

# DIGEST OF INSURANCE LAW

## ARKANSAS

Not revised for this Edition

### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

There are number of inferior courts of limited original civil jurisdiction such as justice of peace, district and county courts.

Arkansas Constitutional Amendment 80, having taken effect on July 1, 2001, eliminated separate courts of law and courts of equity. Circuit Courts are general jurisdiction trial courts. Effective January 1, 2002, Circuit Courts shall consist of five subject matter divisions: criminal, civil, probate, domestic relations, and juvenile.

#### Appellate Courts

Circuit Court is Appellate Court involving all appeals from justice of peace court or municipal court. Appeals must be taken within thirty days after judgment is rendered.

Court of Appeals was created by Amendment 58 to Constitution of State of Arkansas which was approved by electorate in general election of November 1978. Legislature implemented Amendment 58 by adoption of Act 208 of 1979. Judges are selected from six judicial districts by popular election. Court of Appeals was created to hear appeals from Chancery and Circuit Courts and to achieve equalization of appellate workload between Supreme Court and Court of Appeals. There exists no appeal as matter of right from Court of Appeals to Supreme Court, however certiorari may be granted in limited number of cases. Court of Appeals is court of final authority in area of its own jurisdiction.

Possibility that Court of Appeals may have been wrong is not basis for review by Supreme Court. *Moose v. Gregory*, 267 Ark. 86, 590 S.W.2d 662 (1979). Nor does appeal of right lie from tie-vote of Court of Appeals. *Perkins v. Perkins*, 267 Ark. 112, 589 S.W.2d 29 (1979).

Supreme Court has, except in special cases, appellate jurisdiction only, co-extensive with state. It has general superintending control over all inferior courts of law and, in addition to appellate and supervisory jurisdiction, has power to issue writs of error, supersedeas, certiorari,

habeas corpus, prohibition, quo warranto, and other remedial writs and to hear and determine same. In exercise of original jurisdiction Supreme Court has power to issue writs of quo warranto to Circuit Judges.

All appeals from Circuit Court are taken to either Supreme Court or Court of Appeals. Appeals to Supreme Court are no longer allowed as matter of right from judgment of Circuit Court. Rule 1-2 of Rules of Supreme Court and Court of Appeals regulates distribution of cases between two appellate courts. Supreme Court has modified Rule 1-2 through issuance of number of per curiam orders in effort to establish equal distribution of appeals. Ordinarily, notice of appeal must be filed in trial court within thirty days after entry of judgment or decree appealed from, and appeal must be docketed in appellate court within ninety days from filing of notice of appeal. This ninety day period may be extended by trial court, but in no event can extension go beyond seven months from date of entry of judgment or decree.

### LAW

#### Abbreviations

Ark. – Supreme Court Reports.  
Ark. App. – Arkansas Court of Appeals Reports.  
Ark. Code Ann. – Arkansas Code Annotated 1987.  
Ark. Stat. Ann. – Arkansas Statutes Annotated 1947.  
F.2d – Federal Reporter, Second Series.  
F.3d – Federal Reporter, Third Series.  
F. Supp. – Federal Supplement.  
F. Supp. 2d – Federal Supplement, Second Series.  
S.W. – South Western Reporter.  
S.W.2d – South Western Reporter, Second Series.  
S.W.3d – South Western Reporter, Third Series.  
AMI – Arkansas Model Jury Instructions – Civil, 2008.

### ACCIDENT AND HEALTH INSURANCE

(Included in “Accident and Health Insurance”-Ark. Code Ann. §23-62-103, 2001 Repl.)



Relationship of accident to disease or other causes. Accidental injury may be found to have been cause of death within meaning of accident policy if it set in motion chain of events that resulted in insured's death, even though some other condition may also have contributed to final outcome. *Key Life Ins. Co. v. Gullede*, 245 Ark. 74, 431 S.W.2d 245 (1968). Clause in accident policy which excepts death caused or contributed to by disease or sickness does not preclude liability when death results from cooperation of disease and accidental injury. *Hartford Life Ins. v. Catterson*, 247 Ark. 263, 445 S.W.2d 109 (1969). There is no liability under accident policy if accident is proximately caused by disease. *Jackson v. Southland Life Ins. Co.*, 239 Ark. 576, 393 S.W.2d 233 (1965).

It is question of fact for jury as to whether physical infirmity was proximate cause of accident. *Farm Bureau Mut. Ins. Co. v. FuQua*, 269 Ark. 574, 599 S.W.2d 427 (Ct. App. 1980).

### ACCIDENTAL MEANS

If victim has died as result of violent and external means, presumption is that it was accidental and burden is on insurance company to show otherwise. *Aetna v. Little*, 146 Ark. 70, 225 S.W. 298 (1920). Presumption against suicide arises even where it is shown that death was self-inflicted until contrary is made to appear. *Wallin v. Insurance Co. of North America*, 268 Ark. 847, 596 S.W.2d 716 (Ct. App. 1980).

In following cases death or injury of insured was held to have been by accidental means: railroad machinist caught eighty pound cylinder head to keep it from falling; strain ruptured blood vessel in his stomach and death resulted. *Standard Life v. Schmaltz*, 66 Ark. 588, 53 S.W. 49 (1899). Insured was mutilated by unknown person while asleep in his bed at home. *Harrison v. Business Men's Acc. Ass'n*, 133 Ark. 163, 202 S.W. 34 (1918). Insured suffered cardiac arrest during operation to amputate two of his injured fingers; death resulted four days later. *Key Life Ins. Co. v. Gullede*, 245 Ark. 74, 431 S.W.2d 245 (1968).

In following cases death or injury of insured was held not to have been caused by accidental means. Insured was shot and killed while committing felony. *Price v. Business Men's Assur. Co.*, 188 Ark. 637, 67 S.W.2d 186 (1934). Insured's injuries were caused by enemy shell in WW I. *Martin v. People's Mut. Life*, 145 Ark. 43, 223 S.W. 389, 11 ALR 1111 (1920). Insured suffered heart attack and died after walking from warm room into cold air in performance of his duties as foreman of band saw department. *Duke v. Life & Cas. Ins.*, 218 Ark. 686, 238 S.W.2d 631 (1951).

Insured need not be free of negligence where death results from inhalation of carbon monoxide fumes for death to be accidental. *Farm Bureau Mut. Ins. Co. of Ark., Inc. v. Parrish*, 265 Ark. 161, 577 S.W.2d 397 (1979).

See "DISABILITY."

### ADJUSTERS

Adjusters must be licensed, except that foreign adjuster may be sent into this state on behalf of insurer for purpose of investigating particular loss or for adjustment of losses resulting from catastrophe if adjuster provides written notice of such activity to commissioner within ten business days of entering state. Ark. Code Ann. §23-64-209.

### AGE

See "AUTOMOBILES"; "INFANTS"; "LIABILITY INSURANCE"; "NEGLIGENCE."

### AGENTS AND BROKERS

An agent is individual, firm, limited liability company, or corporation who is required to be licensed as insurance producer by Insurance Commissioner. Ark. Code Ann. §23-64-102 (1) (A). "Resident agent" is agent whose residence is in or who may vote in this state, or who is licensed as resident insurance producer by Commissioner. *Id.* §23-64-102 (2) (A) (i). Non-resident solicitors of such insurance shall be licensed by state. Ark. Code Ann. §23-64-508. Agents may share commissions under certain conditions. *Id.* §23-64-513. Company must be authorized before agent can solicit. Ark. Code Ann. §23-65-102. Druggist issuing auto accident insurance policies with sales in effort to increase sales held soliciting agent within purview of statute. *Gentry v. Smith*, 191 Ark. 214, 85 S.W.2d 724 (1935). These statutes probably have no effect upon agent's powers to bind principal, nor do they change general laws of agency. *Continental v. Erion*, 186 Ark. 1122, 57 S.W.2d 1025 (1933) (decided under previous enactment). Insurer may pay or assign commissions to insurance agency or persons who do not sell insurance in state unless payment in rebate, violation of Trade Practices Act, or violation of federal Gramm-Leach-Bliley Act, Pub. L. No. 106-102. See Ark. Code Ann. §23-64-513.

Duties and Authority. Neither agency nor authority of agent can be established by proof of declarations of such alleged agent. *Daly v. Arkadelphia*, 126 Ark. 405, 189 S.W. 1053 (1916). Principal not bound on verbal contract of fidelity insurance where apparent authority of agent not established by evidence. *Central Surety v. O. & S. Co.*, 193 Ark. 523, 101 S.W.2d 167 (1937). Agent's



authority to countersign and issue policies and riders on printed forms when premium was paid did not constitute apparent authority to extend risk contained in printed policy by oral representation. *Batesville Ins. & Finance Co. v. Butler*, 248 Ark. 776, 453 S.W.2d 709 (1970). Oral contract entered into by agent with apparent authority is binding on insurance company. *Constitution Life Ins. Co. v. M. D. Thompson & Son Inc.*, 251 Ark. 784, 475 S.W.2d 165 (1972). Insurance agent, who undertakes to procure policy for another protecting against designated risk, has duty to exercise "reasonable care" to perform obligation he has assumed. *Martin v. Langley*, 252 Ark. 121, 477 S.W.2d 473 (1972).

Agent who orders policy through Assigned Risk Plan is agent for insured, not insurer. *Manufacturers v. Hughes*, 229 Ark. 503, 316 S.W.2d 827 (1958). Salesman selling auto club memberships, held not selling insurance under Ark. Code Ann. §23-60-102. *Arkansas Motor Club v. Arkansas Employment Security Div.*, 237 Ark. 419, 373 S.W.2d 404 (1963) (decided under previous enactment).

Fraud. Insurance agent perpetrates fraud upon insurance company by making false and fraudulent representations upon which insurance is obtained if he is in collusion with applicant and even though he is acting within apparent scope of authority. This fraud will vitiate policy. *Bankers' Reserve v. Crowley*, 171 Ark. 135, 284 S.W. 4 (1926). But where false information is submitted by agent without knowledge or collusion of applicant, insurance company shall be bound. *Time Ins. Co. v. Graves*, 21 Ark. App. 273, 734 S.W.2d 213 (1987).

General Scope of Agency. *Dixie Ins. Co. v. Joe Works Chev, Inc.*, 298 Ark. 106, 766 S.W.2d 4 (1989). Although agent's acts within apparent scope of authority had effect of waiving provision that fire insurer would not be liable for loss occurring while hazard was increased, agent was not liable for amount insurer was required to pay for fire loss occurring during time hazard was increased but was only liable for uncollected premium due to increased hazard. *Millers Mut. Fire Ins. Co. of Texas v. Russell*, 246 Ark. 1295, 443 S.W.2d 536 (1969).

Knowledge of Agents. No statutory regulations. General law applicable to effect that knowledge of agent is imputable to principal. And where agent's duty to ascertain applicant's physical condition, company bound by agent's knowledge except if he colludes with applicant. *Bankers' Reserve v. Crowley*, 171 Ark. 135, 284 S.W. 4 (1926). Soliciting agent did not include in application information re diabetes disclosed to him by insured. Company bound. *Pyramid v. Trantham*, 214 Ark. 791, 217 S.W.2d 924 (1949). Distinction is made be-

tween knowledge of soliciting agent and general agent. *Hunt v. Pyramid Life Ins.*, 21 Ark. App. 261, 732 S.W.2d 167 (1987).

Rider stating policy would not cover loss resulting from heart trouble within 2 years was not binding although policy had provision stating that no change should be valid unless approved and endorsed on policy by president, since vice-president's letter to insured that rider had been removed at end of 2 years showed construction placed on rider by company. *American Republic Life Ins. Co. v. Flynn*, 218 Ark. 825, 238 S.W.2d 937 (1951).

Though knowledge of agent may be held to bind insurer, coverage will not be extended to risk specifically excluded. *Metropolitan v. Stagg*, 215 Ark. 456, 221 S.W.2d 29 (1949); *Peoples Protective Life Ins. Co. v. Virginia Smith*, 257 Ark. 76, 514 S.W.2d 400 (1974). Where insured and agent intended policy to cover insured's operation in two states, and policy as issued covered only operations in one state, policy was properly reformed to cover insured's operations in both states. *Coal Operators v. F. S. Neely*, 219 Ark. 579, 243 S.W.2d 744 (1951).

Fire insurer bound by act of agent of its special agent. *Security v. Van Norman*, 195 Ark. 200, 111 S.W.2d 561 (1937). Agent of fire insurer held to be more than soliciting agent and company bound by his knowledge of additional insurance. *Home v. Cole*, 195 Ark. 1002, 115 S.W.2d 267 (1938).

Liability of. Where fire insurer properly directed agent to cancel policy, who negligently failed to do so and loss occurred, he is liable to insurer for amount it paid insured. *Michigan Fire & Marine v. Rose*, 196 Ark. 1100, 121 S.W.2d 63 (1938). Agent liable to employer for compensation payments to employee when agent negligently failed to procure compensation insurance for employer. *Derby v. Blankenship*, 217 Ark. 272, 230 S.W.2d 481 (1950).

Agent who undertakes to procure coverage affording protection against designated risk has duty to exercise reasonable care to perform obligation he has assumed. *Martin v. Langley*, 252 Ark. 121, 477 S.W.2d 473 (1972).

License and Regulation. Agents or representatives of life department of insurance underwriter may waive forfeiture of life insurance policy, although policy provides that only president, vice-president or secretary has power to modify or to waive provisions of policy. *National Investors Life Ins. Co. v. Tudor*, 264 Ark. 361, 571 S.W.2d 585 (1978). Provision in insurance policy which is essentially for benefit of insurer can be waived by in-

surer through conduct of its agent acting within real or apparent scope of his authority. *Id.*

Where insurance agent had license to solicit insurance and make applications which were “brokered” through insurance agency, he was soliciting agent. *Continental Ins. Co. v. Stanley*, 263 Ark.638, 569 S.W.2d 653 (1978). Notice to soliciting agent is not notice to insurance company. Soliciting agent has no authority to waive any requirements of insurance policy, nor can his knowledge be imputed to company he represents. *Id.*

Measure of damages to growing crops depends upon stage of maturity of crops. *Dickerson Constr. Co. v. Dozier*, 266 Ark. 345, 584 S.W.2d 36 (1979).

### ARBITRATION

Arbitration is strongly favored by public policy and is looked upon with approval by courts as less expensive and more expeditious means of settling litigation and relieving docket congestion. *Lancaster v. West*, 319 Ark. 293, 891 S.W.2d 357 (1995). Doubts and ambiguities of coverage in arbitration agreement should be resolved in favor of arbitration. *Wessell Bros. Foundation Drilling Co. v. Crossett Pub. Sch. Dist. No. 52*, 287 Ark. 415, 701 S.W.2d 99 (1985). To prevail on motion to compel arbitration, party must establish existence of agreement to arbitrate arbitratable claims, and that no waiver of right to arbitrate has occurred. 9 U.S.C.A. §1 *et seq.*; *Bob Ladd, Inc. v. Adcock*, 633 F. Supp. 241 (E.D. Ark. 1986).

### ATTORNEYS

An attorney’s new firm is disqualified from representing party by reason of attorney’s former association with firm representing opposing party only when attorney involved actually has knowledge acquired during former association. Thus, attorney’s prior association creates only rebuttable presumption of disqualification and question of access to confidential information is to be determined by examining facts of particular case. Rules of Prof’l Conduct R. 1.10, 1.10 (b); *Burnette v. Morgan*, 303 Ark. 150, 794 S.W.2d 145 (1990).

The three-year statute of limitations for actions founded on any contract or liability governs attorney malpractice claims. *Smith v. Elder*, 312 Ark. 384, 849 S.W.2d 513 (1993). In order to show damages and proximate cause in legal malpractice action, plaintiff must show that but for alleged malpractice, result would have been different in underlying action. *Vanderford v. Penix*, 39 F.3d 209 (8th Cir. 1994) (applying Arkansas law). Punitive damages, if allowable, in action by client against attorney for neglect of duty requires showing of more than gross negligence, such as element of intentional wrong or conscious indifference. *Id.*

Trial court is required to determine “just” fees for attorneys appointed to represent indigent defendants. *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991), *appeal after remand State v. Independence County*, 312 Ark. 472, 850 S.W.2d 842 (1993). Each county establishes fund to pay reasonable and necessary costs incurred in defense of indigent. Ark. Code Ann. §14-20-102. Among factors that should be taken into account in determining reasonableness of attorney’s fee are attorney’s skill and experience, relationship between parties, difficulty of services, extent of litigation, time and labor devoted to cause, fee customarily charged, and results obtained. *Harper v. Shackelford*, 41 Ark. App. 116, 850 S.W.2d 15 (1993). Attorney’s fees are allowed only by statute and, in absence of statute authorizing payment of such fees in suit for rent allegedly owed under lease agreement, fees were erroneously awarded. *Brady v. Alken, Inc.*, 273 Ark. 147, 617 S.W.2d 358 (1981).

### AUTOMOBILES

See “NEGLIGENCE.”

See Law Digest Tables.

Certificate of title to motor vehicle is not title itself, but only evidence of title. *Masterson v. Tomlinson*, 244 Ark. 208, 424 S.W.2d 380 (1968). Assignee of certificate of title to automobile without consideration stood in no better position than assignor who held title upon resulting trust in favor of another. *Id.*

Statutes which prohibit operating motor vehicle without license and which require driver to show proof of either liability insurance or financial responsibility were not unconstitutional on the ground that they abridged privileges of citizens. State has legitimate interest in providing that persons who operate motor vehicles have financial ability to pay for damages they might cause. U.S.C.A. Const. Amend. 14, §1; Ark. Code Ann. §§27-16-303 (a) (1), 27-22-104 (a); *Stevens v. State*, 319 Ark. 640, 893 S.W.2d 773 (1995), *cert. denied*, 516 U.S. 860, 116 S. Ct. 168 (1995).

Motor-driven cycle which was used on public streets was “motor vehicle” which had to be registered and licensed and equipped with standard equipment. Ark. Code Ann. §§27-14-207, 27-19-206, 27-20-101 (2), (3), 27-20-104, 27-20-105; *Nationwide Mut. Ins. Co. v. Worthey*, 314 Ark. 185, 861 S.W.2d 307 (1993).

It is unlawful and punishable for any person to operate or be in actual physical control of motor vehicle if at that time there was 0.08% or more by weight of alcohol in person’s blood as determined by chemical test of person’s blood, urine, breath, or other bodily substance. Ark. Code Ann. §5-65-103 (a), (b); *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996). Violation of statute

creating felony offense for fourth driving while intoxicated (DWI) offense within three years of first offense required only that defendant have been convicted of having committed, within relevant time frame, three prior offenses and does not require offenses to be designated as first, second and third DWI offenses. Ark. Code Ann. §§5-65-103, 5-65-111 (b) (3); *Johnson v. State*, 55 Ark. App. 117, 932 S.W.2d 347 (1996).

Accident. Accident coverage not available to insured who drowned after removal from car. *Continental Cas. v. Hawkins*, 236 Ark. 302, 365 S.W.2d 722 (1963).

Age. Minimum age for operator's license is 16 years; however, restricted license may be provided to any person who is at least 14. Ark. Code Ann. §27-16-604. Negligence of driver under 18 years of age is imputed to parents, guardian, employer or other responsible person who signs application of minor for driver's license. Ark. Code Ann. §27-16-702; *Garrison v. Funderburk*, 262 Ark. 711, 561 S.W.2d 73 (1978). See AMI 802-804.

Agency. Arkansas has rejected dangerous agency theory and has consistently held that owner is not liable for damages occasioned by operation of his automobile by reason solely of his ownership of car. Owner can be held liable only if driver is acting as servant of owner in prosecution of master's business under doctrine of respondeat superior, or as agent of owner on owner's business. *Healey v. Cockrill*, 133 Ark. 327, 202 S.W. 229 (1918). When regular employee is driving vehicle owned by employer, and accident occurs, there is presumption of fact that employee is acting within scope of his employment. It is presumption of fact which imposes on other party, against whom presumption is directed, burden of overcoming this presumption. *Nipper v. Brandon Co. & Johnson*, 262 Ark. 17, 553 S.W.2d 27 (1977). Owner held liable although servant exceeded authority, but had not completely abandoned his principal's business. *Campbell Co. Baking v. Clark*, 175 Ark. 899, 1 S.W.2d 35 (1927). Statute authorizing issuance of driver's license for child under 18 years imposes vicarious liability on parent who is required to sign application for minor child's driver license whether he does so or not. Ark. Code Ann. §27-16-702 (b), (c); *Garrison v. Williams*, 246 Ark. 1172, 442 S.W.2d 231 (1969); *Jones v. Davis*, 300 Ark. 130, 777 S.W.2d 582 (1989). Defenses available to minor child are equally available to his parents. *Kyser v. Porter*, 261 Ark. 351, 548 S.W.2d 128 (1977).

Where parent allows child under 14 to drive vehicle, per se such parent is liable for negligence where same is proximate cause of injuries. *Carter v. Montgomery*, 226 Ark. 989, 296 S.W.2d 442 (1956).

Assumption of Risk. Treated as fault to be compared with fault of defendant and not as complete bar to recovery. Ark. Code Ann. §16-64-122.

Coverage. Purchaser of stolen automobile not entitled to recover under policy containing statement that he was sole owner of vehicle. *Southern Farmers v. Motor Finance*, 215 Ark. 601, 222 S.W.2d 981 (1949).

Personally owned automobile used in lieu of school bus listed under policy held to be temporary substitute vehicle and was covered. *Southern Farm Cas. Ins. v. Noggle*, 246 Ark. 35, 437 S.W.2d 215 (1969). Recovery denied to party whose automobile was damaged by tornado where premium was paid for "collision or upset" coverage but not for loss caused by "windstorm." *Mercury v. McClellan*, 216 Ark. 410, 225 S.W.2d 931 (1950). Insured sold car; took bad check. No "theft or larceny" where policy excluded voluntary parting induced by fraud, etc. *Galloway v. Marathon*, 220 Ark. 548, 248 S.W.2d 699 (1952). Under policy option to pay loss or make repairs, election to repair must be made within reasonable time. *Resolute v. Bailey*, 221 Ark. 419, 253 S.W.2d 771 (1952).

Service of Process upon Non-resident Motorists. Service on, effected by serving summons on Secretary of State and sending to defendant, by first-class mail, notice of suit and copy of summons. Thereupon courts of state acquire jurisdiction of case and non-resident defendants so as to authorize personal judgment against such non-residents. Ark. Code Ann. §16-58-120 (b).

Service upon resident owner, operator, chauffeur or driver subsequently absenting himself physically from State may be effected by serving summons on Secretary of State and sending to defendant, by first-class mail, notice of suit and copy of summons. *Id.* §16-58-121 (b) (1).

Service may be had on owner or operator of motor bus, coach or truck, operating in this state, by serving any agent or driver. *Yocum v. Oklahoma*, 191 Ark. 1126, 89 S.W.2d 919 (1936) (holding statute constitutional); see Ark. Code Ann. §16-58-121. This act applicable solely to actions for damages caused by negligent operation of busses, etc., on state highways and not to poisoned Coca-Cola suit. *Coca Cola v. Bacon*, 193 Ark. 6, 97 S.W.2d 74 (1936). Act includes suits for personal injuries resulting from assault by carrier's driver. *Dixie v. Toler*, 197 Ark. 1097, 126 S.W.2d 618 (1939). Action may be brought against individual, co-partnership, or association by serving agent in charge where more than one office or place of business maintained in state. Ark. Code Ann. §16-60-105; *Agee v. Snodgrass*, 196 Ark. 266, 117 S.W.2d 26 (1938). Motor vehicle accident on private property not within Non-Resident Motorists

Statute. *Langley v. Bunn*, 225 Ark. 651, 284 S.W.2d 319 (1955).

Actions for personal injury, property damage or wrongful death shall be brought in county where accident occurred, or in county where injured or killed resided at time of injury, and service may be had upon any party to such action or upon agent who is regular employee of such party and on duty at time of service. Ark. Code Ann. §§16-60-112 and 16-58-118. Ark. Code Ann. §16-60-113 (a) provides that all actions for damage to personal property, whether arising from contract, tort or conversion shall be brought in county where damage occurred, or property was converted, or where owner of property resides. Ark. Code Ann. §16-60-113 (b) provides that any action for any type fraud may be brought in county where plaintiff resides or defendant is located, where one or more of fraudulent acts performed, or in county where any fraudulent act originated or was communicated from.

### AVIATION

Although federal aviation regulations, which have force and effect of law, provide that pilot retains primary responsibility for movement of his aircraft, before pilot can be held legally responsible, he must be supplied with those pertinent facts that he is not in position to know for himself. *Martin v. United States*, 448 F. Supp. 855 (1977), *aff'd in part, rev'd in part*, 586 F.2d 1206 (1978). In wrongful death action brought against United States based on negligence of air controller, Government failed to bear its burden of establishing by preponderance of evidence that two pilots in airplane's front seats, or either of them, were negligent in descending below minimum descent altitude. *Id.*; 28 U.S.C.A. §§1346 (b), 2671 *et seq.*

### BROKERS

See "AGENTS AND BROKERS."

### BURGLARY INSURANCE

Prohibited ownership, occupancy, or changed circumstances avoids burglary policy. *National Surety Co. of New York v. Fox*, 174 Ark. 827, 296 S.W. 718 (1927). Third party donee beneficiary under burglary insurance policy must file proof of loss as required under terms of policy. *Cook v. U.S.F.&G.*, 216 Ark. 743, 227 S.W.2d 135 (1950).

### CANCELLATION

Notice of cancellation and termination of automobile liability, physical damage and collision insurance coverages effective only if based on one or more reasons

set forth in Act. No such notice effective unless given at least 20 days prior to effective date of cancellation. Where cancellation is for nonpayment of premium, at least 10 days notice accompanied by reason shall be given. Ark. Code Ann. §§23-89-303 and 23-89-304. Cancellation may be made with consent of both parties. *Missouri State v. Hill*, 109 Ark. 17, 159 S.W. 31 (1913). Insurance company can exercise right to cancel policy without consent of insured only when such right is reserved in policy, and then can be exercised only strictly as therein provided. *Commercial Union v. King*, 108 Ark. 130, 156 S.W. 445 (1913). But cancellation deferred to date of actual refund of unearned premium where insured made demand within policy period. *General Exchange v. Coffelt*, 192 Ark. 468, 92 S.W.2d 213 (1936). Cancellation effective where provision as to notice strictly followed whether insured receives it or not. *Home v. Jones*, 192 Ark. 916, 95 S.W.2d 894 (1936); *but see National Investors Fire & Cas. Ins. v. Chandler*, 4 Ark. App. 116, 628 S.W.2d 593 (1982) (notice of cancellation mailed to insured insufficient to cancel policy absent express policy provisions providing for constructive notice). Whether cancellation is effective is jury question where proof of strict compliance with policy provisions was controverted by testimony of insureds attorney that company's adjuster told him no notice was mailed. *Home Ins. v. Hall*, 192 Ark. 283, 91 S.W.2d 609 (1936). Notice of cancellation, however, may be waived by insured. *Phoenix v. State*, 76 Ark. 180, 88 S.W. 917 (1905). Notice of cancellation of fire insurance policy must be unequivocal. Burden of proving effective cancellation is on insurer, and company liable where no proof that mortgagee was agent of insured in authorizing cancellation. *North River v. Thompson*, 190 Ark. 843, 81 S.W.2d 19 (1935). Policy provided that acceptance of any renewal premium would be optional, insurer could, by refusing to accept payment of monthly premium, permit policy to expire. *Jordan v. Washington Nat'l Ins. Co.*, 219 Ark. 530, 243 S.W.2d 367 (1951). When insured notifies insurer of change of address, notice to insured at original address stated in policy is not effective notice, in absence of actual receipt or knowledge thereof. *Merrimack Mut. Fire Ins. Co. v. Scott*, 219 Ark. 159, 240 S.W.2d 666 (1951).

Cancellation on one day's notice not reasonable time and void where policy stated no specific time. *Commercial v. Waller*, 190 Ark. 636, 80 S.W.2d 78 (1935).

Cancellation ineffective where refund of premium not made within reasonable time. *Riverside Ins. Co. v. Parker*, 237 Ark. 594, 375 S.W.2d 225 (1964).

In action by insurance agent to recover from insured premium which agent said he was obligated to re-



mit to company, insured had burden of proving affirmative defense of cancellation to avoid payment of premium. *Yant v. Bowker*, 248 Ark. 826, 454 S.W.2d 84 (1970).

Insurer's acceptance of premium due constitutes waiver of right to assert forfeiture on ground that previous premium remained unpaid. *Dickerson v. Equitable Life Assur. Soc'y*, 631 F.2d 99 (8th Cir. 1980) (applying Arkansas law).

Where agent of insurer issued thirty day oral binder which was cancelled when insured failed to send requested information, agent's subsequent statements were ambiguous and did not preclude finding of second thirty day oral binder. *Farm Bureau Mut. Ins. Co. v. Milburn*, 269 Ark. 384, 601 S.W.2d 841 (1980).

### CHATTEL MORTGAGE

See "FIRE INSURANCE."

Under usual loss payable clause in fire policy, insurer is protected if, after adjusting loss with insured, proper proportionate share of settlement is paid to mortgagee or lien-holder under loss payable clause. *Cash v. Home*, 197 Ark. 670, 125 S.W.2d 99 (1939).

### CONSTRUCTION OF POLICY

Provisions of insurance policy must be construed most strongly against insurer that prepared it, and if reasonable construction could be placed on contract that would justify recovery, it would be duty of court to so construe. *Southern Farm Bureau Cas. Ins. Co. v. Pettie*, 54 Ark. App. 79, 924 S.W.2d 828 (1996). Terms of insurance policy are not to be rewritten under rule of strict construction against company issuing policy so as to bind insurer to risk which is plainly excluded and for which it was not paid. *Smith v. Southern Bureau Cas. Ins. Co.*, 353 Ark. 188, 114 S.W.3d 205 (2003). Language in insurance policy is to be construed in its plain, ordinary, and popular sense. *Tri-State Ins. Co. v. Sing*, 41 Ark. App. 142, 850 S.W.2d 6 (1993).

### DAMAGES

Where cause and existence of damages have been established, recovery will not be denied merely because damages are difficult to ascertain. *Taylor v. Green Memorial Baptist Church*, 5 Ark. App. 101, 633 S.W.2d 48 (1982). Motor Vehicles: Double damages, attorney's fee and court costs upon failure to pay meritorious claim of \$1000 or less. Ark. Code Ann. §27-53-402.

Income and Earning Capacity. Losses must be shown with reasonable certainty. *Swenson v. Hampton*, 244 Ark. 104, 424 S.W.2d 165 (1968). Loss of sick

leave is recoverable. *Swindle v. Thornton*, 229 Ark. 437, 316 S.W.2d 202 (1958). There can be loss of future income with no loss of earning capacity. *Missouri Pacific Railroad Co. v. Hendrix*, 169 Ark. 825, 277 S.W. 337 (1925), *cert. denied*, 270 U.S. 651 (1926). Loss of capacity with no loss of past or present income. *Hogan v. Hill*, 229 Ark. 758, 318 S.W. 2d 580 (1958). Income increased. *Ward Body Works v. Smallwood*, 227 Ark. 314, 298 S.W.2d 332 (1957). Evidence did not warrant instruction as to loss of ability to earn in future. *Waterfield v. Quimby*, 277 Ark. 472, 644 S.W.2d 241 (1982).

Pain and Suffering. May be inferred from serious nature of injury. *Scott-Burr Stores v. Foster*, 197 Ark. 232, 122 S.W.2d 165 (1938). Likelihood of future pain and suffering must be shown to "reasonable certainty." *McCord v. Bailey*, 195 Ark. 862, 114 S.W.2d 840 (1938).

Amount depends on circumstances of case. *Hamby v. Haskins*, 275 Ark. 385, 630 S.W.2d 37 (1982). Mental Anguish: May be inferred from degree of physical pain in negligence case. *Chicago, R.I. & P. Ry. Co. v. Caple*, 207 Ark. 52, 179 S.W.2d 151 (1944). Damages recoverable without physical harm where tort was intentional. *Erwin v. Mulligan*, 188 Ark. 658, 67 S.W.2d 592 (1934); *see also Dalrymple v. Fields*, 276 Ark. 185, 633 S.W.2d 362 (1982); *Givens v. Hixson*, 275 Ark. 370, 631 S.W.2d 263 (1982).

It is only proper to enter remittitur when jury award shocks conscience. *Morrison v. Lowe*, 274 Ark. 358, 625 S.W.2d 452 (1981).

No liability of parent for damages caused by child unless parent has: 1) opportunity and ability to control minor child; 2) knowledge of proclivity of child to commit injurious acts; and 3) fails to exercise reasonable care to control child. *Farm Bureau Mut. Ins. Co. v. Henley*, 275 Ark. 122, 628 S.W.2d 301 (1982). Punitive Damages: May be imposed when defendant acted with malice, or with willfulness, wantonness, or conscious indifference to consequences, from which malice will be inferred. *Barlow v. Lowder*, 35 Ark. 492 (1880); *St. Louis I.M. & S.R. Co. v. Dysart*, 89 Ark. 261, 116 S.W. 224 (1909). Jury may consider defendant's financial condition. *Davis v. Richardson*, 76 Ark. 348, 89 S.W. 318 (1905). There is coverage for punitive damages under automobile liability policy. *Southern Farm Bureau Cas. v. Daniel*, 246 Ark. 849, 440 S.W.2d 582 (1969).

*Sharp v. Great Southern Coaches, Inc.*, 256 Ark. 773, 510 S.W.2d 266 (1974), overruled prior Arkansas law which disallowed recovery for loss of use for damages to all vehicles and authorized recovery for loss of use of business vehicle which was repairable. Court approved for inclusion within "loss of use" concept follow-

ing: 1) Rental value or amount which could have been realized by owner by renting out vehicle during period of repairs; 2) Cost of hiring substitute; and 3) Ordinary profits that could have been made from use of vehicle. *Stevens v. Mid-Continent Investments, Inc.*, 257 Ark. 439, 517 S.W.2d 208 (1974) extended rule to permit recovery for loss of use of business vehicle which was totally destroyed, and limited recovery to reasonable time required to replace vehicle. Following two decisions, legislature enacted Ark. Code Ann. §27-53-401, which authorized recovery for loss of use of all vehicles.

It is error to give instruction relative to scar as added fact of damages where scar is not ordinarily visible and does not diminish future earning power of minor boy, even though scar is permanent. *Welter v. Curry*, 260 Ark. 287, 539 S.W.2d 264 (1976).

Ark. Code Ann. §9-25-102 permits owner of property, including certain bodies political or corporate, to recover damages up to limit of \$5,000 from parents of any minor under age of 18 years who is living with his parents and who maliciously or willfully destroys property belonging to other.

Where insured paid for medical bills, less set-offs paid by insurer and any deductible, insured was entitled to statutory penalty and attorney's fee. *Time Ins. Co. v. Boren*, 271 Ark. 183, 607 S.W.2d 412 (Ark. App. 1980); see Ark. Code Ann. §23-79-208. Statutory penalty and attorney's fee have been allowed only in those cases having connection with state of Arkansas. *USAA Life Ins. Co. v. Boyce*, 294 Ark. 575, 745 S.W.2d 136 (1988).

Insurer who complies with Arson Reporting Immunity Statute is immune from civil or criminal liability when he notifies state agency of suspected arson. Insurer is required to notify insured of said notice within ninety days thereafter. Ark. Code Ann. §12-13-303.

Where insured suffers total loss due to fire he is entitled to full amount of policy paid under Arkansas Valued Policy law. Ark. Code Ann. §23-88-101.

Award of penalty and attorney's fees allowed only when recovery is in amount sued for. *Ford Life Ins. Co. v. Jones*, 262 Ark. 881, 563 S.W.2d 399 (1978); *Southern Farm Bureau Life Ins. v. Cowger*, 295 Ark. 250, 748 S.W.2d 332 (1988); Ark. Code Ann. §23-79-208. Pre-judgment interest may be awarded pursuant to Ark. Code Ann. §23-81-118 in addition to awarding statutory penalty and attorney's fees under §23-79-208. *USAA Life Ins. Co. v. Boyce*, 294 Ark. 575, 745 S.W.2d 136 (1988).

Exemplary Damages. *Toney v. Haskins*, 7 Ark. App. 98, 644 S.W.2d 622 (Ark. App. 1983).

For incidents occurring on or after March 25, 2003, The Civil Justice Reform Act of 2003 creates statutory scheme for punitive damages. Pursuant to the Act, plaintiff must prove by "clear and convincing evidence" either that (a) defendant who is liable for compensatory damages maliciously or recklessly continued in a course of conduct or (b) defendant intentionally pursued a course of conduct causing injury or damage. Ark. Cod. Ann. §16-55-206 (1)-(2). Punitive damages not awarded unless compensatory damages first awarded. *Lake v. Lake*, 262 Ark. 852, 562 S.W.2d 68 (1978). For incidents occurring on or after March 25, 2003, punitive damages generated will be limited to the greater of (a) \$250,000 or (b) three times amount of compensatory damages (up to \$1 million). Ark. Cod. Ann. §16-55-208 (a). Cap does not apply if clear and convincing evidence shows that defendant intentionally (and successfully) engaged in conduct designed to harm plaintiff. *Id.* §16-55-208 (b) (1)-(2).

Whenever punitive damages sought for incidents occurring on or after March 25, 2003, any party has option of requesting bifurcated proceeding at least ten days prior to trial. *Id.* §16-55-211 (a) (1). In bifurcated trial, fact finder must first determine that (a) defendant is liable and (b) plaintiff is entitled to compensatory damages, before considering whether to award punitive damages. *Id.* §16-55-211 (a) (2) (A)-(B). Evidence relevant only to establishing punitive damages, such as financial condition of defendant, not admissible in first liability phase. *Id.* §16-55-211 (b).

Pursuant to The Civil Justice Reform Act of 2003, no limits on non-economic damages such as pain, suffering and disfigurement.

## DEATH

See Law Digest Tables.

Damages for Wrongful Death. Personal representative may recover for mental anguish suffered by wife, parent, child, brother, sister or person standing in loco parentis to deceased. Damages allowed for mental anguish suffered by surviving spouse, children, parents and siblings. See *Waldrip v. McGarity*, 270 Ark. 305, 605 S.W.2d 5 (1980). Wrongful Death Actions: Survivorship. See Ark. Code Ann. §16-62-102; *Lowe v. United States*, 662 F. Supp. 1089 (W.D. Ark. 1987). Punitive damages, respondent superior, and wrongful death. *Fields v. Huff*, 510 F. Supp. 238 (E.D. Ark. 1981). Punitive damages are recoverable in wrongful death actions. *Vickery v. Ballentine*, 293 Ark. 54, 732 S.W.2d 160 (1987).

Presumption of Death. Any person absenting himself beyond limits of state for five years successively is



presumed to be dead. Ark. Code Ann. §16-40-105. Construed in *Wilks v. Mutual Aid*, 135 Ark. 112, 204 S.W. 599 (1918). Neither death nor fact of absence can be inferred from mere disappearance. *Metropolitan v. Fry*, 184 Ark. 23, 41 S.W.2d 766 (1931). Statute inapplicable where statutory period of time had not expired as of date of lapse of policy. *Aetna Life v. Robertson*, 195 Ark. 237, 112 S.W.2d 436 (1937). "Residence" and "absence" from state may be proved by circumstantial evidence. *Metropolitan v. Williams*, 197 Ark. 883, 125 S.W.2d 441 (1939).

Time to Sue. Action is of statutory origin and must be brought within 3 years as required by statute. General savings clause allowing infants to bring action within 3 years after attaining full age does not apply. *Sandusky v. First Electric Co-op*, 266 Ark. 588, 587 S.W.2d 37 (1979).

Upon death of insured proceeds payable under disability insurance policy shall include unearned premiums. Ark. Code Ann. §23-85-134.

Provision for settlement of payment for death of insured shall not exceed two months after receipt of proof of death or other required proof. Ark. Code Ann. §23-81-113. Evidence: *Stull v. Ragsdale*, 273 Ark. 277, 620 S.W.2d 264 (1981).

## DISABILITY

Disability insurance generally. Ark. Code Ann. §23-85-101 *et seq.* Under provision in life insurance policy defining it as "such as to prevent insured then and at all times thereafter from performing any work or conducting any business for compensation or profit," held that total disability does not mean absolute physical disability on part of insured to transact any kind of business pertaining to his occupation; it is sufficient to prove that injury wholly disabled him from doing all of substantial and material acts necessary to be done in prosecution of his business. *Aetna v. Phifer*, 160 Ark. 98, 254 S.W. 335 (1923). "Total disability" depends largely upon occupation and capabilities of person under disability, all of which should be considered. *Aetna v. Person*, 188 Ark. 864, 67 S.W.2d 1007 (1934). Examples: Insanity, preventing insured from being entrusted with responsibility is total disability. *Old Colony v. Julian*, 175 Ark. 359, 299 S.W. 366 (1927). Loss of leg below knee raises jury question of total disability. *Prudential v. Lane*, 189 Ark. 7, 70 S.W.2d 43 (1934).

Insurance against permanent and total disability is not insurance of one's business but is guaranty of continued personal fitness to perform substantial and material acts necessary in conduct of one's business. *John Hancock v. Magers*, 199 Ark. 104, 132 S.W.2d 841

(1939). Clause "prevented from engaging in any occupation whatever for remuneration or profit." Held: no recovery where insured changed occupation and was profitably employed. *New York Life v. Ashby*, 199 Ark. 881, 138 S.W.2d 65 (1940). Total disability provisions do not require that insured be absolutely helpless, rather they mean disability to perform substantial and material acts of his occupation in usual way. *Metropolitan Life v. Hawley*, 210 Ark. 855, 198 S.W.2d 171 (1946). Even though insured's earning capacity was not completely destroyed, issue of total disability one of fact for jury. *Alexander v. Mutual*, 232 Ark. 348, 336 S.W.2d 64 (1960). Jury instruction that insured was totally disabled within meaning of policy if he was unable to perform any of substantial and material acts necessary to prosecution of his business: Approved. *Avemco v. Luebker*, 240 Ark. 349, 399 S.W.2d 265 (1966).

"Continuously confined within house" does not mean insured cannot leave house for periodic exercise as prescribed by doctor. *Occidental v. Vervack*, 244 Ark. 1231, 429 S.W.2d 116 (1968).

Provisions requiring regular care and attendance of physician liberally construed. *Federal Life Ins. Co. v. Gann*, 196 Ark. 958, 120 S.W.2d 563 (1938). Jury question as to whether insured was intoxicated even though disability policy excluded auto accidents occurring while driver was intoxicated and insured was convicted in criminal prosecution. *Washington Nat'l v. Clement*, 192 Ark. 371, 91 S.W.2d 265 (1936). In absence of policy provision, insured not required to undergo surgical operation for purpose of mitigating damages. *Aetna v. Sanders*, 192 Ark. 590, 93 S.W.2d 141 (1936). Burden on insurer to prove recovery from disability. *Equitable Life v. Bagley*, 192 Ark. 749, 94 S.W.2d 722 (1936).

Insured's heart trouble not "the result of self inflicted injury" within policy exception, in absence of medical testimony that excessive drinking caused said disability. *W. O. W. v. Sams*, 194 Ark. 557, 108 S.W.2d 1089 (1937).

Notice and Proof of Loss. Written notice of claim must be given within 20 days of loss, or as soon thereafter as is reasonably possible. Notice is to be given to address designated by insured in policy, or to any agent of insurer. Ark. Code Ann. §23-85-110. Proof of loss shall be given within 90 days of loss, or as soon as reasonably possible. Absent mental incapacity, proof of loss must be made within one year. *Id.* §23-85-112.

No action on disability policy (individual or group) shall be brought before expiration of 60 days from proof of loss; no action shall be brought after expiration of 3 years from time proof of loss was required. *Id.* §23-85-116.

Under policy in which recovery conditioned on proof within 120 days, requirement of notice was condition precedent. *Pacific Mut. v. Butler*, 192 Ark. 614, 93 S.W.2d 329 (1936). Suit premature when brought before proof furnished. *American Central Life Ins. Co. v. Palmer*, 193 Ark. 945, 104 S.W.2d 200 (1937). But company liable where proof filed within 120 days from commencement of disability resulting from infection although injury sustained prior to said period. *Pacific Mut. v. Jordan*, 190 Ark. 941, 82 S.W.2d 250 (1935). Under policy providing that proof of blindness would be held on file for one year, suit not prematurely brought when company denied liability before 12 month period ended. *Locomotive v. Vandergriff*, 192 Ark. 244, 91 S.W.2d 271 (1936).

Proof of disability is sufficient if it justifies presumption of disability to one exercising reasonable and fair judgment. *Benefit Ass'n v. France*, 228 Ark. 765, 310 S.W.2d 225 (1958).

Delay by insured until expiration of disability policies' two year incontestability period after being advised that policies would probably be controverted by insurer on several grounds bars insureds use of incontestability clause to avoid attack by insurer on policy applications. *Ferguson, M.D. v. Union Mut. Stock Life Ins. Co. of Am.*, 501 F. Supp. 247 (E.D. Ark. 1980).

## FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables.

## FIRE INSURANCE

**Binder.** May be made orally or in writing, and is deemed to include all usual terms of policy as to which it is given, except as superseded by clear and express terms of binder. Not valid beyond issuance of policy with respect to which it is given, or 90 days from its effective date, whichever is shorter. If policy not issued, may be extended or renewed beyond 90 days with written approval of Insurance Commissioner, or under his regulations. Ark. Code Ann. §23-79-120. Acceptance of proposal of insurance must be evidenced by some act that binds party accepting; mental resolution not sufficient. *Pacific v. Suit*, 201 Ark. 767, 147 S.W.2d 346 (1941).

See "LIABILITY INSURANCE, Binder."

Cancellation. See "CANCELLATION."

Condition not broken where insured had mortgaged property before taking out insurance, but mortgagee had released lien. *Home v. Driver*, 87 Ark. 171, 112 S.W. 200 (1908). Where policy issued without written application, and insured had no knowledge of such condition company held to have waived chattel mortgage provi-

sion. *Great Southern v. Burns*, 118 Ark. 22, 175 S.W. 1161 (1915). Transaction, whereby personal property was conveyed as security for debt, held not chattel mortgage, and does not avoid insurance policy containing provision that if subject matter so encumbered policy should be void. *Monongahela v. Batson*, 111 Ark. 167, 163 S.W. 510 (1914).

**Coverage.** Damage to truck caused by turning over in ditch, not covered by comprehensive policy excluding loss due to "collision or upset." *Witherspoon v. Lumbermen's*, 211 Ark. 844, 203 S.W.2d 185 (1947). No coverage where insured, under floater policy for its mortgage interests, failed to report property or pay premium until after fire loss. *Providence v. Smith*, 221 Ark. 327, 253 S.W.2d 226 (1952).

Policy containing excess clause affords no coverage until policy with pro rata clause is exhausted. *Arkansas Grain v. Lloyd's*, 240 Ark. 750, 402 S.W.2d 118 (1966). Where each of two policies contains excess clause, clauses are considered to be mutually repugnant and ineffective. *Calvert Fire Ins. Co. v. Francis*, 259 Ark. 291, 532 S.W.2d 429 (1976). Where each of two insurers had issued policies covering property damaged by fire, and each policy contained excess clause, assessment of proportionate liability between two insurers for loss was required. *Id.*

**Excepted Risks.** Provision excluding liability for loss occurring while hazard is increased by insured, applies to changes of permanent nature, not to temporary changes in use of premises. *Orient v. Cox*, 218 Ark. 804, 238 S.W.2d 757 (1951).

**Mortgage Clause.** Mortgagee has right to insure his separate interest and contract to assign his claim to insurer upon payment of loss, and insurer may foreclose by way of subrogation for loss paid. No obligation on mortgagee to insure for mortgagor's benefit. *Lockett v. Western Assurance*, 190 Ark. 1135, 83 S.W.2d 65 (1935). Where policy issued to mortgagee who later notified company his mortgage had been satisfied and company accepted premiums from owner, it was liable for subsequent loss. *Fire Association v. Eldridge*, 191 Ark. 1135, 89 S.W.2d 722 (1936). Where property insured for mortgagee's benefit, this constituted appropriation in advance of proceeds to satisfaction of indebtedness even though not due. *Sharp v. Pease*, 193 Ark. 352, 99 S.W.2d 588 (1936).

Stipulation that company not liable for loss or damage to property while subject to lien or mortgage is enforceable. *Aetna v. Jackson*, 203 Ark. 839, 159 S.W.2d 461 (1942). Execution of new mortgage, smaller than original mortgage to which insurer had assented, does

not violate provision against encumbrances. *Providence v. McKenzie*, 221 Ark. 235, 252 S.W.2d 627 (1952).

Mortgagor entitled to sue as "real party in interest" even though interest less than mortgagee. *New York Underwriters v. Jarvis*, 196 Ark. 770, 120 S.W.2d 8 (1938). Mortgagee or lienholder has vested right under mortgage or loss payable clause, which cannot be destroyed by settlement between insurer and insured. *Insurance Underwriters v. Pride*, 173 Ark. 1016, 294 S.W. 19 (1927). Insurer may settle directly with mortgagee, as its interest appears. *Cash v. Home*, 197 Ark. 670, 125 S.W.2d 99 (1939).

Ownership. Conditional Sale. Unconditional ownership. Entire unencumbered and sole ownership provision not violated because insured entered into executory agreement in writing to sell, if no deed passed, no possession given. *Arkansas Fire v. Wilson*, 67 Ark. 553, 55 S.W. 933 (1900). Landlord's lien upon personal property does not amount to mortgage, nor affect title. *Phoenix v. Fleenor*, 104 Ark. 119, 148 S.W. 650 (1912). Sale of interest of one partner to third person violates unconditional ownership clause, as does sale by tenant in common to stranger. *Firemen's Ins. Co. v. Larey*, 125 Ark. 93, 188 S.W. 7 (1916). Death of policyholder effects no change. *Georgia Home v. Bennett*, 134 Ark. 52, 203 S.W. 279 (1918). Conditional vendee of chattel, title to which is reserved in vendor until paid, is not until such payment is made, unconditional owner. *Phoenix v. Public Parks*, 63 Ark. 187, 37 S.W. 959 (1896). Policy not void where no representations as to title made to insurer. *Globe v. Pruitt*, 188 Ark. 92, 64 S.W.2d 91 (1933). Provision not violated where grantee of void administrator's deed in possession and claimed sole ownership. *Crider v. Simmons*, 192 Ark. 1075, 96 S.W.2d 471 (1936). Requirements waived when company's agent requests proof of loss with knowledge of violation of sole ownership provision. *Security v. Harris*, 220 Ark. 900, 251 S.W.2d 115 (1952).

Gin company policy covers purchaser of planter's cotton where ginner allows cotton to remain on gin platform free of charge. *Pacific Fire v. Murdoch*, 193 Ark. 327, 99 S.W.2d 233 (1936).

Proof of Loss. Insurer must furnish form within twenty days to any person claiming loss under its policy, but has no responsibility for completion or manner of completion. Failure to furnish such forms within twenty days constitutes waiver of requirement. Ark. Code Ann. §23-79-126. Neither acknowledgment of receipt of notice of loss or claim under policy, nor furnishing forms for reporting loss or claim or making proof of loss, nor investigating any loss or claim or negotiating possible settlement, is deemed to constitute waiver of any provision or defense, except investigation and negotiation

may waive need of proof of loss. *Id.* §23-79-127. Where policy requires insured to furnish proof of loss, failure to comply therewith forfeits policy, unless there has been waiver. *Teutonia Ins. Co. v. Johnson*, 72 Ark. 484, 82 S.W. 840 (1903). Time period during which proof of loss must be provided begins when insured acquires knowledge of loss. *Rowe v. National Security Fire and Cas. Co.*, 4 Ark. App. 16, 626 S.W.2d 622 (1982).

Delivery to soliciting agent not sufficient where policy requires filing with company. *Arkansas Mut. v. Clark*, 84 Ark. 224, 105 S.W. 257 (1907).

Requirement that proof be filed within 60 days after fire is reasonable and valid. *Franklin Fire v. Holmes*, 188 Ark. 1053, 69 S.W.2d 281 (1934).

Letter not sufficient when not treated as proof, where it does not purport to comply with requirements of policy in respect to proofs of loss. *Home v. Driver*, 87 Ark. 171, 112 S.W. 200 (1908).

Facts in Proof of Loss. Not required to be within insured's personal knowledge. *German-American v. Brown*, 75 Ark. 251, 87 S.W. 135 (1905).

False and Fraudulent Statement in Proofs avoids policy if made in bad faith. *Id.*

Severable Contracts. Fact that separate amounts of insurance are apportioned to separate items or classes of property does not make policy divisible so that where contract and risk are indivisible, contract is entire and any breach rendering it void as to part of property renders it void as to all property. *Phoenix v. Public Parks*, 63 Ark. 187, 37 S.W. 959 (1896). Distinguished in *Firemen's Ins. v. Larey*, 125 Ark. 93, 188 S.W. 7 (1916), where one tenant in common sold to third person. Held that policy was avoided as to vendee third person but that other tenant in common could collect his share since his interest was not affected by sale; but that rule would be different in case of partnership.

Standard Policy Provisions. No policy shall contain any condition, provision or agreement which shall directly or indirectly deprive insured or beneficiary of right of trial by jury or any question of fact arising under such policy, and all such provisions, conditions or agreements shall be void. Ark. Code Ann. §23-79-203. This provision outlaws appraisal provision in New York Standard fire policy. *Firemen's Ins. v. Davis*, 130 Ark. 576, 198 S.W. 127 (1917). Clause in fire insurance policy which binds parties to appraisal of damages is void. *Insurance Co. v. Kempner*, 132 Ark. 215, 200 S.W. 986 (1918). However, statutory method of arbitration and award can be followed. Ark. Code Ann. §16-108-101.

Insurance contract executed in Arkansas between Arkansas resident and foreign insurance company authorized to do business in Arkansas could not be subject of arbitration in home state of insurer and under its laws. *Allstate Ins. Co. v. Harrison*, 307 F. Supp. 743 (W.D. Ark. 1969). Where policy susceptible of two equally reasonable interpretations, that which sustains claim will be adopted. *Wolff v. National Liberty*, 191 Ark. 146, 83 S.W.2d 836 (1935). In *Connecticut v. Boydston*, 173 Ark. 437, 293 S.W. 730 (1927), policy contained standard fire policy provision permitting examination. Court held that standard provision about examination applied only while policy was in force and not after loss has occurred.

Rule that contract must be strictly construed against insurer has no application where no ambiguity or uncertainty appears. *Witherspoon v. Lumbermen's*, 211 Ark. 844, 203 S.W.2d 185 (1947).

Ark. Code Ann. §§12-13-301 - 12-13-305. Arson Reporting - Immunity Statute, provides for certain agencies to request and receive from insurance companies information relating to fire losses; provides for insurance companies to notify certain agencies of suspicious fire losses; and provides immunity and confidentiality to those insurance companies providing information.

### FRAUD

See "AGENTS AND BROKERS"; "FIRE INSURANCE, Proof of Loss"; "RELEASE."

Fraud. *McAllister v. Forrest City Improvement Dist. No. 11*, 274 Ark. 372, 626 S.W.2d 194 (1981). Fraud is defined as intent not to exercise honest judgment, and not to make true finding but to disregard facts and make false finding. Burden of proof is on insurer, who must establish that applicant knew of preexisting medical condition. *Ford Life Ins. Co. v. Samples*, 277 Ark. 351, 641 S.W.2d 708 (1982); *Southern Farm Bureau v. Cowger*, 295 Ark. 250, 748 S.W.2d 332 (1988).

### GUEST CASES

See "AUTOMOBILES."

Guest Cases. (a) Act 13 of Acts of Arkansas of 1983. This Act repeals Arkansas' automobile, aircraft and vessel "guest statutes," formerly codified as Ark. Stat. Ann. §§75-913, 914, 915 and 21-235.

### HOSPITALS

Evidence-Records. Hospital records may be authenticated by affidavit of custodian, with same effect as if custodian had appeared in court. Ark. Code Ann. §16-

46-301; *Surridge v. State*, 279 Ark. 183, 650 S.W.2d 561 (1983). Such records must be within hearsay exception.

Immunity. No liability attached to corporation organized under Arkansas law to operate as nonprofit hospital service for failure to render service to any subscriber nor for negligence, malpractice, or other acts of hospital or physicians. Ark. Code Ann. §23-75-116.

### HUSBAND AND WIFE

Where husband and wife own estate by entirety, court can require husband to carry insurance on property for benefit of both himself and his wife. *Evans v. Evans*, 263 Ark. 291, 564 S.W.2d 505 (1978).

### INFANTS

See "AUTOMOBILES, Age"; "LIABILITY INSURANCE"; "NEGLIGENCE, Age."

### INLAND MARINE

Ark. Code Ann. §23-62-107 outlines property and interests included and excluded under term "marine insurance."

### LIABILITY INSURANCE

Automobile liability policy provision excluding coverage to extent that benefits were paid to insured under any workmen's compensation law did not violate "no fault" statute, Ark. Code Ann. §23-89-202, or offend public policy. *Aetna Ins. Co. v. Smith*, 263 Ark. 849, 568 S.W.2d 11 (1978).

Binders. Binders or other contracts for temporary insurance may be made orally or in writing. Ark. Code Ann. §23-79-120.

Cancellation. Statute requiring notice of cancellation not applicable to automatic termination by expiration of policy period. Ark. Code Ann. §23-89-303; *Farmers Ins. Co. v. J.W. Hall*, 263 Ark. 734, 567 S.W.2d 296 (1978).

Compromise of Claims. While insured is generally prohibited from settling claim under policy giving that right to insurer, insurers must not breach contract by refusing in bad faith to settle. *Home v. Snowden*, 223 Ark. 64, 264 S.W.2d 642 (1954). Insurer is likewise liable to insured for negligently or in bad faith failing to settle. *Southern Farm Bur. Cas. Ins. Co. v. Parker*, 232 Ark. 841, 341 S.W.2d 36 (1960). However, mere refusal to settle within policy limits is not actionable if actual controversy exists with respect to liability. *Findley v. Time Ins. Co.*, 264 Ark. 647, 573 S.W.2d 908 (1978). Contribution among joint tortfeasors. Uniform Contribution



Among Tortfeasors Act adopted. Ark. Code Ann. §16-61-201.

Cooperation of Insured in Defense of Action. Insured's failure to disclose name of material witness, attend trial or cooperate in defense of action, held not to constitute breach of policy. Burden on insurer to show insured's lack of cooperation. *U.S. Fidelity & Guaranty v. Brandon*, 186 Ark. 311, 53 S.W.2d 422 (1932). Insured gave written statement to company immediately after accident. Trial testimony conflicted with statement. Held not breach of policy as conflict not material. *Standard v. Jackson*, 188 Ark. 724, 67 S.W.2d 584 (1934). *But see, Home Indemnity Co. v. Finley*, 261 F. Supp. 318 (E.D. Ark. 1966) (no liability for insurer where material and intentionally false statements are not connected in time to avoid prejudice).

Excess policy voided where insured advised insurer of settlement and failed to notify later when settlement fell through. *Black & White, Inc. v. Reserve Ins. Co.*, 242 Ark. 573, 414 S.W.2d 369 (1967).

Coverage Policy insuring against damages by reason of "ownership, maintenance and use" of certain ambulance covers injuries sustained in fall from stretcher while being carried to ambulance. *Owens v. Ocean Accident*, 194 Ark. 817, 109 S.W.2d 928 (1937). Mobile home covered while towed on its own wheels. *Service Cas. v. Vasseau*, 245 Ark.63, 431 S.W.2d 243 (1968).

Defense of Suit. Insurer liable to insured for refusing to defend actions or pay judgments rendered against insured.

Direct Action against Insurer. Ark. Code Ann. §23-79-210 gives direct cause of action against liability insurer of nonprofit organization or public agency up to amount of limits of insurance for any torts of organization or agency even though organization or agency itself would not be subject to suit. Clause in policy excluding employees of charitable organization from coverage under this section was permissible. *Ramsey v. American*, 234 Ark. 1031, 356 S.W.2d 236 (1962). Act 750 of 2007 amended direct action statute to include self-insurance funds, pooled liability funds, or similar funds to the definition of "liability insurance" subject to direct action. Ark. Code Ann. §23-79-210 (a) (2). Act became effective on July 30, 2007. Ark. Code Ann. §23-89-101 provides for direct action against insurer where certain judgments against insured remain unsatisfied.

Infants. Insurer not liable for damages caused by automobile operated by person under age permitted by law if such provision is included in policy. In *Rambo v. Rambo*, 195 Ark. 832, 114 S.W.2d 468 (1938), unemancipated minor could not maintain action for involuntary

tort against his parents, even though liability insurance was carried.

Insolvency of Insured. Insolvency of insured does not release liability insurer. Ark. Code Ann. §23-89-102. Statute does not confer original cause of action against insurer and injured third party cannot bring direct action against insurer before recovering judgment against insured, even though latter insolvent. *Universal v. Denton*, 185 Ark. 899, 50 S.W.2d 592 (1932).

Insurer who erroneously denied coverage was liable to agent for expenses and attorney's fees in third party claim. *Southern Farm Bureau Cas. Ins. Co. v. Gooding*, 263 Ark. 435, 565 S.W.2d 421 (1978).

Jury. Questioning jurors on voir dire as to insurance connections is allowed. *Delamar & Allison v. Ward*, 184 Ark. 82, 41 S.W.2d 760 (1931). Unjustifiable injection of insurance coverage in trial prejudicial and constituted reversible error. *Ward v. Haralson*, 196 Ark. 785, 120 S.W.2d 322 (1938). Counsel may not question jurors about specific insurance company. *De Long v. Green*, 229 Ark. 100, 313 S.W.2d 370 (1958).

Negligent entrustment of airplane could be considered as "arising out of ownership, maintenance, operation, or use" of airplane within meaning of comprehensive general liability policy. *Fox Hills Country Club, Inc. v. American Ins. Co.*, 264 Ark. 239, 570 S.W.2d 275 (1978).

Notice. Insured not required to report trivial accident, and notice is not condition precedent unless expressly made so in policy. Policy not void unless insurer suffered damage because of delay of notice. *Home Indemnity Co. v. Banfield*, 188 Ark. 683, 67 S.W.2d 203 (1934). Failure to give notice within time provided in policy does not invalidate claim where not reasonably possible. *Pacific v. Dupins*, 188 Ark. 450, 66 S.W.2d 284 (1933); *Maryland v. Waggoner*, 193 Ark. 550, 101 S.W.2d 451 (1937). Not required until insured has received notice or first learned of claim. *American v. Northeast*, 201 Ark. 622, 146 S.W.2d 165 (1941). Injured third party cannot recover from insurer on policy of liability insurance where insured breaches provision as to notice. *Warren v. Commercial Standard*, 219 Ark. 744, 244 S.W.2d 488 (1951).

Phrase "arising out of" as used in hit and run limiting abuse of uninsured motorist policy cannot be construed to mean "proximately caused by." *State Farm Mut. Auto Ins. Co. v. LaSage*, 262 Ark. 631, 559 S.W.2d 702 (1978).

Regular use clause held ambiguous in *Travelers v. Hyde*, 232 Ark. 1020, 342 S.W.2d 295 (1961) (medical payments coverage).

“Use” does not include riding as passenger or allowing car to be pushed by insured vehicle. *Dunlap v. Maryland Cas. Co.*, 242 Ark. 533, 414 S.W.2d 397 (1967); *Rogers v. State Farm Ins. Co.*, 243 Ark. 887, 422 S.W.2d 677 (1968).

Fact that person discharging pistol was inside insured vehicle at time of accident does not make injury “arising out of ownership, maintenance, or use” of vehicle. *Hartford Fire Ins. Co. v. State Farm Mut. Auto Ins. Co.*, 264 Ark. 743, 574 S.W.2d 265 (1978). Car not within “care, custody or control” of insured. *Hardware Mut. Cas. v. Crafton*, 233 Ark. 1020, 350 S.W.2d 506 (1961).

Omnibus Clause. Original permittee had implied authority, under omnibus clause of policy, to permit another to drive insured vehicle. *M.F.A. v. Mullin*, 156 F. Supp. 445 (W.D. Ark. 1957).

Conditional vendee not covered under omnibus clause. *Olin v. Southwest Cas.*, 149 F. Supp. 600 (W.D. Ark. 1957).

“Other Insurance Clause” prohibiting stacking of uninsured motorist coverage upheld. *M.F.A. Mut. v. Wallace*, 245 Ark. 230, 431 S.W.2d 742 (1968).

Punitive. Automobile liability policy which obligates insurer to pay on behalf of insured all sums which insured becomes legally obligated to pay as damages provides coverage for punitive damages awarded in addition to compensatory damages. Arkansas law allows no recovery for punitive damages unless actual damages are suffered and assessed. *Southern Farm Bureau Cas. Ins. Co. v. Daniel*, 246 Ark. 849, 440 S.W.2d 582 (1969).

Uninsured Motorist. Under uninsured motorist statute, burden of showing that other vehicle involved in accident is uninsured is on plaintiff. Ark. Code Ann. §§23-89-403-404; *Home Ins. Co. v. Harwell*, 263 Ark. 884, 568 S.W. 2d 17 (1978). Where uninsured motorist coverage is in effect and same vehicle is covered for damage by collision, then deductible on collision coverage does not apply if damage is caused by uninsured motor vehicle, same insurer covers both, and operator of vehicle is solely at fault.

Borrowed pickup truck found not to be “private passenger automobile” within meaning of automobile liability insurance policy. *National Investors Fire and Casualty Ins. Co. v. Edwards*, 5 Ark. App. 42, 633 S.W.2d 41 (1982); *Coleman v. MFA Mut. Ins. Co.*, 3 Ark. App. 7, 621 S.W. 2d 872 (1981).

## LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Period prescribed by law for suing on written contracts (which is five years after loss is due). Any stipulation or provision in policy requiring such action to be brought within any shorter time or be barred shall be void. Ark. Code Ann. §23-79-202. (Note—Probably not applicable to any policies not involving property or life, e.g. health insurance.) Does not apply to action filed on contractor’s performance bond, or fidelity bond. *Chandler Trailer Co. v. Lawyer’s Sur. Corp.*, 535 F. Supp. 204 (E.D. Ark. 1982). Where policy provides for payment sixty days after receipt of proof of loss, suit premature which is brought before expiration of that time in absence of waiver of proofs. *St. Paul v. Womack*, 122 Ark. 396, 183 S.W. 203 (1916). Not applicable to fraternal benefit societies. Ark. Code Ann. §23-74-103.

No defense that contract was made in another state since period of limitation is matter of procedure. *Gulf v. Holland*, 218 Ark. 405, 236 S.W.2d 1003 (1951).

Defense to any complaint or cross-complaint must be filed first day after expiration of periods set forth below: 1) Where summons has been served in any county in state, 20 days; 2) Where summons has been served outside state, 30 days; 3) Where defendant incarcerated, 60 days; 4) In case of constructive service where publication of warning order has been made as required by law, and thirty days have elapsed since making of order and appointment of attorney ad litem. Ark. R. Civ. P. 12.

Special Statute of Limitations for actions for medical malpractice, which shall be commenced within two (2) years after cause of action accrues. Exception where wrongful act is leaving foreign object in person’s body - one (1) year from date of discovery, or date object reasonably should have been discovered, whichever is earlier. Ark. Code Ann. §16-114-203. Another exception where medical injury results in wrongful death claim. *Brown v. St. Paul*, 292 Ark. 558, 732 S.W.2d 130 (1987), *overruled in part, on other grounds, Bailey v. Rose Care*, 307 Ark. 14, 817 S.W.2d 412 (1991). Or where medical treatment is on-going. *Lane v. Lane*, 295 Ark. 671, 752 S.W.2d 25 (1988).

## MALPRACTICE

Generally. Rules governing duty and liability of physicians in performance of professional services are applicable to practitioners of similar branches of healing art, including dentists. *Black v. Bearden*, 167 Ark. 455, 268 S.W. 27 (1925).



**Standard of Care.** Recovery may be had from physician if physician did not have degree of skill and learning required, did not apply skill and learning with reasonable care, or did not use his best judgment, and damage proximately results. Ark. Code Ann. §16-114-206; *Rickett v. Hayes*, 256 Ark. 893, 511 S.W.2d 187 (1974).

**Expert Testimony.** In malpractice suit expert testimony not required if testimony is of character that jurors may draw inference of negligence. *Brewington v. St. Paul Fire*, 285 Ark. 389, 687 S.W.2d 838 (1985). To prove physicians performed below standard of degree of skill and learning possessed by other members of profession expert testimony is required. *Bailey v. Rose*, 307 Ark. 14, 817 S.W.2d 412 (1991); see AMI 1501. Whenever expert testimony required, plaintiff must file affidavit signed by expert engaged in same type of medical care as each medical professional defendant. Ark. Code Ann. §16-114-209 (b). No set time period for filing affidavit. *Summerville v. Thrower*, 369 Ark. 231, 253 S.W.3d 415 (2007).

**Informed Consent.** Patient must be informed of all material elements of procedure and all material risks which may affect his decision. *Pegram v. Sisco*, 406 F. Supp. 776 (1976). Physician's duty to disclose risks is measured by customary practice of physicians in community in which he practices or similar community. *Fuller v. Starnes*, 268 Ark. 476, 597 S.W.2d 88 (1980).

**Damages.** Punitive damages are recoverable in medical malpractice actions. *HCA Health Services v. National Bank of Commerce*, 294 Ark. 525, 745 S.W.2d 120 (1988). However, pursuant to The Civil Justice Reform Act of 2003, punitives capped at greater of \$250,000 or three times compensatory damages, not to exceed \$1 million. Ark. Code Ann. §16-114-208.

## NEGLIGENCE

See Law Digest Tables.

See "AUTOMOBILES."

**Age.** Minor has same duty as adult when charged with negligence in operation of motor vehicle. *Harrelson v. Whitehead*, 236 Ark. 325, 365 S.W.2d 868 (1963); but compare *Williams v. Gilbert*, 239 Ark. 935, 395 S.W.2d 333 (1965). Also see Imputed Negligence.

**Attractive Nuisance.** To children, discussed. *Arkansas Power v. Kilpatrick*, 185 Ark. 678, 49 S.W.2d 353 (1932); *Central Coal v. Porter*, 170 Ark. 498, 280 S.W. 12 (1926). In absence of hidden hazards, natural pond held not attractive nuisance. *Carmichael v. Little Rock*, 227 Ark. 470, 299 S.W. 2d 198 (1957).

**Comparative Negligence.** Followed in actions in which railroads are involved. Ark. Code Ann. §23-12-904.

Appellate Court will not review jury's apportionment of comparative negligence where reasonable men could differ regarding it. *Ferrell v. Whittington*, 271 Ark. 750, 610 S.W. 2d 572 (1981).

Comparative fault applies in all actions resulting in personal injuries, wrongful death or injury to property whether predicated on traditional concepts of tort law or breach of warranty. Fault of claiming party is compared with fault of all parties from whom recovery is sought. Ark. Code Ann. §16-64-122.

**Joint and Several Liability.** The Civil Justice Reform Act of 2003 ends doctrine of joint and several liability so that defendants partly responsible for damages do not have to pay entire judgment if other defendants fail to pay their share. Damages in multiple-defendant cases are limited to actual damages proved against individual defendants, unless one or more of defendants can show they are unable to pay full judgment. Law includes sliding scale by which judges then increase judgments against defendants who can pay.

Definition and discussion of negligence, *St. Mary's Hospital v. Bynum*, 264 Ark. 691, 573 S.W.2d 914 (1978); *Blakemore v. Stevens*, 188 Ark. 755, 67 S.W.2d 733 (1934).

Right of contribution exists among joint-tortfeasors. Ark. Code Ann. §16-61-202. Foreseeability is necessary ingredient. *North Little Rock Transportation Co. v. Finkbeiner*, 243 Ark. 596, 420 S.W.2d 874 (1967). Res ipsa loquitur is recognized. *Megee v. Reed*, 252 Ark. 1016, 482 S.W.2d 832 (1972).

Definition and discussion of doctrine of res ipsa loquitur and its application to nursing home accidents. *Palmer v. Intermed, Inc.*, 270 Ark. 538, 606 S.W.2d 87 (Ark. App. 1980).

Occurrence of injury or accident is not of itself evidence of any negligence. *Pilkington v. Riley*, 271 Ark. 746, 610 S.W.2d 570 (1981); AMI 603.

**Imputed Negligence.** Negligence of minor operator under 18 years of age imputed to mother, passenger in car, who signed application of minor. Ark. Code Ann. §27-16-702; *Wilson v. Koen*, 202 Ark. 576, 151 S.W.2d 681 (1941). Negligence of minor under 14 years driving automobile imputed to person permitting. *Garrison v. Funderburk*, 262 Ark. 711, 561 S.W.2d 73 (1978). Also imputed to signer of minor's application for license or to that person legally required to sign application whether signed or not. Ark. Code Ann. §27-16-702; AMI 802-804. Mother's negligence resulting in injury to her child



could be imputed to her husband. *Stull v. Ragsdale*, 273 Ark. 277, 620 S.W.2d 264 (1981).

Proximate Cause. *Collier v. Citizens Coach Co.*, 231 Ark. 489, 330 S.W.2d 74 (1959).

Defenses of assumption of risk and intervening causation of fault are questions of proximate causation, which is jury question. *Larson Machine, Inc. v. Wallace*, 268 Ark. 192, 600 S.W.2d 1 (1980).

Intervening act or omission of third-party is not superseding cause where original negligent actor realized that third-party's action would be natural and normal response to his negligent act. *Id.*

Bad faith refusal to settle within policy limits. *Reynolds v. Shelter Mut. Ins. Co.*, 313 Ark. 145, 852 S.W.2d 799 (1993). Insurance carrier may be liable in tort if it actively engages in dishonest, malicious, or oppressive conduct to avoid its contractual liability, absent good faith defense. *Findley, Administratrix v. Time Ins. Co.*, 264 Ark. 647, 573 S.W.2d 908 (1978); *Aetna Cas. & Surety v. Broadway Arms*, 281 Ark. 128, 664 S.W.2d 463 (1984).

#### NO-FAULT INSURANCE

It is mandatory that every automobile liability insurance policy covering any private passenger motor vehicle issued or delivered in Arkansas provide, without regard to fault, certain minimum benefits to named insured and members of his family residing in same household injured in motor vehicle accident, to passengers injured while occupying insured motor vehicle, and to persons other than those occupying another vehicle struck by insured vehicle. Ark. Code Ann. §23-89-202; see also *O'Bar v. MFA Mut. Ins. Co.*, 275 Ark. 247, 628 S.W.2d 561 (1982).

Intent of no-fault insurance was to make insured whole on relatively minor claims without regard to fault or liability without his being required to engage in expensive and extended litigation. *Aetna Ins. Co. v. Smith*, 263 Ark. 849, 568 S.W.2d 11 (1978).

Medical and Hospital Benefits. Benefits for such expenses incurred within twenty-four months after accident shall be paid up to minimum aggregate of \$5,000. per person. Ark. Code Ann. §23-89-202.

Income Disability Benefits. Benefits shall be paid for 70% of loss of income from work during period commencing 8 days after accident, and not to exceed 52 weeks, subject to maximum of \$140 per week. Benefits not to exceed \$70 per week shall be paid to nonincome earner for expenses reasonably incurred for essential services in lieu of those injured person would have performed without income. *Id.*

Accidental Death Benefits. Personal representative of insured shall be paid \$5,000 should accident cause death within one year from date of accident. *Id.* Insured can reject, in writing, coverage provided by §23-89-202. *Id.* §23-89-203; see also *O'Bar v. MFA Mut. Ins. Co.*, 275 Ark. 247, 628 S.W.2d 561 (1982).

Insurer under no-fault policy cannot deduct amount of medical payments from accidental death benefits due insured. *Farm Bureau Mut. Ins. Co. v. Parrish*, 265 Ark. 161, 577 S.W.2d 397 (1979).

Exclusion of Benefits. Insurer may exclude benefits to any insured, or his personal representative, who injured himself intentionally or who was injured enforcement official. Ark. Code Ann. §23-89-205.

Tort Liability Retained. Tort liability arising from ownership, maintenance, or use of motor vehicle within Arkansas is retained. *Id.* §23-89-206.

Reimbursement of Insurer. When insured, either by settlement or judgment, recovers medical and hospital or income disability benefits in tort, insurer paying such benefits has right of reimbursement out of tort recovery or settlement. *Id.* §23-89-207.

Lien. Insurance company making no-fault payment to its own insured is entitled to lien upon, and right of reimbursement from, any tort recovery obtained by its insured, less insurance company's proportionate part of costs of collection. *Northwestern Nat'l Ins. Co. v. American States Ins. Co.*, 266 Ark. 432, 585 S.W.2d 925 (1979).

Minimum Coverage. Coverages enumerated above are minimums, and insurer is not prevented from providing broader benefits. Ark. Code Ann. §23-89-201.

Payment Schedule. Payment shall be made on monthly basis as benefits accrue. Benefits become overdue if not paid within thirty days after insurer receives reasonable proof of amount of such benefits. Person entitled to benefits may bring action in contract to recover benefits not paid. In event of such suit, insurer shall pay benefits plus reasonable attorneys' fees plus 12% penalty plus interest from date benefits become overdue. *Id.* §23-89-208.

Accidental Death Benefits. Reduction clause, reducing payment of accidental death benefits by amounts of workers' compensation or disability benefits paid, is void as against public policy. Court notes that insurer has statutory right to reduce payments, or claim reimbursement for any medical hospital benefits or income disability benefits by Ark. Code Ann. §23-89-207. *O'Bar v. MFA Mut. Ins. Co.*, 275 Ark. 247, 628 S.W.2d 561 (1982).

Insurer is entitled to credit on its liability to estate of insured for estate's recovery from third party tortfeasor where insurer did not induce or know of settlement agreement which extinguished its subrogation rights before liability was denied; further, attorney fees under Ark. Code Ann. §23-89-208 not proper in this case where suit not concerned only with recovery under policy, but insurers rights of subrogation and credit were in issue. *National Investors Fire & Cas. Ins. Co. v. Edwards*, 5 Ark. App. 42, 633 S.W. 2d 41 (1982).

### PENALTY AND ATTORNEYS' FEES

Provided in cases where insurance carrier fails to pay loss for which it is liable by Ark. Code Ann. §23-79-208. This section provides that carrier must pay 12% penalty to holder of policy or his assign in all cases where loss occurs under policy of cargo, fire, marine, casualty, fidelity, surety, cyclone, tornado, life or health-medical coverage if carrier fails to honor loss within time specified by policy after demand is made. Section also provides for reasonable attorney's fee.

Penalty and Attorneys' Fees authorized under Ark. Code Ann. §23-79-208 apply whenever insured prevails in controversy with insurer and actually obtains money judgment for amount paid. *MFA Mut. Ins. Co. v. Keller*, 274 Ark. 281, 623 S.W.2d 841 (1981).

Ark. Code Ann. §23-79-209 provides for collection of reasonable suits by holders of life policies for declaratory judgment or reinstatement of such policies if judgment is against carrier. Face value of policy and difficulty of issues are factors determining reasonableness of fee. *Equitable Life Assur. Soc'y v. Rummell*, 257 Ark. 90, 514 S.W.2d 224 (1974).

Uninsured motorist coverage is casualty insurance and therefore within penalty and attorneys' fee statute. *Farm Bureau Mut. Ins. v. Mitchell*, 249 Ark. 127, 458 S.W.2d 395 (1970).

Penalty and reasonable attorney's fee is assessed by court as matter of course in event of recovery, regardless of good faith in refusing payment. Statute is upheld as proper exercise of police power of state. *Federal Union v. Flemister*, 95 Ark. 389, 130 S.W. 574 (1910). Penalty not assessed unless plaintiff recovers amount sued for. *Arkansas Ins. Co. v. McManus*, 86 Ark. 115, 110 S.W. 797 (1908); *Pacific Mut. v. Carter*, 92 Ark. 378, 123 S.W. 384 (1909); *Cassady v. United Ins. Co. of America*, 370 F. Supp. 388 (W.D. Ark. 1974). Attorney's fees allowed where insured is permitted to amend complaint demanding lesser amount, notwithstanding that company then confesses judgment for amount sought. *Continental Cas. v. Vardaman*, 232 Ark. 773, 340 S.W.2d 277 (1960). Not recoverable if insured holds out for unrea-

sonable cash settlement and settles with third party, where insurer had election to repair. *Papan v. Resolute*, 219 Ark. 907, 245 S.W.2d 565 (1952). Not recoverable if carrier admits claim and insured continues to return checks when question of identity of insureds was involved. *Callum v. Farmers Union Mut. Ins. Co.*, 256 Ark. 376, 508 S.W.2d 316 (1974).

Excess insurer who acts on behalf of insured upon refusal of primary insurer to act is subrogated to rights of insured, considered "holder" of policy and can recover attorney's fees from primary carrier. *Blevins v. Commercial Standard Ins. Cos.*, 544 F.2d 967 (8th Cir. 1976) (applying Arkansas law).

Insured is entitled to reimbursement from insurer for attorney's fees and penalty for defending action by injured party under Ark. Code Ann. §23-79-209. Cost of appeal is included. *Southern Farm Bureau Cas. Ins. v. Gooding*, 263 Ark. 435, 565 S.W.2d 421 (1978). This statute is highly penal and should be strictly construed. *Broadway v. Home*, 203 Ark. 126, 155 S.W.2d 889 (1941). In action on oral policy of insurance, penalties held not recoverable. *Carolina Cas. v. Helms*, 248 F. 2d 268 (1957).

Insurer has reasonable time to make investigation after demand is made. *Clark Center v. National Life*, 245 Ark. 563, 433 S.W.2d 151 (1968).

Ark. Code Ann. §23-79-135 provides for penalty, equal to amount of benefits, where insurer fails within reasonable time after demand to pay claims for hospital, surgical, medical or accident benefits under \$300.

Penalty of double damages, plus attorney's fees arises from failure to pay property damage claims of \$1000 or less due to motor vehicle collision within 60 days of notice. Ark. Code Ann. §27-53-402.

### PRIVILEGED COMMUNICATIONS

Uniform Rules of Evidence adopted.

Rule 502 establishes lawyer-client privilege. Privilege to refuse disclosure of confidential communications made to facilitate legal services to client.

Rule 503 establishes physician and psychotherapist-patient privilege. Patient has privilege to prevent disclosure of confidential communications made for diagnosis or treatment. Exceptions for commitment proceedings, court order, or if physical condition is at issue.

Rule 504 grants husband-wife privilege but is limited to criminal proceedings.

Rule 505 grants religious privilege. Person has privilege to refuse disclosure of confidential communication made by person to clergyman.

Rule 507 provides that trade secrets are privileged unless they conceal fraud or work injustice.

Rule 510 provides that any privilege can be waived by voluntary disclosure.

### PRODUCTS LIABILITY

Arkansas recognizes negligence, warranty and strict liability as bases for causes of action.

**Negligence.** See "NEGLIGENCE." Manufacturer has duty to use ordinary care in design and manufacture of his product, commensurate with risk of harm flowing from normal use of that product. *Nicklaus v. Hughes Tool Co.*, 417 F. 2d 983 (8th Cir. 1969) (applying Arkansas law). AMI 1001.

Manufacturer has duty to warn of dangers reasonably foreseeable in use of its product, but has no duty to warn of obvious dangers. AMI 1002. Manufacturer has duty to instruct, if danger is reasonably foreseeable in use of product. AMI 1003.

Vendor who knows or should know product is dangerous when put to its intended use has duty to warn unless danger is obvious. AMI 1005.

Seller who has reason to believe product is defective has duty to inspect. AMI 1006.

**Warranty.** Uniform Commercial Code adopted. Ark. Code Ann. §4-1-101. Warranties may be either expressed or implied. Implied warranties include warranty of merchantability and warranty of fitness for particular purpose. Warranties extend from manufacturer or seller to any person who might reasonably be "expected to use, consume, or be affected by goods." Ark. Code Ann. §4-86-101. This Section also eliminates privity as defense to breach of warranty or negligence action.

Act 822 of 1981 makes implied warranties of merchantability and fitness inapplicable to sale of livestock in certain circumstances. Ark. Code Ann. §4-2-316.

**Strict Liability.** Arkansas has adopted modified version of §402A, Restatement of Torts 2d. Ark. Code Ann. §4-86-102. Liability is imposed upon supplier in business of manufacturing, selling, or otherwise distributing product, who supplies product in defective and unreasonably dangerous condition which proximately causes damages. Privity is no defense. *Id.* §4-86-102. Defenses. Certain defenses (e.g., limitations of actions, compliance with existing standards, use and supplying of product beyond its anticipated life, and subsequent unforeseeable alterations) have been codified in Ark. Code Ann. §16-116-105. Arkansas recognizes "comparative fault" under which fault of plaintiff will be compared to that of defendant in tort cases. Ark. Code Ann. §16-64-122. As-

sumption of Risk. *Bugh v. Webb*, 231 Ark. 27, 328 S.W.2d 379 (1959). Intervening Proximate Cause. *Hill v. Wilson*, 216 Ark. 179, 224 S.W.2d 797 (1949). Disclaimers of Warranty under Uniform Commercial Code permitted. Ark. Code Ann. §4-2-316. In addition, plaintiff must give notice of alleged breach. *L. A. Green Seed Co. v. Williams*, 246 Ark. 463, 438 S.W.2d 717 (1969) (citing Ark. Code Ann. §4-2-607).

Supplier of product is subject to liability if product is supplied by him in defective condition rendering it unreasonably dangerous. Ark. Code Ann. §4-86-102. Res ipsa loquitur will apply if standard tests are met. AMI 610.

### RELEASE

See Law Digest Tables.

Release free from fraud or undue influence is binding and smallness of consideration cannot of itself furnish ground for avoidance. *Smith v. Mo. Pac.*, 197 Ark. 692, 122 S.W.2d 176 (1938). Not binding when injured party relies on company's doctor that injuries temporary when in fact permanent, *Phoenix Utility Co. v. Smith*, 185 Ark. 587, 48 S.W.2d 238 (1932); but there must be substantial evidence that doctor was company's agent. *National Life v. Hitt*, 194 Ark. 691, 109 S.W.2d 426 (1937).

Release will not be rescinded where adjuster was justified in believing injured parties had mental capacity to execute releases. *Bradley v. Southern Farm Bureau Cas. Ins. Co.*, 392 F. Supp. 478 (E.D. Ark. 1975). Release will be set aside for fraud where released party expresses "opinion" of non-liability, if he knows that opinion to be false. *Vickers v. Gifford-Hill & Co., Inc.*, 534 F.2d 1311 (8th Cir. 1976) (applying Arkansas law).

Burden of proof of invalidity of release on beneficiary. Compromise settlement will not be disturbed for ordinary mistake. *Progressive Life v. Shope*, 190 Ark. 927, 82 S.W.2d 8 (1935). Release not effective where assured taken by surprise and insurer failed to disclose double indemnity provision. *National v. Threlkeld*, 189 Ark. 165, 70 S.W.2d 851 (1934); *Mid-Continent v. Hill*, 192 Ark. 667, 94 S.W.2d 364 (1936). Jury question as to whether criminal threats constituted duress. *National Life v. Blanton*, 192 Ark. 1165, 97 S.W.2d 77 (1936). Where induced by fraud to give release, insured has reasonable time after discovery of fraud to repudiate release. *Kilgo v. Continental*, 140 Ark. 336, 215 S.W. 689 (1919). Fraud, duress. *Union Life v. Johnson*, 199 Ark. 241, 133 S.W.2d 841 (1939); *Mutual v. Arrington*, 200 Ark. 701, 140 S.W.2d 427 (1940).

Ordinarily, tender or return of consideration is condition precedent to rescission of release, but not when



releaser, because of poverty, is unable to meet tender-or-return requirement, and fraud remained undiscovered until after consideration was spent. *Vickers v. Gifford-Hill & Co., Inc.*, 534 F.2d 1311 (8th Cir. 1976) (applying Arkansas law).

Settlement of total fire loss for less than face amount of policy void for violation of valued policy law. Ark. Code Ann. §23-88-101; *Coddington v. Safeguard Ins. Co.*, 237 Ark. 457, 373 S.W.2d 413 (1963).

“Loss of Damage Agreement” in which insured agrees to take certain sum in settlement of his claim under policy lacks mutuality unless it contains corresponding promise by insurer to pay this amount, and it can be avoided by insured before payment is made. *Motors v. Lopez*, 217 Ark. 203, 229 S.W.2d 228 (1950).

### REPRESENTATIONS AND WARRANTIES

Agreement providing that horseback riding teacher would help potential purchaser of horse find suitable horse to purchase was for personal services and not for sale of goods, and thus remedies prescribed in Uniform Commercial Code (UCC) for buyer against seller of goods and product liability remedies for buyers against manufacturers and suppliers were not applicable in lawsuit arising out of agreement. Ark. Code Ann. §§4-2-314-316, 16-116-101-107; *Mason v. Jackson*, 323 Ark. 252, 914 S.W.2d 728 (1996).

If there is no material misrepresentation or failure to disclose, there is no right to rescind. *C & C Elec. Const. Co., Inc. v. Rogers*, 281 Ark. 178, 663 S.W.2d 707 (1984). Misstatement or nondisclosure of facts in sales transaction must be such that reasonable person would consider it important in making decision before it is “material.” *Id.*

UCC remedy for breach of warranty is not the only appropriate measure of damages for buyer of goods. When both fraud and breach of contract are pled, buyer may pursue, but not recover, both revocation of acceptance, sometimes referred to as common-law equitable rescission with restitution, and damages for breach of warranty. Ark. Code Ann. §§4-2-711, 4-2-714; *Roach v. Concord Boat Corp.*, 317 Ark. 474, 880 S.W.2d 305 (1994).

What constitutes nonconforming delivery, acceptance, rejection or revocation of acceptance with respect to sale of goods are questions of fact to be determined within framework of facts in each particular case. *Marine Mart, Inc. v. Pearce*, 252 Ark. 601, 480 S.W.2d 133 (1972). “Nonconformity” of goods must substantially impair value to buyer. Ark. Code Ann. §4-2-608; *O’Neal Ford v. Earley*, 13 Ark. App. 189, 681 S.W.2d 414 (1985).

### SERVICE OF PROCESS

Upon Non-Resident Motorists. See “AUTOMOBILES.”

Uniform Interstate and International Procedure Act. Ark. Code Ann. §16-4-108 provides for personal jurisdiction over nonresident tortfeasors and others in wide range of cases, including contracting to insure any person, property or risk located in State at time of contract. Held retroactive in *Safeway Stores v. Shwayder Bros.*, 238 Ark. 768, 384 S.W.2d 473 (1964). Insufficient inquiry to ascertain last known address deprived nonresident defendant of “reasonably probable” actual notice which is required by due process. *Halliman v. Stiles*, 250 Ark. 249, 464 S.W.2d 573 (1971); *Canal Ins. Co. v. Hall*, 259 Ark. 797, 536 S.W.2d 702 (1976).

Statutory service procedures are in derogation of common law and must be strictly complied with. *Edmonson v. Farris*, 263 Ark. 505, 565 S.W.2d 617 (1978).

Non-resident defendant must go forward with proof when he files motion to quash summons because of lack of jurisdiction. *Hawes Firearm Co. v. Roberts*, 263 Ark. 510, 565 S.W.2d 620 (1978).

### SUBROGATION

Subrogation clause in fire insurance policy upheld and enforced, without necessity of formal assignment. *Railway Co. v. Fire Assn.*, 55 Ark. 163, 18 S.W. 43 (1891); *Railway Co. v. Fire Assn.*, 60 Ark. 325, 30 S.W. 350 (1895); *Graysonia v. Newberger*, 170 Ark. 1039, 282 S.W. 975 (1926). Where insurer denies liability to mortgagor and indemnifies mortgagee, it is subrogated to mortgagee’s rights. *Hill v. Mass. Fire*, 195 Ark. 602, 113 S.W.2d 104 (1938).

Assignor insured and assignee insurer must both be made parties. *C.R.&I. Ry. v. Cobbs*, 151 Ark. 207, 235 S.W. 995 (1921); *National Fire v. Pettit-Galloway Co.*, 157 Ark. 333, 248 S.W. 262 (1923); *Motors v. Coker*, 218 Ark. 653, 238 S.W.2d 491 (1951). Loss payee in mortgage clause is merely appointee of fund with no more right than insurer had. *Fulmer v. East Ark.*, 173 Ark. 668, 293 S.W. 1018 (1927).

Insurer, after payment to insured of amount due under policy, entitled to subrogation and to enforce its rights as “the real party in interest” in action at law. *Home v. Lack*, 196 Ark. 888, 120 S.W.2d 355 (1938). Where owner settles with insurer for less than market value of car, and then sought to replevy car from defendant, insurer could intervene as party to plaintiff’s action. *Bryant v. Kilpatrick*, 218 Ark. 494, 237 S.W.2d 465 (1951). But where insured has paid deductible, he is real party in interest, and insurer is not necessary party. *Page v. Scott*, 263 Ark. 684, 567 S.W.2d 101 (1978).



Advancement under “loan receipt” was not such payment of loss as to make insurer real party in interest in suit against third person. *Dixey v. Federal*, 132 F.2d 275 (8th Cir. 1942) (applying Arkansas law).

No recovery from insurer allowed under medical payment coverage where insured had recovered full medical from third-party tortfeasor and did not notify insurer of suit. *Shipley v. Northwestern Mut.*, 244 Ark. 1159, 428 S.W.2d 268 (1968).

Res Judicata. Where insurer paid “K” for damages to her car caused by “C,” and then “K” sued “C” for personal injuries and dismissed with prejudice, it was res judicata as to insurer’s action against “C” for damages to “K’s” car. *Motors v. Coker*, 218 Ark. 653, 238 S.W.2d 491 (1951).

### THEFT

Insured sold car; took bad check. No “theft or larceny” where policy excluded voluntary parting induced by fraud, etc. *Galloway v. Marathon*, 220 Ark. 548, 248 S.W.2d 699 (1952).

Bailed vehicle used in manner contrary to bailment terms is larceny under Ark. Code Ann. §5-36-103. Intention of bailee to return vehicle will not preclude recovery under theft coverage. *Sullivant v. Pennsylvania*, 223 Ark. 721, 268 S.W.2d 372 (1954). Loss of vehicle to swindler posing as prospective purchaser not covered under theft policy excluding loss where insured voluntarily parts with possession induced by trick. *Phillip’s v. U.S. Guar.*, 225 Ark. 761, 285 S.W.2d 333 (1955). No recovery where insured’s wife left him and took his truck under claim of right. *State Farm v. Switzer*, 257 Ark. 810, 520 S.W.2d 245 (1975).

### WAIVER AND ESTOPPEL

Arkansas Supreme Court has extended doctrine of waiver to its extreme as applied to insurance companies. Apparently no voluntary or intentional act or forbearance is required; mistake or confusion on part of insurer can result in waiver. *National Investors v. Tudor*, 264 Ark. 361, 571 S.W.2d 585 (1978). Waivers may be oral although policy requires them in writing. *Burlington v. Lowery*, 61 Ark. 108, 32 S.W. 383 (1895); *Georgia Home v. Bennett*, 134 Ark. 52, 203 S.W. 279 (1918); *Service Fire v. Payne*, 218 Ark. 499, 236 S.W.2d 1020 (1951). Local recording agents have apparent power to waive. *Camden Fire v. Grubbs*, 133 Ark. 202, 202 S.W. 820 (1918). Not necessarily founded on estoppel. *American Life v. Vaden*, 164 Ark. 75, 261 S.W. 320 (1924); *W. O. W. v. Garner*, 200 Ark. 696, 140 S.W.2d 414 (1940). However, notice to mere soliciting agent is not notice to insurer. *Home v. Cole*, 195 Ark. 1002, 115 S.W.2d 267

(1938). Soliciting agent has no authority to waive any requirements of insurance policy. *Continental Ins. Cos. v. Stanley*, 263 Ark. 638, 569 S.W.2d 653 (1978). But agents can waive policy forfeiture even when policy states that only officers have that power. *National Investors v. Tudor*, 264 Ark. 361, 571 S.W.2d 585 (1978).

Waiver of Notice. Denial of liability on fidelity bond obviated necessity of notice to surety of subrogation claim. *Hartford v. Bradley*, 211 Ark. 1069, 204 S.W.2d 792 (1947).

Waiver of Proofs. Proof can be waived before being due by denial of liability admission of liability, or any acts of insurer leading insured to believe that no proofs or further proofs are necessary. *Fireman’s v. Rye*, 160 Ark. 212, 254 S.W. 465 (1923); *Old American v. Wexman*, 160 Ark. 571, 255 S.W. 6 (1923). Not waived by sending adjuster to make investigation. *National Union v. Wright*, 163 Ark. 42, 257 S.W. 753 (1924). Denial of liability is not waiver where made after time for filing has expired. *Illinois Bankers v. Byassee*, 169 Ark. 230, 275 S.W. 519 (1925). Denial of liability within time for filing is waiver notwithstanding reservation of right to make any defenses. *Missouri v. Barron*, 186 Ark. 46, 52 S.W.2d 733 (1932). Failure to furnish forms as requested constitutes waiver. *Illinois v. Lane*, 189 Ark. 261, 71 S.W.2d 189 (1934); *W. O. W. v. Law*, 190 Ark. 653, 80 S.W.2d 50 (1935). Notice to local agent of vacancy, and agreement with adjuster on “part of loss” constitutes waiver of vacancy permit and proof of loss. *Farmers v. Wyman*, 221 Ark. 1, 251 S.W. 2d 819 (1952).

Waived by not requiring strict compliance in prior claims. *Gulf v. Holland*, 218 Ark. 405, 236 S.W.2d 1003 (1951).

Principle that State can never be estopped because of acts of its agents was abandoned, but constitutional doctrine of sovereign immunity was retained. *Foote’s Dixie Dandy v. McHenry, Adm’r*, 270 Ark. 816, 607 S.W.2d 323 (1980).

Attempt by insurer to collect on insufficient premium check was not inconsistent with notice of policy lapse and no waiver occurred. *Hendrix v. Republic Nat’l Life Ins. Co.*, 270 Ark. 955, 606 S.W.2d 601 (1980).

### WORKERS’ COMPENSATION

See Law Digest Tables.

Ark. Code. Ann. §11-9-505, which requires that program of rehabilitation be requested prior to final determination of permanent disability benefits, is mandatory. *Revere Copper & Brass v. Morris*, 271 Ark. 109, 607 S.W.2d 402 (1980). Penalty provisions of Workers’ Compensation Act do not apply to payments to Second

Injury Fund or to Death and Permanent Total Bank Fund. *Smith v. Glen Bros. Trucking Co.*, 271 Ark. 285, 608 S.W.2d 41 (1980).

Temporary total disability and healing period are not same in all cases. Disability as defined by act controls compensation awards in all cases of temporary disability except where compensation is statutorily based upon healing period. *Arkansas State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981); *Wheeler Const. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). In claim for occupational disease, claimant must establish causal connection between occupation or employment and occupational disease by clear and convincing evidence. *Arkansas Dept. of Correction v. Chance*, 271 Ark. 472, 609 S.W.2d 666 (1980). Statute of limitations in worker's compensation case begins to run when employee knows or should reasonably be expected to be aware of extent and nature of injury. *Woodard v. ITT Higbie Mfg. Co.*, 271 Ark. 498, 609 S.W.2d 115 (1980).

Decisions by commission on claims against state are final and binding on all parties and are not subject to judicial review. State agency has 15 days after workers compensation award to pay award or be subject to 20 percent penalty. *Arkansas Hwy. and Transp. Dept. v.*

*Godwin*, 270 Ark. 743, 606 S.W.2d 127 (1980). Dependency of child is not conclusive presumption but is fact question to be determined in light of surrounding circumstances. *Doyle's Concrete Finishers v. Moppin*, 268 Ark. 167, 594 S.W.2d 243 (1980).

Ark. Code Ann. §11-9-404 authorizes Worker's Compensation Commission to determine amount to be posted as surety bond for self-insurers, but no less than two hundred thousand dollars (\$200,000.00).

Ark. Code Ann. §11-9-711 provides that party must file appeal with Commission within 30 days and cross appeal must be filed within 15 days. Ark. Code Ann. §11-9-108 provides that if waiver of coverage by corporate officer or self-employed employer reduces number of employees of business to less than 3 employer shall continue to provide coverage. Ark. Code Ann. §11-9-716 provides that lump sum settlement fee shall be discounted as provided in Ark. Code Ann. §11-9-804. *Southern Wooden Box Co. v. Smith*, 5 Ark. App. 14, 631 S.W. 2d 620 (1982).

Arkansas Act 444 of 1983 amends Ark. Code Ann. §11-9-102 as to include within definition of "medical services," services performed by practitioner licensed under state laws relating to healing arts.