have rectification of policy. *F.B.D.B. v. American Home Assur.*, (1986) 21 C.C.L.I. 28 (H.C.). Under somewhat similar circumstances Alberta court held there was no need for rectification because even though policy issued did not contain mortgage clause, there was oral contract between mortgagee and insurer. *Co-operators General Ins. v. National Bank of Canada*, (1988) 62 Alta. L.R. (2d) 289 (C.A.).

**Severable Contracts.** Contracts of insurance are not severable but rather subject matter of contracts may be

severable depending on wording of policy. *Gore District Mut. Fire v. Samo*, (1878) 2 S.C.R. 411.

**Standard Provisions.** Under §549 of Insurance Act every contract of fire insurance is subject to statutory conditions. Statutory conditions deal with misrepresentation; property of others; change of interest; change material to risk; termination of insurance contract; requirements after loss; fraud; who may give proof of loss; proof of loss; salvage; entry, control, abandonment; appraisal; when loss payable; replacement; limitation for commencing action and notice.

**Damages. Excepted Risks. Explosions.** Are by nature abrupt and can be contrasted with eruption which takes place through slower process. *Canadian General Electric Co. Ltd. v. Liverpool & London & Globe Ins. Ltd.*, (1981) 36 N.R. 541 (S.C.C.).

**Fixtures.** No cases.

**Friendly Fires.** No cases.

**Smoke and Soot.** No cases.

**Proof of Loss.** Statutory Condition 8 under §549 of Insurance Act provides that notice of loss may be given and proof of loss may be made by agent of insured in case of absence or inability of insured to give notice or make proof, and absence and inability being satisfactorily accounted for, or in like case where insured refuses to do so, by person to whom any part of insurance money is payable. Under statutory condition 6, if damages covered by contract of insurance insured shall forthwith give notice thereof in writing to insurer and deliver as soon as practicable to insurer proof of loss verified by statutory declaration giving information as prescribed.

Statutory condition 7 provides that fraud or wilfully false statements in statutory declaration or in relation to any particulars shall vitiate claim of person making declaration. One false statement in proof of loss will vitiate whole claim notwithstanding that legitimate portion of the claim goes beyond policy limits. *Swan Hills Emporium & Lumber Co. Ltd. v. Royal General Ins. Co. of Canada*, (1977) 2 Alta. L.R. (2d) 1 (C.A.). However, insured filing undervalued proof of loss to expedite settlement does not vitiate policy. *Carr v. Wawanesa Mut.*, (1985) 41 Alta. L.R. (2d) 278 (Q.B.).

**Denial of coverage by insurer estops insurer from demanding proof of loss.** *Trotter v. Calgary Fire*, (1910) 3 Alta. L.R. 12 (S.C.A.D.).

**Repair.** Statutory condition 13 under §549 of Insurance Act provides that insurer instead of making payment, may repair, rebuild or replace property damaged or lost by giving written notice of intention to do so

within 30 days after receipt of proof of loss. In such event insurer shall commence to so repair, rebuild or replace property within 45 days of receipt of proofs of loss and shall thereafter proceed with all due diligence to completion.

However, insurer making election to repair and replace rather than make payment cannot be held to election by order of specific performance. *Nejasmic v. Royal Ins.*, (1981) 28 A.R. 617 (Q.B.).

**Replacement Value.** Such endorsements are valid and enforceable, although not strictly speaking, contracts of indemnity. Insured with replacement value endorsement is entitled to obtain declaration of entitlement under policy notwithstanding that insured has not yet met conditions of endorsement. *Data Tech Systems Ltd. v. Commonwealth Ins.*, (1982) 135 D.L.R. (3d) 569 (S.C.), *aff'd*, (1983) 48 B.C.L.R. 116 (C.A.).

**Multiple Policies. Co-insurance.** Section 550 of Insurance Act provides that any contract containing (a) deductible clause, (b) co-insurance, average or similar clause, or (c) clause, limiting recovery by insured to a specified percentage of value of any property insured at time of loss, whether or not that loss is conditional or unconditional shall have printed or stamped upon face of policy in red ink or bold type "This policy contains clause which may limit amount payable" and unless those words are printed or stamped, clause shall not be binding upon insured. For example of how to calculate insurer's liability where there is 90% co-insurance clause in policy see *McMurray Mobile Home Park Ltd. v. Halifax Ins.*, (1979) 17 A.R. 40 (S.C.T.D.).

**Concurrent Insurance.** Clause allowing concurrent insurance to be placed by insured does not limit insurer's liability when insured does not place such insurance. *Farmers' Fire & Hail Ins. v. Philip*, (1924) 2 W.W.R. 204 (Alta. S.C.T.D.). Clause permitting limited insurance up to specified percentage over cash value of property does not limit recovery to such percentage, but nor does it allow insured to cover more than cash value of property loss. *Taylor v. Equitable Fire Etc.*, (1918) 13 Alta. L.R. 58 (S.C.).

**Contribution Between Companies.** Section 551 of Insurance Act provides for rateable contribution when there is more than one contract of insurance covering same interest. Insurers in respect of contracts are to bear liability to insured in rateable proportion to loss unless expressly agreed otherwise between insurers. Rateable contribution applies notwithstanding that any term in policy providing that insurance shall not come into force, attach or become insurance with respect to property until full or partial payment of any loss under other policy.

Interest of mortgagee and interest of mortgagor are two distinct interests and therefore a policy held by mortgagee and policy held by mortgagor are not held with respect to same property and therefore §237 does not apply. *I.D.B. v. Fayad*, (1976) 5 A.R. 451 (S.C.A.D.).

Excessive Policy. Section 545 (2) of Insurance Act prohibits insurer and agent from issuing contract for fire insurance on property when amount covered, or when added to any existing contracts, exceeds fair value of property or interest insured therein.

Where insured has excess coverage over value of property, absent fraud on part of insured, insured is entitled to full value of property. *Hoffman v. Calgary Fire*, (1909) 2 Alta. L.R. 1 (T.D.).

### GUEST CASES

See "AUTOMOBILES, Guests."

### HOSPITALS

Evidence. Records. Medical records may be obtained with patient's written consent under §24 (6) of Hospitals Act, or through exercise of ministerial discretion where public interest dictates under §24 (2) of Alberta Hospitals Act.

Party to action may demand physical examination of party claiming damages for personal injuries under Rule 217 of Alberta Rules of Court and where party conducts such examination, party examined is entitled to report of independent medical examination. However, party conducting independent medical examination is then entitled to similar report of all prior or subsequent examinations of party claiming damages.

Confidentiality of records arises from physician and patient relationship. *Solicitor Gen. of Canada v. Royal Comm'n Inquiry into Confidentiality of Health Records*, (1981) 38 N.R. 588 (S.C.C.). However, confidentiality does not apply within court room and patient's right to confidentiality ceases once health is put into issue in litigation and patient's subsequent prohibition to doctor in respect to release of medical records is nugatory. *Faye v. University of Alberta Hosp.*, unreported, April 20, 1990, (Alta. Q.B.). Where a claim for physical injury is made, pre- and post-injury medical treatment is potentially relevant. *Kachkar v. Attwell*, (1990) 106 A.R. 130 (Q.B.).

Liens. Section 62 of Hospitals Act gives the Crown the right to recover from wrongdoer the Crown's cost of health services provided or likely provided to a person. The Crown's recovery shall be reduced by any percentage of contributory negligence of the recipient of the

health service. The Crown does not have the right to recover the Crown's cost of health services if the injuries arise from the use or operation of motor vehicle and the wrongdoer is insured under a motor vehicle liability policy issued in Alberta. The subrogated claim of the Crown for health services survives the death of the beneficiary. *James Estate v. Rentz*, (1986) 69 A.R. 198 (C.A.).

Warranties. Negligence is primary cause of action against hospital, but hospital may be contractually liable for provision of services and competence of staff. Terms must be ascertained from wide variety of factual circumstances and are often implied. *Abel v. Cooke*, [1938] 1 W.W.R. 49 (Alta. C.A.) and *Fraser v. Vancouver General Hosp.*, (1952) 2 S.C.R. 36.

Immunity. Hospitals are generally liable for negligence of servants in course of employment. *Fraser v. Vancouver General Hosp.*, [1952] 2 S.C.R. 36. But partial immunity for hospitals may exist with respect to employees whose actions hospital could not supervise if hospital can show that it had hired competent personnel. However, applicability of this defense has been diminishing over time. *Able v. Cooke*, (1938) 1 W.W.R. 49 (S.C.A.D.) and *Aynsley v. Toronto General Hosp.*, (1972) 25 D.L.R. (3d) 241 (S.C.C.).

For limitation of actions against hospital and health care professionals see: "LIMITATIONS OF ACTIONS."

### HUSBAND AND WIFE

Community Property. No concept of community property exists in Alberta law. There is concept of "matrimonial property" under legislation. Matrimonial property is all assets acquired by husband and wife during course of marriage and increase in value of any assets during marriage. However, concept of matrimonial property has no effect until application for division of property is made upon break-up of marriage and until such time full legal title vests in either one or the other spouse or in both as joint interest holders.

Interspousal Immunity. Under §2 (3) of Married Woman's Act married person did not have general cause of action to sue partner in tort. Effective July 5, 1990 this provision has been repealed and replaced. Married persons now have same right of action in tort against one another as if they had not been married.

Loss of Consortium. Damages may be claimed for injury to spouse or for alienation of spouse's affection due to loss of consortium. *Ramsay v. Ducharme*, (1984) 56 A.R. 275 (Q.B.) and *Forlano v. Lane*, (1981) 65 A.R. 156 (C.A.).

**INFANTS**

See “AUTOMOBILE, Age”; “NEGLIGENCE”; “LIABILITY INSURANCE, Infants.”

**INLAND MARINE**

No cases.

**LIABILITY INSURANCE**

Cancellation. See “CANCELLATION.”

Compromise of Claims. Duty to act in good faith. In *Frederickson v. I.C.B.C.*, (1990) 44 B.C.L.R. (2d) 303 (S.C.) insured indicated to insurer that he did not wish to settle. Claim for well over insurer’s policy limits. Insurer thought very unlikely that plaintiff would succeed. Plaintiff had made offer to settle within limits six times including after trial judgment and pending appeal. Court finding that although insurer had duty of good faith in exercising right to settle, did not breach such duty in this case. As well, court finding unlikely that insurer owed fiduciary duty in circumstances. “Bad faith doctrine” developed in American law implicitly applied in Canada. *Shea v. MPIC*, (1991) 55 B.C.L.R. (2d) 15 (S.C.).

Right of Insured to Settle. *Fredericksen v. I.C.B.C.*, (1990) 44 B.C.L.R. (2d) 303 (S.C.) implies that insurer acting in good faith has right to settle action within policy limits.

Where insured defending under duty to defend, but not admitting duty to indemnify insurer may prejudice itself by settling. *Merchant’s Cas. v. Waterloo Trust & Savings Co.*, [1936] 1 D.L.R. 361 (Ont. H.C.).

Contribution among Joint Tortfeasors. See “NEGLIGENCE.” Under provisions of Tortfeasors Act any tortfeasor liable in respect of damage may recover contribution from any other tortfeasor who would, if sued, be liable in respect of same damage, provided that no person shall be entitled to recover contribution from any person entitled to be indemnified by him in respect of same damage. Amount of such contribution shall be such as may be found by court to be just and equitable having regard to extent of person’s responsibility for damage.

Cooperation of Insured. Specific provisions provided for in Insurance Act with respect to automobile liability policy. Most of these provisions found in Statutory Condition 3 under §614 of Insurance Act. Duty of the cooperation of insured includes duty to promptly notify insurer in writing of any accident involving loss or damage to persons or property, to forward immediately to insurer every letter, document, advice or writ received by insured from or on behalf of the claimant, insured not allowed to assume voluntarily liability or

settle claim except at own cost, insured cannot interfere in negotiation for settlement and insured shall, whenever requested by insurer, aid in securing information and evidence and attendance of any witness, shall cooperate with insurer in defense of proceedings, prosecution or any appeal. As well, under §637 (1) of Insurance Act insured required to give notice to insurer within five days of service of any process in action against insured. At common law, the insured also has a duty to cooperate fully in the prosecution of a claim by his insurer. *Dane v. Mortgage Ins. Corp.*, (1894) 1 Q.B. 54.

Insured had general liability policy and was found jointly and severally liable along with plaintiff to third party. Insured did not cooperate in defense and insurer withdrew. Judgment went against both insured and plaintiff and plaintiff brought action against insurer under §219 of Insurance Act for indemnification under liability policy. Court held that plaintiff could seek indemnity directly against insurer where plaintiff was entitled to indemnity from insured notwithstanding lack of insured’s cooperation. *Birtles v. Dom. of Can. Gen.*, (1986) 46 Alta. L.R. (2d) 193 (C.A.); *Bennett Estate v. Wawanesa*, (1990) 72 D.L.R. (4th) 765 (Alta. C.A.)

Coverage Construction of Terms. See also “CONSTRUCTION OF POLICY.” Where coverage for “liability imposed by law” no coverage for liability voluntarily assumed by insured under contract with respect to damages for wrongful dismissal. *Capital Regional Dist. v. General Acc. Assur. Co. of Canada*, (1987) 15 B.C.L.R. (2d) 224 (C.A.).

“Claims Made” policy only covers loss which manifests itself during policy period. *Selig v. 31390 Sask Ltd.*, (1987) 50 Sask. R. 80 (C.A.). Where act or omission of insured prior to policy which ultimately results in liability during policy period of claims made policy, insured has coverage as long as insured not aware of impending claim prior to entering into policy. *Wright Engineers Ltd. v. U.S. Fire*, (1986) I.L.R. para. 1-2066 at 7969 (B.C.C.A.).

Standard Provisions. Statutory conditions are enacted pursuant to §614 of the Insurance Act with respect to automobile liability coverage. No other type of liability insurance has statutory conditions.

Omnibus Provisions. “Damage to property of every description” includes indemnity for liability incurred for loss of profits. *Tramways, Etc. Co. v. Employers Liab. Etc. Co.*, (1919) 40 D.L.R. 297 (N.S.C.A.).

“Injury to person” includes liability for pure economic loss. *Richards v. Continental Cas.*, (1987) 53 Alta. L.R. (2d) 76 (C.A.).

Direct Action Against Insurers/Rights of Injured Parties. With respect to automobile liability insurance §635 (1) of the Insurance Act says any person having claim against any insured for which indemnity is provided by motor vehicle liability policy shall be entitled upon recovering judgment therefor against insured to have insurance monies payable under policy applied in or towards satisfaction of judgment. Section 635 (4) of Act provides right of person entitled under (1) to have insurance money applied is not prejudiced by (a) assignment, waiver, surrender, cancellation or discharge of contract, or any interest therein or of proceeds thereof, made by insured after happening of event giving rise to claim under contract, or (b) any act of default of insured before or after event in contravention of Subpart 5 or of terms of contract, or (c) any contravention of Criminal Code or statute of any province or any state or District of Columbia of the U.S.A. by owner or driver of automobile. Section 635 (11) provides that except as provided in subsection (12) insurer may with respect to coverage in excess of limits mentioned in §627 of Act (\$200 K) notwithstanding §635 (4) avail itself of any defense that it is entitled to set up against insured other than defense arising out of breach of statutory condition 2 under §614 of Insurance Act. Furthermore, no such action may be maintained against insurer after expiration of one year from final determination of action against insured including appeals. If insurer has to pay out because of §635 it may recover same from insured (§635 (13)). However, to recover against insured, insurer must have had to pay out because of judgment obtained by third party. Insurer cannot pursue insured if insurer has entered into settlement with third party. *Merchants Cas. Ins. v. Waterloo Trust & Savings Co.*, [1936] 1 D.L.R. 361 (Ont. H.C.).

For liability policies other than auto, §530 of Insurance Act provides if insured liable for injury or damage to persons or property of others and failed to satisfy judgment obtained by claimant for injury or damage and execution against insured in respect thereof is returned unsatisfied, execution creditor has right of action against insurer to recover amount not exceeding face amount of policy or amount of judgment in same manner and subject to same equities as insured would have if judgment had been satisfied. Courts have held that right of claimant is only as good as insured's right would be and insurer has same defense against claimant as would have against insured if claiming indemnity after satisfying judgment. *Carwold Concrete & Gravel Co. v. Gen. Security Ins. Co. of Can.*, (1985) 70 A.R. 340 (C.A.).

Courts have further held that damage to "person or property of others" includes damages for pure economic loss. *Richards v. Continental Cas.*, (1987) 53 Alta. L.R. (2d) 76 (C.A.).

Duty to Defend. Supreme Court of Canada has set out principle with respect to insurer's obligation to defend. Insurers were denying obligation to defend on basis that only claim made in Statement of Claim fell within exclusion in policy for fraud. Insured argued that fraud exclusion only applied to duty to indemnify and not separate duty to defend. Supreme Court of Canada rejected insured's argument and held duty to defend solely based on allegations in statement of claim and whether there was potential for indemnity. Court rejected American case of *Conner v. Transamerica Ins.*, 496 P. (2d) 770 (Okla. 1972). See *Nichols v. American Home Assur.*, (1990) 1 S.C.R. 801. (S.C.C.).

Alberta court has held that insurer has duty to defend notwithstanding that it may have right to claim over against insured with respect to policy breaches. *Canadian Linen Supply v. Canadian Indem.*, (1987) 55 Alta. L.R. (2d) 342 (Q.B.).

Liability between Insurer's/Primary and Excess Liability Insurers. Section 650 (1) of Insurance Act applicable to auto liability policies provides that owner's liability policy (as opposed to Driver's Liability policy) is first loss insurance and any other valid motor vehicle policy is excess insurance only. Section 650 (2) goes on to state that where there is more than one owner's liability policy insurer is only liable for its ratable portion of liability and expense.

Section 631 (1) allows for the placement of excess insurance over any designated contract whether designated contract is first loss insurance or excess insurance and §631 (2) provides that when designated contract referred to in excess contract terminates excess contract automatically terminates as well.

Section 634 (1) of Insurance Act dealing with automobile liability policies provides mechanism whereby application can be made to court to determine which insurer is entitled to defend action against insured. In *Economic Mutual v. I.C.B.C.*, (1986) 44 Alta. L.R. (2d) 242 (Q.B.) Court was faced with dispute between first loss insurer and excess insurer as to which was entitled to defend. Claim against insured was for well over first loss insurer's limits and Court determined that insurer facing greatest exposure should be given control of proceedings. In this case it was excess insurer who had greatest exposure. However, Court stated that excess insurer must keep first loss insurer fully advised of all steps taken in defense. For the same result in professional liability insurance, see *Station Square Development v. Amako Constr.*, (1989) 40 C.C.L.I. 292 (B.C.S.C.). Where excess insurer was compelled to defend because primary insurer was not subject to jurisdiction of court, excess insurer was held to have paid under compulsion of law and could recover from primary in-

surer on basis of the equitable right of restitution. *Aetna v. Canadian Surety*, (1991) 2 C.C.L.I. (2d) 215 (Alta. Q.B.).

Which policy is primary policy is to be determined by insurer's respective interests as manifested in policies. *Healy v. Prefontaine*, (1989) 43 C.C.L.I. 117 (Q.B.).

Exclusions. Intentional Acts. On basis of public policy insurer not liable to insured for intentional wrongs. Under policy of auto insurance insurer liable to third party under §635 of Insurance Act. *K.C. Cab Company Ltd. v. Alliance Assur.*, [1973] 3 W.W.R. 277 (Alta. D.C.). However, this liability extends only to damage caused by the insured auto and not damage to it, so an unpaid repairer cannot claim directly against the insurer where the policy was breached. *Renfrew Chrysler v. Northwest Mutual*, [1972] 3 W.W.R. 551 (Alta S.C.T.D.).

Where employer is vicariously liable for acts of employees, employer entitled to coverage even though employee intentionally causes loss. *Seligman v. Firemen's Fund Ins.*, (1963) 2 O.R. 614 (H.C.).

Where insured guilty of criminal negligence causing bodily harm there was no sufficient intention to fall within exclusion to coverage. *Taylor v. Co-operative Fire & Cas.*, (1984) 35 Alta. L.R. (2d) 77 (Q.B.). However, contrary decision was reached in *Devlin v. Co-operative Fire & Cas.*, (1978) 6 A.R. 271 (C.A.) where Court found that insured guilty of criminal negligence must have intended consequences of actions and therefore indemnity coverage excluded. Decision reversed by CA and Says indemnity coverage included.

Assault. Liability policy excludes assault as intentional act unless use of reasonable force to protect people or property. *Wlasichuk v. Citadel Gen. Assur.*, (1999) 246 A.R. 41 (Q.B.).

Violations of Law. Section 529 of Insurance Act says that unless contract otherwise provides contravention of any criminal or other law enforceable in Alberta or elsewhere does not ipso facto render claim for indemnity unenforceable under contract except when contravention is committed by insured or by another with insured's consent, with intent to bring about loss. Section 528 of Insurance Act provides that it is lawful for insurer to contract to indemnify insured against financial loss occasioned by reason of liability to third person, whether or not loss is caused by insured through negligence or contravention of municipal by-law or any act of Legislature of Alberta.

Miscellaneous Exclusions. Liability policy excluding liability arising out of breach of contract excludes

liability where insured may be concurrently liable under contract and in tort. *Dominion Bridge Co. v. Toronto Gen. Ins.*, (1963) S.C.R. 362.

Exclusion in liability policy with respect to property "used by insured" did not include property of subcontractor which insured did not have exclusive possession of and power over. *Kenting v. General Acc.*, (1979) 26 A.R. 90 (S.C.T.D.).

Insured caused damage to third party vehicle while siphoning gas out of it for his own vehicle. Insured covered by general home liability policy excluding coverage for liability resulting from "ownership, use or operation of motor vehicle." Court held that this exclusion applied in that siphoning gas from motor vehicle is part of ownership and use. *Pioneer Grain Co. v. Wellington Ins.*, (1988) 63 Alta. L.R. (2d) 304 (Q.B.).

Waiver. Section 517 (1) of Insurance Act provides that no term or condition of contract shall be deemed to be waived unless in writing and signed by authorized party and §517 (2) states that neither insurer nor insured shall be deemed to have waived by appraising amount of loss, submitting proofs of loss or investigating loss.

In *Parrot v. Western Canada Acc. & Guar. Ins.*, [1921] 61 S.C.R. 595 it was held that if insurer has knowledge of policy breach it must elect to repudiate or affirm policy. If it continues in defense of insured after having knowledge of breach it is deemed to have affirmed policy. This would seem to apply notwithstanding §517. The Supreme Court of Canada held that, to bind the insurer in a case of non-disclosure, the plaintiff must prove that the insurer had knowledge of the defect and an intent to rectify it. *Canadian Indem. v. Johns-Mansville*, [1990] 2 S.C.R. 549. Courts have interpreted waiver to be something different than estoppel. An estoppel still applies notwithstanding §517. *Yorkshire Ins. v. Craine*, (1922) 2 A.C. 541.

It is thus common for insurer to enter into a non-waiver agreement if it continues in defense of insured after gaining knowledge of potential breach allowing insurer to deny coverage. An insurer was estopped from denying cover where it had proceeded through document discovery and examinations for discovery and commenced settlement negotiations in the face of an exclusion in the policy as the court presumed some detriment to the insured. *Rosenblood v. Law Society of U.C.*, [1989] I.L.R. para. 1-2416 at 9334 (Ont. S.C.).

Reservation of Rights. Issue of Reservation of Rights arises where there is question of interpreting coverage or where multiple claims made against insured some falling within and some falling outside coverage. The insurer has duty to defend in circumstances and practice is to defend after notifying insured of insurer's

reservation of rights. If there is issue of policy breach rather than reservation of rights insurer must be careful to enter into non-waiver agreement because notification of reservations of rights will not be sufficient. *Allstate Ins. Co. of Can. v. Foster*, (1971) 24 D.L.R. (3d) 9 (Ont. Co. Ct.).

Infants. In *Yorkton Agri. & Indus. Exhibition Assoc. v. Morely*, (1967) 66 D.L.R. (2d) 37 (Sask. C.A.) boys age 6 and 8 were playing with matches in barn. Eldest boy lit match and dropped it when it burned his fingers. Younger boy covered up match with straw and barn burned down. Court found that having regard to age, intelligence and experience of the boys, they knew playing with matches was wrong, but could not have foreseen consequences of acts and were therefore not liable.

In *Christie v. Slevinsky*, (1981) 12 M.V.R. 67 (Alta. Q.B.) 11 year old boy took father's dune buggy without permission. Was driving at dusk and it was dusty when he hit plaintiff. Court found child not negligent because he was too young to realize danger of driving when vision obstructed by darkness and dust.

Insolvency of Insured. Section 145 of the Bankruptcy Act reserves claimants rights under §635 of the Insurance Act and allows claimant against bankrupt insured to have benefit from proceeds of automobile liability policy. Bankruptcy Act only deals with auto liability policies and not other forms of liability insurance.

In *Re Major*, (1984) 56 B.C.L.R. 342 (S.C.) Court found that the victim of bankrupt insured should get full benefit of liability coverage because insured was required to carry liability coverage by law. Court determined that public policy required fund for victim of insured's wrong doing and victim should gain exclusive benefit of coverage.

Where liability coverage is not mandatory, courts have not decided whether proceeds of liability policy go directly to the victim or to bankrupt insured's estate.

Jury. Section 13 (1) of the Jury Act provides that civil jury is constituted by six jurors and §13 (2) provides verdict given by five jurors has same effect as six.

Under §17 (1) there is a right to jury upon application by any party to proceeding in action for defamation, false imprisonment, malicious prosecution, seduction or breach of promise of marriage, tort or contract action over \$10K and recovery of property over \$10K but §17 (2) provides that judge can direct matter to proceed without jury if in opinion of judge matters are too complex for jurors. NOTE: if action commenced before March 1, 2003 then \$10K, and if action commenced on or after March 1, 2003 then \$75K.

In *Schug v. Odegaard*, [1984] I.L.R. para. 1-1841 at 6878 (Alta. Q.B.) insured brought application to add insurer as third party in proceedings before a jury. Court held that insurer should be added because it is now common understanding amongst jurors that there is insurance in automobile liability cases.

Notice. Where notice of accident was omitted but was no wilful or fraudulent conduct on part of the insured and the insurer was not prejudiced insured was given relief from forfeiture. *Hogan v. Kolisnyk*, (1983) 25 Alta. L.R. (2d) 17 (Q.B.).

Where insured late in giving notice and insurer prejudiced in investigation insured will have breached policy and not be entitled to relief from forfeiture. *Cunningham v. Western Union Ins.*, (1979) 26 A.R. 361 (Q.B.) and *Brown v. Co-op. Fire & Cas.*, (1982) 22 Alta. L.R. (2d) 370 (C.A.). Even where insured did not think there was valid claim and thus did not give notice court held that since insurer had been prejudiced, there should be no relief from forfeiture. *W. Schroeder Trucking v. Markel Ins.*, (1979) 19 A.R. 196 (D.C.).

Punitive Damages. See "DAMAGES."

## LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See also Law Digest Tables.

Limitations in Contract. Section 3 of Limitations Act sets general limitation period of two years for all causes of action. The distinction between torts and contracts no longer applies to limitation of actions cases. *Alberta v. Komant* [2000] A.J. No. 764 (Q.B.).

Special limitations provided for in Insurance Act with respect to various types of insurance: statutory condition 14 under §549 for fire insurance gives one year limitation from date of loss or damage; statutory condition 6 (3) under §614 for auto insurance gives one year limitation period commencing upon occurrence of loss or damage to vehicle and commencing when cause of action arose for loss or injury to persons or property; statutory condition 12 under §671 with respect to accident and sickness insurance gives one year limitation commencing when insurance money became payable; and statutory condition 16 under §728 gives one year limitation next after loss or damage with respect to hail insurance.

Accrual. Generally a limitation period runs from date party first knew or ought to have known "injury" occurred, injury attributable to defendant and injury warrants legal proceedings.

Discovery Rule. Discovery rule applies to all actions but the action must be commenced within ten years after claim arose.

Fraud. Section 4 of Limitations Act provides that where fraudulent concealment used to conceal existence of cause of action, limitation period does not start to run until plaintiff discovers fraud.

Tolling. Limitations Act has repealed provisions dealing with tolling.

Section 5 states that, for persons under disability (i.e. infants or persons of unsound mind) limitation period will commence when disability ceases. Disability by way of unsound mind does not have to exist at time cause of action arose; it is sufficient that cause of action and disability arose contemporaneously. *Koszyk v. Kloetstra*, [1976] 5 W.W.R. 205 (Alta. S.C.).

Waiver. For defendant to waive or be estopped from claiming expiration of limitation period as defense (a) legal relationship between parties must exist; (b) representation, express or implied, must be made by defendant that strict legal rights will not be enforced against plaintiff; and (c) plaintiff must have relied upon representation. Admission of liability and negotiations over quantum will not alone allow plaintiff to plead waiver or estoppel with respect to limitation defense. *Viau v. Savard*, (1984) 31 Alta. L.R. (2d) 150 (Q.B.).

Statutory and Case Law References to Specific Limits on Causes of Action. Hospitals, physicians, dentists, chiropractors and optometrists are now subject to no special treatment. Two-year limitation applies.

Crown is bound by the Limitations Act §2(3). However, Municipal Government Act sets out certain notice periods as condition precedent to commencement of cause of action: under §531, 21 days from accident caused by snow or ice on streets; and §532, within 30 days if injury is caused by faulty repair of public place.

Section 38 (8) of Public Highways Development Act requires notice to the Minister of Highways within one month of injury in action against Crown for disrepair.

Requirements of notice against municipalities and public authorities cited above are not necessarily bar to action. Discretion remains in court to allow action to proceed if reasonable excuse for delay in notice is given. The test of whether the court will grant relief against missing municipal limitations is whether a reasonable person in the position and circumstances of the claimant would have been led to do what was done by the claimant. *Duret v. Calgary*, (1990) 77 Alta. L.R. (2d) 444 (Q.B.).

## MALPRACTICE

Medical. Statutory Requirements and Limitation. The *Limitations Act* applies to medical malpractice cases. Therefore a claimant must commence an action within two years after they knew, or ought in the circumstances to have known that the injury for which the claimant seeks a remedial order had occurred, that the injury was attributable to the conduct of the defendants, and that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding or 10 years after the claim arose, whichever period expires first.

Medical. Expert Testimony. The production of expert testimony in medical malpractice cases is governed by Part 15 of the Alberta *Rules of Court*. A party intending to adduce expert evidence at a trial shall, not less than 120 days before the day of the trial commences or such other time as may be ordered by the Court, serve on other parties to the action a statement of the substance of the evidence and a copy of any expert's report. A party adverse in interest to the expert may demand that the expert be in attendance at trial for cross-examination. That party may also call expert evidence in rebuttal. In this case, a statement of the substance of the evidence and a copy of any rebuttal report must be served on the other parties no more than 60 days after the expert report was received.

Medical. Informed Consent. A physician has an obligation to disclose to his patients material risks associated with the treatment: *McCann v. Hyndman* (2003), 23 Alta. L.R. (4th) 113, *aff'd* [2004] 11 W.W.R. 216, 28 Alta. L.R. (4<sup>th</sup>) 214.

Medical. Standard of Care. It is well settled that physicians have a duty to conduct their practice in accordance with the conduct of a prudent and diligent doctor in the same circumstances. The conduct of physicians must be judged in the light of the knowledge that ought to have been reasonably possessed at the time of the alleged act of negligence: *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674 (S.C.C.).

Medical. Wrongful Life. It has not yet been decided by a court in this Province whether a cause of action for wrongful life exists: *Holowaychuk v. Hodges* (2003), ABQB 201.

Hospital. Charitable Immunity. The Supreme Court of Canada has noted that the old common law charitable immunity has long been abolished. This position has not been challenged in the Province of Alberta: *T. (G.) v. Griffiths*, [1999] 2 S.C.R. 570.

Hospital. Damages. See "DAMAGES."

Hospital. Informed Consent. See "Medical. Informed Consent," *supra*.

Hospital. Standard of Care. See “Medical. Standard Of Care,” *supra*.

Legal. See “ATTORNEYS.”

Other Professional. Damages. See “DAMAGES.”

Other Professional. Standard of Care. ‘Professions’ generally refers to employment that holds four characteristics: i) the work being performed is skilled and specialized; ii) the person is expected to be committed to moral principles which go beyond the duty of honesty; iii) the person is commonly associated with an association which regulates the admission to that profession and sets the codes of conduct and ethics for that profession; and iv) the person usually has a higher status within the community.

Typical examples of ‘other’ professions would be architects, engineers and accountants. The principles of negligence are equally applicable to professionals. See “NEGLIGENCE”. The standard of care in relation to professionals remains very similar regardless of the profession. The professional must perform their duties with the reasonable skill, care and diligence of an ordinary, competent and skilled professional in the particular circumstance and location of any given case.

## NEGLIGENCE

Age. In *McEllistrum v. Etches*, [1956] S.C.R. 787, Court stated that it cannot be laid down as general rule that child of 6 years is never to be charged with contributory negligence. Proper rule is that where age is not such as to make discussion of contributory negligence absurd, it is question for jury in each case whether infant exercised care to be expected of child of like age, intelligence and experience. If child is in arms or is very young child, it will not be identified with negligence of person attending it. *Smith v. C.P.R.*, (1921) 62 S.C.R. 134. Owner of dangerous machine becomes liable if it is likely to attract children and is left on street or on private premises which children frequent or are invited or allowed to frequent where no precautions are taken to prevent interference by children. In such cases machine is said to be attractive nuisance and children recover under what has become known as doctrine of allurements. *Cook v. Midland Railway*, (1909) A.C. 229 (H.L.); *McEwen v. C.N.R.*, (1961) 38 W.W.R. 76 (Alta. S.C.T.D.) and *Kotke v. Sutherland*, (1990) 75 Alta. L.R. (2d) 27 (Q.B.).

Contributory Negligence. Contributory negligence of Plaintiff is not complete defense to his action but results only in apportionment of damages. Section 1 of Contributory Negligence Act provides: “1. (1) When by fault of two or more persons damage or loss is caused to one or more of them, liability to make good damage or loss is in proportion to degree in which each person was

at fault but if, having regard to all circumstances of case, it is not possible to establish different degrees of fault, liability shall be apportioned equally; (2) Nothing in this section shall operate to render person liable for damage or loss to which his fault has not contributed.”

Section 2 of Contributory Negligence Act provides: “2. (1) When damage or loss has been caused by fault of 2 or more persons, court shall determine degree in which each person was at fault. (2) When 2 or more persons are found at fault they are jointly and severally liable to person suffering damage or loss, but as between themselves, in absence of contract express or implied, they are liable to make contribution to and indemnify each other in degree in which they are respectively found to have been at fault.” §5 of the Contributory Negligence Act provides: “4. If trial is before a judge with a jury, judge shall not submit to jury any question as to whether, notwithstanding fault of one party, other could have avoided consequences thereof, unless in his opinion there is evidence on which jury could reasonably find that act or omission of latter was so clearly subsequent to and severable from act or omission of former as not to be substantially contemporaneously with it.” *Walker v. Brownlee*, (1952) 2 D.L.R. 450 (S.C.C.).

Imputed Negligence. Master or principal is liable for negligence of his servant or agent when such negligence occurs in course of such servant’s or agent’s employment. The test is that the employee is engaged in type of act authorized by employer and the wrongful act was so connected to authorized act to amount to a mode of performing it. *O’Riordan v. Central Agencies*, (1987) 51 Alta. L.R. (2d) 206 (C.A.). Employer is not, however, liable for collateral negligence of independent contractor. Thus where a contractor was engaged to do certain work not necessarily or inherently dangerous, and he negligently caused damage by fire, employer of contractor was held not liable. *Johnston v. Mills*, [1917] 3 W.W.R. 742 (Alta. S.C.A.D.). Where, however, work to be done is inherently dangerous, employer cannot relieve himself of responsibility for work by delegation of its proper performance to independent contractor. *Longmore v. J.D. McArthur Co.*, (1910) 43 S.C.R. 640.

An employer may be held liable where it has failed to give adequate instructions or supervise properly. *Henuset Bros. v. PanCanadian Pet.*, (1977) 82 D.L.R. (3d) 345 (Alta. S.C.).

Last Clear Chance. This doctrine no longer applies if damage caused or contributed to by act or omission of a person, whether or not another person had opportunity to avoid consequences and failed to do so. Contributory Negligence Act, §3.1.

Occupiers' Liability Act. This does away with common law on invitees, allurements etc. It generally sets duty of care on all "occupiers," to see that visitors will be reasonably safe. It applies common duty of care to (a) condition of premises, (b) activities on premises, (c) conduct of third party on premises. Generally as to adult trespassers, there is no duty of care, except that occupier must avoid wilful or reckless acts or conditions that would cause injury. Special duty is owed to child trespassers. See §13. *Houle v. Calgary*, (1985) 38 Alta. L.R. (2d) 331 (C.A.).

Proximate Cause. In *Thompson v. Ontario Sewer Pipe Co.*, (1908) 40 S.C.R. 396, Davies J. stated: "It is trite law that negligence or shortcomings of Defendants in any action of negligence however numerous will not make them liable for injury Plaintiff may have sustained unless there is direct connection found by jury, with evidence to sustain it, between injury sustained and negligence found." Where goods were sold at a fire sale, the court found no proximate cause since the object of the sale was to protect the insured's reputation. *Sterling Shoes v. Fire Ins. Co.*, (1971) I.L.R. para. 1-401 at 61 (Alta. C.A.).

In *Goodwin v. Goodwin and C.P.R.*, [1933] O.R. 225 (H.C.) where freight train obstructed highway at level crossing for more than five minutes in breach of statutory requirements, Plaintiff who was passenger in car which ran into freight had no cause of action against Railway Company. It was held that obstructing of highway for more than five minutes (although breach of Railway Act) was not cause of Plaintiff's injury. In Canadian Law there is no tort of statutory breach. Rather the breach is merely some evidence of negligence. *Sask. Wheat Pool v. R.*, [1983] 1 S.C.R. 205.

### NO-FAULT INSURANCE

Section 629 of the *Insurance Act* provides for certain benefits which must be paid by an insurer. These benefits are prescribed by the *Automobile Accident Insurance Benefits Regulations* (Alberta) 352/72. Accident benefits are commonly referred to as Section B – Accident Benefits. This forms part of every motor vehicle policy issued in Alberta.

Section B provides compensation to accident victims irrespective of who was at fault. These benefits include medical expenses incurred within two years from the date of the accident up to \$50,000.00 per person, chiropractic services up to \$750.00, massage therapy up to \$250.00 and acupuncture, also up to \$250.00.

If the deceased was the head of the household at the time of death and aged over 10 years old, a payment of a principle sum of \$10,000.00 is to be made by the insurer.

In this case where there are two or more survivors who are a spouse/adult interdependent partner and one or more dependant relatives, or two or more dependant relatives, the principle sum payable is increased by 20% for each survivor other than the first and where there is a spouse/adult interdependent partner or dependant relative survivor living in the household, the death benefit is increased by \$15,000.00 for the first survivor and then by \$4,000.00 thereafter for each additional survivor.

If the deceased was a spouse/adult interdependent partner at the time of death and aged over 10 years old, a payment of a principle sum of \$10,000.00 is to be made by the insurer.

If the deceased was a dependant relative, an award of between \$1,000.00 and \$3,000.00 is to be made by the insurer. The exact amount awarded will depend on the age of that dependant and is set forth in the Regulation.

Funeral expenses in the amount of up to \$5K are available in respect of the death of any one person. In addition, grief counseling expenses are available up to the amount of \$400.00 per family in respect of the death of any one person.

### PENALTY AND ATTORNEY FEES

Generally an Alberta court will award a successful litigant pre-judgment interest. The court also has the discretion to award party-and-party costs. On the whole the court will exercise this discretion and award costs in relation to the success of the litigants.

Unless payment of interest is governed by a contract enforcement which is the subject of litigation, the interest rates payable on pre-judgment interest are set by the *Judgment Interest Act*, 2000, R.S.A. 2000 J-1 and the supporting *Judgment Interest Regulation* (Alberta) 364/84. Judges do, however have the discretion to vary these rates as they see just.

Party-and-party costs are generally payable to the successful litigant and payable by the unsuccessful litigant. Guidelines for cost are provided in Schedule C of the *Alberta Rules of Court*, however Rule 601(1) lists factors which a judge may take into account when assessing costs and as such are granted discretion to increase or decrease the award of costs.

In cases where fraud has been alleged, but the fraud claim is defeated, a successful defendant may obtain costs on a full indemnity, solicitor and his own client, basis.

Where a pre-trial settlement offer is made by a plaintiff and the plaintiff recovers judgment on terms less favorable to those in the offer, they may recover costs to the date of the offer and the defendant may re-

cover the costs thereafter. Where the plaintiff recovers judgment on terms higher than those in the settlement offer a judge has the discretion to award double costs from the date of that offer.

Conversely, if a defendant offers to settle and the plaintiff rejects that offer, if the plaintiff is unsuccessful, the defendant may obtain double costs: *Anderson v. Canada Safeway Ltd.* (2005), ABCA 6.

### PRIVILEGED COMMUNICATION

Only legal privilege recognized is that in respect to communications between solicitor and client. Not only documents passing actually between solicitor and client are privileged, however. Communications passing between party and non-professional agent or third party are privileged if purpose of instructing solicitors is “dominant purpose” for preparation of documents in question, and not merely “substantial purpose.” *Nova, Alberta Corp. v. Guelph*, (1984) 30 Alta. L.R. (2d) 183 (C.A.). Statements obtained by opposing adjuster at time of accident may not be privileged. *Strass v. Goldsack*, [1975] 6 W.W.R. 155 (Alta. S.C.A.D.).

### PRODUCTS LIABILITY

**Strict Liability.** Strict liability has not been extended to product liability as it has in the United States: *Ficila v. Cechmanek* (2001), 94 Alta. L.R. (3d) 201, 9 W.W.R. 1, 281 A.R. 248.

**Implied Warranty.** The *Sale of Goods Act*, 2000, R.S.A. 2000, c. S-2 provides two implied warranties: i) that the product is fit for its purpose; and ii) that the product is of a merchantable quality.

There are three necessary elements which must be established before an implied warranty of fitness for purpose will be found to exist. First, the purchaser of the product must have made the seller aware, expressly or impliedly, as to the particular purpose the product was required for. Second, it must be evident that the purchaser has relied upon the skill and judgment of the seller. Finally, it has to be shown that the seller ‘was in the business’ of supplying and selling that particular product. If each of the three elements is established, section 16(2) impliedly creates a warranty by the seller that the goods are fit for the purpose they were supplied.

There are two necessary elements which must be established before an implied warranty of merchantable quality will be found. First, the goods must be bought by description and second, the goods must be purchased from a seller who deals in goods of that description. As with the elements of the fitness for purpose warranty, these elements are interpreted liberally by the Alberta courts.

**Duty to Warn.** A duty to warn in relation to products liability was confirmed in *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189. The knowledge of the danger carries with it a duty to warn those to whom the product has been supplied, and that duty arises at the moment when the manufacturer or supplier was seized with the knowledge of the fault in the product. It is well-established in Canadian law that a manufacturer of a product has a duty in tort to warn consumers of dangers inherent in the use of its product which it has knowledge or ought to have knowledge. The rationale for the manufacturer’s duty to warn can be traced to the neighbor principle, which lies at the heart of the law of negligence, and was set down in its classic form by Lord Atkin in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.). When manufacturers place products into the flow of commerce, they create a relationship of reliance with consumers, who have far less knowledge than the manufacturers concerning the dangers inherent in the use of the products, and are therefore put at risk if the product is not safe. The duty to warn serves to correct the knowledge imbalance between manufacturers and consumers by alerting consumers to any dangers and allowing them to make informed decisions concerning the safe use of the product. The nature and scope of the manufacturer’s duty to warn varies with the level of danger entailed by the ordinary use of the product. Where significant dangers are entailed by the ordinary use of the product, it will rarely be sufficient for manufacturers to give general warnings concerning those dangers; the warnings must be sufficiently detailed to give the consumer a full indication of each of the specific dangers arising from the use of the product. *Hollis v. Birch*, [1996] 2 W.W.R. 77, [1995] 4 S.C.R. 634.

**Damages.** See “DAMAGES.”

**Defenses.** Possible defenses in relation to products liability in Alberta would include the misuse of a product despite instructions to the contrary, adequate warnings being provided as to the dangers of the product, intervening acts (*Viridian Inc. v. Dresser Canada Inc.*, [2002] 10 W.W.R. 37, 4 Alta. L.R. (4th) 254, 312 A.R. 93) and of course the *Limitations Act* under which a claimant must commence an action within two years after they knew, or ought in the circumstances to have known that the injury for which the claimant seeks a remedial order had occurred, that the injury was attributable to the conduct of the defendants, and that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding or 10 years after the claim arose, whichever period expires first.

## RELEASE

Covenant not to sue. Distinction between release and covenant not to sue is that former being satisfaction of claim will release all persons jointly liable with releasee, while covenant not to sue will have no such effect.

Fraud. Fraud will vitiate release as it will any contract or agreement.

Infant claims. Infant is not competent to effect release. Proper method of obtaining release for injury done to infant is to obtain release by his guardian who has been authorized to act by Court. Settlement of infant's claim must be approved by Public Trustee and Court. Minors Property Act, §15.

Procured in Hospital. There are no statutory restrictions in respect to release procured in hospital, but same would always be open to challenge on ground of undue influence or mental incapacity on part of releasor if these facts were established.

Joint Tortfeasors. Judgment against any tortfeasor will not be bar to action against any other joint tortfeasor. Tortfeasors Act, §3.

## REPRESENTATIONS AND WARRANTIES

Parties to an insurance contract are held to a standard of *uberrima fides* - utmost good faith - in their dealings with one another: *Schoff v. Royal Insurance Co. of Canada* (2004), 27 Alta. L.R. (4th) 208, 348 A.R. 366, and *Coronation Insurance Co. Ltd. v. Taku Air Transport Ltd.*, [1991] 3 S.C.R. 622 (S.C.C.).

An applicant for insurance must disclose every fact within their knowledge that is material to the insurance and such a failure to disclose or misrepresentation of such renders the contract voidable by the insurer. Generally the *Insurance Act* will provide that the contract is not voidable if it has been in existence for 2 years during the life of the insured person or the policy where there has been no fraud. In relation to motor vehicle insurance if an applicant gives false particulars of the described automobile to be insured to the prejudice of the insurer or knowingly misrepresents or fails to disclose in the application any fact required to be stated in the application a claim by the insured is invalid and the right of the insured to recovery indemnity is forfeited. In relation to fire insurance certain statutory conditions state that any fraud or willfully false statement in a statutory declaration in relation to the particulars of a claim shall vitiate the claim of the person making the declaration.

## SERVICE OF PROCESS

Alberta Rules of Court provide for service upon defendant by personal service, or by double registered mail with acknowledgement of receipt card attached to affidavit of Service. (Rules 14 and 22). Where service cannot be promptly effected Court may order substitutional service.

Rules of Court make provision for service on body corporate. Rule 15 (2) reads: "15 (2). Personal service is effected on corporation either (a) in the manner provided by statute, in which case these Rules as to mode of service do not apply, or (b) by leaving true copy of document to be served with a mayor, reeve, president, chairman or other head officer by whatever name he is known, or by service upon manager, office manager, cashier, secretary, agent, attorney, councillor, alderman, director, vice president, etc." Business Corporations Act (§256) allows for service to be made upon corporation's registered office by registered mail, with acknowledgement of receipt card attached, or by personal delivery.

Alberta Rules of Court provide for service outside jurisdiction in number of instances, including where action is in respect of breach committed within jurisdiction of contract made within or out of jurisdiction, and irrespective of fact, if that is case, that breach was preceded or accompanied by breach committed out of jurisdiction that rendered impossible performance of so much of contract as ought to have been performed within jurisdiction; where action is founded on tort committed within jurisdiction; or where action relates to breach of an equitable duty within jurisdiction (Rule 30).

## SUBROGATION

There is no common law right of subrogation until insured is wholly indemnified with respect to loss of insured property. *Esso Resources v. Sterns Catalytic* [1989] A.J. No. 618 (Q.B.). Common law doctrine of subrogation is changed by Insurance Act §651 and 553 which relate to automobile and fire insurance respectively. These provisions allow insurer to share in partial recovery by insured on a pro rata basis factored on amount of loss borne by each of the insured and the insurer. Under §651 insurer given express control of subrogated action. However, since §553 does not give insurer such control courts have found insured to be entitled to control subrogated claim with respect to fire insurance. *Farrell Estates v. Can. Indem.*, (1990) 45 B.C.L.R. (2d) 223 (C.A.). Where insurance contract was held to benefit all contractors on a project, the insurer had no right of subrogation against sub-contractor whose employee caused damage. The sub-contractor's insurable interest extended to the entire works. *Commonwealth Constr. v. Imperial Oil*, (1978) 1 S.C.R. 317

(S.C.C.). Where insurance company failed to obtain a non-waiver agreement and settled with third party, insurer was able to recover from insured under §336 as it was subrogated to insured's right of recovery against impaired driver, driving with consent. *Makowsky v. Makowsky*, (1978) 7 Alta. L.R. (2d) 69 (Q.B.).

### WAIVER AND ESTOPPEL

A waiver of a term or condition of an insurance contract requires a communication by the insurer of clear intention not to rely on rights contained in policy: *Maritime Life v. Saskatchewan River Bungalows*, [1994] 2 S.C.R. 490.

The *Insurance Act* provides that no term or condition of a contract is deemed to be waived by the insurer in whole or in part unless the waiver is stated in writing and signed by a person authorized for that purpose by the insurer. Neither the insurer nor the insured is deemed to have waived any term or condition of a contract by any act relating to the appraisal of the amount of loss or to the delivery and completion of proofs or to the investigation or adjustment of any claim under the contract.

### WORKERS' COMPENSATION

This subject is governed by provisions of Workers' Compensation Act.

Actions. Effect of Act on worker's right of action for injury sustained set out in §21 which provides as follows: 21 (1) No action shall lie for recovery of compensation under Act, and all claims for compensation shall be determined by Board. (2) Act and regulations apply in lieu of all rights and causes of action, statutory or otherwise, to which worker, his legal personal representatives or his dependents are or might become entitled against employer of worker by reason of any accident happening to worker, and no action in respect of such personal injury or death lies against employer. (3) Any party to action may, on notice to other parties, apply to Board for determination of whether worker who is party to action is entitled to compensation under Act and regulations.

Section 22 provides for subrogation by Board as follows: 22 (1) If accident happens to worker entitling him or his dependents to compensation under Act and circumstances of accident are such as to also entitle worker, his legal personal representatives or his dependents to action against some person other than employer or worker in industry to which this Act applies in respect of personal injury to or death of worker, Board is subrogated to rights of worker, his legal personal representatives or his dependents in respect of that cause of action. 22 (8) When Board has become subrogated to rights of worker, his legal personal representative or his depend-

ents (a) no payment or settlement shall be made to or with worker, his legal personal representatives his dependents for or in respect of those rights or for or in respect of any claim, cause of action or judgment arising out of them except with consent of Board, and any payment or settlement made in contravention of this clause is void. (4) If in any action in which Board is subrogated to rights of worker, his legal personal representatives or his dependents, payment into court is made pursuant to Alberta Rules of Court, clerk of Court, upon receipt of notice by Board of its subrogation in matter, shall not make payment out of court except with consent of Board. (5) If money is received by Board because it is subrogated to rights of worker, his legal personal representatives or his dependents (a) Board may accept money and give receipt for it and, if money is accepted in full settlement, may release person paying money or on whose behalf money is paid from liability in respect of personal injury to or death of worker resulting from accident, (b) if judgment of court under which money is received clearly indicates that portion of award is for pain and suffering suffered by worker and resulting from injury, Board may pay to worker from money remaining in its hands after payment of all legal costs incurred in recovering that money, amount that bears same proportion to money remaining in its hands as portion of award that is attributable to pain and suffering bears to total award, (c) if money is received as result of action taken or negotiations carried on by worker, his legal personal representatives or his dependents, Board may pay to that person from money remaining in its hands after payment of all legal costs incurred in recovering money, amount equal to 25% of gross amount received by Board, but in any case when payment is made to worker under clause (b) payment to worker under this clause shall be made only to extent by which 25% of money received exceeds payment made to worker under clause (b) and (d) if balance of money remaining in Board's hands after payment of all legal costs incurred in recovering money and after payment of amounts, if any, under clauses (b) and (c) exceeds costs of accident to Board, including capital cost of any pension award, excess shall be paid over to worker, his legal personal representatives or his dependents, as case may be. A worker is not required to pay his S.E.F. 44 benefits (underinsured motorist protection) to the Board which is otherwise subrogated to his claim. *W.C.B. v. Peters*, (1990) 108 A.R. 396 (C.A.).

Section 23. Abolishes right of action against any employer, or any worker of employer, in industry within scope of this Act. This section withstood a challenge on the basis of whether it violated the Canadian Charter of Rights and Freedoms, the court holding that the right to sue is a pure economic right not fundamental to human

life or survival. *Budge v. Calgary*, (1991) 111 A.R. 228 (C.A.)

Benefits. Act sets out scale of benefits payable from Fund.

Compensation. Section 24 provides that subject to this Act, compensation under Act is payable to worker who suffers personal injury by accident, unless injury is attributable primarily to serious and wilful misconduct of worker, and to dependents of worker who is seriously disabled as result of accident notwithstanding that injury is attributable primarily to serious and wilful misconduct of worker.

If worker is found dead at place where worker had right, during course of his employment, to be, it is presumed that his death was result of personal injury by accident arising out of and during course of his employment, unless contrary is shown.

If accident arose out of employment, unless contrary is shown, it is presumed that it occurred during course of employment, and if accident occurred during course of employment, unless contrary is shown, it is presumed that it arose out of employment.

If worker is required as condition of his employment to attend any classes or take any course of instruction, classes or course of instruction are, for purposes of this act, deemed to be part of his employment.

If worker suffers disablement from or because of any occupational disease and at some time during 12 months preceding disablement was employed in industry or process deemed by regulations to have caused that disease, disease is deemed to have been caused by that employment unless contrary is shown.

If worker suffers disablement or potential disablement caused by occupational disease, date of accident for purposes of this Act is deemed to be (a) in case of disablement, date disablement occurs, and (b) in case of potential disablement, date potential disablement comes to Board's attention (§24).

Time Limits for Claims. Subsection 26 (1). Subject to subsection (2) Board shall not pay compensation (a) to worker unless worker makes claim to Board within 24 months after date of accident, or (b) to dependant unless dependant makes claim to Board within 24 months after date of death of worker.

Subsection 26 (2) If worker or dependant does not make claim within time prescribed by subsection (1) Board may nevertheless pay compensation if it is satisfied there are reasonable and justifiable grounds for claim not being made within prescribed time. §27. Intervention by Lieutenant Governor in Council. Notwith-

standing anything in this Act, if, after considering report and recommendations of Ombudsman, Lieutenant Governor in Council is of opinion that injustice or hardship to worker has resulted or will result, Lieutenant Governor in Council may direct Board (a) to pay to worker from Accident Fund amount that Lieutenant Governor in Council considers appropriate, or (b) to refer matter to Court of Queen's Bench for assessment of damages and to pay to worker from Accident Fund amount of any damages so assessed.

Confidentiality of Records. Act provides that all Board records are privileged and not admissible in evidence without Board consent (§148). However, the court has jurisdiction to compel production of relevant documents. *Jahnke v. Wylie*, (1993) 13 Alta. L.R. (3d) 31 (Q.B.).