

# DIGEST OF INSURANCE LAW

## DELAWARE

Not Revised for this Edition

### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

There are two inferior courts of special civil jurisdiction, namely Justices of Peace, and Common Pleas.

Justices of Peace have jurisdiction in cases of contract, debt, replevin and trespass for direct and immediate injuries to personal or real property in amounts not in excess of \$15,000, exclusive of any interest on judgment. Jurisdiction is state wide in civil cases, with the exception of summary possession.

Courts of Common Pleas have special jurisdiction limited in civil actions to amounts in controversy of \$50,000, and unlimited jurisdiction over counterclaims, cross-claims and third-party claims as defined and provided by 10 Del. Code §1322. They have concurrent jurisdiction with justices of peace. Trial is without jury.

Superior Court has original, civil jurisdiction in all cases, except where jurisdiction is vested exclusively in another court. Superior Court has state-wide jurisdiction. All complaints must be accompanied by "Form 30 Interrogatory" responses concerning witnesses, insurance coverage, past and present medical providers.

Court of Chancery has original jurisdiction over all matters and causes in equity, including decedents' estates.

Delaware has one state-wide Family Court, for all proceedings involving minors, and domestic relations.

#### Appellate Courts

Superior Court serves as appellate court for Court of Common Pleas and certain administrative agencies. Court of Common Pleas serves as appellate court for Justices of Peace. Court of Chancery serves as appellate court for certain other agencies and commissions, including Insurance Commissioner.

Supreme Court is Court of last resort and hears appeals from Superior Court, Court of Chancery and Family Court.

### LAW

#### Abbreviations

A. – Atlantic Reporter.

A.2d – Atlantic Reporter, Second Series.

Del. Supr. – Delaware Supreme Court.

Del. Super. – Delaware Superior Court.

Del. Ch. – Delaware Court of Chancery.

Del. Code – Delaware Code.

D.R.E. – Delaware Rules of Evidence.

Note – References are to Delaware Code Annotated (Rev. 1974) and subsequent amendments thereto.

### ACCIDENT AND HEALTH INSURANCE

All health policies issued must comply with statutory provisions. 18 Del. Code §3303.

### ACCIDENTAL MEANS

Accidental Means. Intentional stabbing of deceased caused "through external, violent, unintentional, involuntary and purely accidental means." *Fulnettle v. North American*, Del. Super., 50 A.2d 614 (1946). Grocery clerk wrenched shoulder lifting heavy package, held not caused by "violent and accidental means." *Metropolitan v. Landsman*, Del. Super., 165 A. 563 (1933). Insured killed by unintentional discharge of revolver while attempting to take it from another, held not caused by "accidental means." *Koester v. Mutual Life Ins.*, Del. Super., 179 A. 327 (1934). Insured deliberately thrown downstairs after making advances to man's wife, held not caused by "accidental means." *Szymanska v. Equitable Life Ins.*, Del. Super., 183 A. 309 (1936).

Term "by accidental means" is equivalent to "caused by accident" and as used in insurance policy, refers to operative cause of accident. *Chelly v. Home Ins. Co.*, Del. Super., 285 A.2d 810 (1971), *aff'd*, 293 A.2d 295 (1972).



## ADJUSTERS

Certificate of authority is required of claims adjusters. 18 Del. Code §§1701, 1708, 1720. Apprentice Adjuster is individual to whom initial license has been issued and is qualified to be adjuster except as to experience, education, and training. 18 Del. Code §1710.

## AGE

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

In general, age of majority is 18. 1 Del. Code §701. Except in extremely limited circumstances (i.e. medical malpractice), State Statutes of Limitation are not tolled for the benefit of minors.

## AGENTS AND BROKERS

Uniform Agents and Brokers Licensing Act as approved by National Association of Insurance Commissioners is adopted. 18 Del. Code §1701 *et seq.* This governs qualifications and procedures for granting certificates of authority to agents and brokers.

Agent. Individual, partnership or corporation holding agent's certificate of authority and appointed by insurer to solicit applications for policies of insurance, or to negotiate for policies of insurance on its behalf and, if authorized to do so by insurer, to issue conditional receipts, to effectuate and/or to countersign insurance contracts. 18 Del. Code §1702 (a). Agent who solicits or negotiates application for insurance shall, in any controversy between insurer and insured, be deemed agent of insurer. 18 Del. Code §1702 (c).

Broker. Individual, partnership or corporation holding broker's certificate of authority who, for compensation but not being appointed by insurer as agent, acts or aids in any manner in negotiating contract for insurance for party other than himself. Broker may not issue binders, conditional receipts or effectuate or countersign insurance contracts on behalf of insurer. 18 Del. Code §1703 (a). Broker who acts or aids in negotiating contracts for insurance shall, in any controversy between insured and insurer, be deemed representing insured; except, insurer which delivers into State to broker a policy of insurance pursuant to application or request of broker shall be deemed to authorize broker to receive on insurer's behalf payment of premium due on policy at time of issuance of delivery. 18 Del. Code §1703 (c).

Continuing Education. Resident and non-resident licensees must comply. Twenty approved credit hours, four of which in ethics, must be completed biennially.

Insurance Commissioner Regulation No. 47, as amended.

License and Regulation. Each insurance agent, broker or appraiser must be licensed by State Insurance Department and must have certificate of authority which authorizes and governs scope of business that may be transacted. 18 Del. Code §1713. Applicants must take written examination. 18 Del. Code §1724. Insurance Commissioner may suspend or terminate certificate of authority for violations of statute or, alternatively, fine licensee up to \$2300 for each violation. 18 Del. Code §1733. Revocation of license must be based upon violation of written policy or regulation. *Butler v. Insurance Comm'r of State of DE*, Del. Supr., 686 A.2d 1017 (1997).

Persons acting as agents or broker of insurance company without having certificate of authority are deemed agents or brokers under statute and subject to all duties, responsibilities, liabilities, prohibitions and penalties thereunder. 18 Del. Code §1702 (b), 1703 (b).

Persons acting as agents or brokers who have knowledge of violation of any provision of this title shall promptly report the facts and circumstances pertaining to the violation to commissioner. 18 Del. Code §1739 (a).

Appropriately licensed individuals may serve as Public Adjusters solely in relation to first party claims arising under insurance contracts that insure the real or personal property of the insured, on behalf of an insured individual in negotiating for, or effecting the settlement of a claim for loss or damage covered by an insurance contract. 18 Del. Code §1750 *et seq.*

## ARBITRATION

Uniform Arbitration Act has been enacted in Delaware. 10 Del. Code §5701 *et seq.*

All civil actions for money damages brought before Delaware Superior Court for sums equal to or less than \$100,000 will be subject to compulsory, non-binding arbitration. Del. Super. Ct. R. 16.1. Discovery (other than medical records, medical examination, and "Form 30 Interrogatories" - See Courts) is stayed prior to demand for trial de novo. Del. Super. Ct. R. 16.1 (e) and (h) (2). Hearing conducted by single attorney/arbitrator.

## ATTORNEYS

Appointment and Authority. Generally, death of client terminates the attorney-client relationship and revokes the authority of the attorney to act. *Coleman v. Durden*, Del. Supr., 338 A.2d 570 (1975). In some instances, however, an attorney retained by an insurance



company may act to protect the interests of that company subsequent to the death of the insured. *Hoffman v. Cohen*, Del. Supr., 538 A.2d 1096 (1988). Such authority is subject to limitations. *Id.* Note, though, that privity of a professional is not necessary (and, so, death of original client not preclusive) when performance is for benefit of an identifiable third party, at least as to economic damages. *Hodges v. Smith*, Del. Super., 517 A.2d 299 (1986).

**Conflict of Interest.** Subject controlled generally by Delaware Lawyers' Rules of Professional Conduct, 1.7-1.15. Lawyer shall not accept compensation for representing a client from one other than client unless client consents after consultation; there is no interference with lawyers independence of professional judgment as with the client-lawyer relationship; and client confidences and secrets are properly protected. Rule 1.8. Lawyer employed by organization represents the organization acting through its duly authorized constituents. Rule 1.13. For discussion of attorney and insurer conflicts in workers' compensation context *see, Cannon v. Container Corp. of Am.*, Del. Supr., 282 A.2d 614 (1971).

**Legal Malpractice.** Cause of Action cannot be established in the absence of a showing that wrongful conduct has deprived the client of something to which he otherwise would have been entitled. *Thompson v. D'Angelo*, Del. Supr., 320 A.2d 729 (1974). Subject to three-year statute of limitations. *Began v. Dixon*, Del. Super., 547 A.2d 620 (1988). Lawyer may not make an agreement prospectively limiting liability for malpractice unless permitted by law and client is independently represented in making the agreement. Delaware Lawyers Rules of Professional Conduct, 1.8 (h). Lawyers may not settle malpractice claim with an unrepresented client or former client without first advising in writing that independent representation is appropriate therewith. *Id.*

**Fees.** In general, controlled by Delaware's Lawyers' Rule of Professional Conduct 1.5. Must be reasonable. *Id.* Factors considered in determining reasonableness set forth in Rule 1.5. May be contingent, except in most domestic relations matters and in criminal cases. *Id.* Not recoverable by prevailing party in action in the absence of statute, common law rule, or agreement specifically providing for such. *Stephenson v. Capano Development*, Del. Supr., 462 A.2d 1069 (1983); *Began v. Dixon*, Del. Super., 547 A.2d 620 (1988). Fees recoverable by plaintiff as costs in successful action against any insurer upon any policy of property insurance. 18 Del. Code §4102. Fees for claimant's attorney in medical malpractice action limited by statute. 18 Del. Code §6865.

## AUTOMOBILES

See Law Digest Tables.

See "NEGLIGENCE"; "NO-FAULT"; "LIABILITY INSURANCE"; and "SERVICE OF PROCESS."

**Age.** Operator's license shall not be issued to person under 16 years of age, 21 Del. Code §2707. License may be issued to minor under age of 18 years if minor has completed course in driver education, or has been licensed in another state and completed course in driver's education, and if minor's license application is signed by father or mother of applicant, if both parents are living together within State, and minor resides with both parents; or, if minor resides only with mother, by mother only; or, if minor resides only with father, by father only; or, by either father or mother, if minor resides with neither and has no legal guardian within State; or, if minor is not living with either mother or father, guardian residing within State or employer. 21 Del. Code §2707, 2712. Negligence of minor under age of 18 is imputed to person signing such application, who shall be jointly and severally liable with minor for damages. 21 Del. Code §6105. Every owner causing or knowingly permitting minor under 18 years to drive motor vehicle, and any person who gives or furnishes motor vehicle to such minor shall be jointly and severally liable with such minor for damages caused by negligence of such minor, and negligence of such minor shall be imputed to such owner or person. 21 Del. Code §6106. *See also, Benson v. Lynch*, 404 F. Supp. 8 (D. Del. 1975). Imputed negligence applies only to incidents which occur upon highway of state. *Markland v. B. & O. R.R. Co.*, Del. Super., 351 A.2d 89 (1976).

**Qualification.** Operation is also prohibited by persons whose license has been suspended or revoked, habitual drunkards or drug users, adjudged mentally ill persons, idiots, imbeciles, or feebleminded persons or persons afflicted with or suffering from physical disability or disease such as to prevent exercise of reasonable control of motor vehicle, by person unable to understand highway warnings or direction signals in English language, or by one under 18 who has not completed driver education or who has been adjudged delinquent. 21 Del. Code §2707 (b). Persons subject to losses of consciousness due to disease of central nervous system must furnish, upon initial application and annually thereafter, certification from 2 medical doctors that disease is under sufficient control to permit such person to operate motor vehicle with safety to persons and property. 21 Del. Code §2707 (b) (7).

**Occupational License.** Upon application, occupational license may be issued during period of suspension



provided suspension created extreme hardship in conduct of applicant's business and provided that there have been no more than 2 such prior suspensions. 21 Del. Code §2733 (g). No occupational license will be issued to one whose license was suspended for physical or mental disability or revoked because of conviction for commission of specified serious acts; i.e., manslaughter by auto; drunken driving; three charges of reckless driving in one year; adjudication of delinquency of minor, etc. 21 Del. Code §2732, 2733.

Agency. In any action arising out of operation of automobile, if plaintiff so requests in complaint, denial by defendant of agency of operator must be made by affidavit at or before time of filing answer, or agency and operation in scope of employment will be taken as admitted. 10 Del. Code §3916. If owner of automobile is not present while automobile is being driven by another, no presumption of agency arises merely from ownership. *Roach v. Parker*, Del. Super., 107 A.2d 798 (1954).

Evidence. Rules 702 & 703 require court to be "Daubert" gatekeeper. *Cede v. Technicolor*, Del. Supr., 758 A.2d 485 (2000). Use of vehicle photos greatly restricted. *Davis v. Maule*, Del. Supr., 770 A.2d 36 (2001). Causation and permanency testimony by chiropractor may be precluded. *White v. Faith*, Del. Super. (98C-02-003) (2000). Nullified, at least as to causation, by 24 Del. Code §717.

Family Purpose Doctrine. Rejected, but it has been partially enacted by imputed negligence statute. *Markland v. B. & O. R.R. Co.*, Del. Super., 351 A.2d 89 (1976).

Guest Cases. Delaware Automobile Guest Statute was repealed, effective June 23, 1983. Property Guest Statute is still in effect. However, attractive nuisance doctrine overcomes property guest statute for both guest (*Fox v. Fox*, Del. Supr., 729 A.2d 825 (1999)) and trespasser (*Porter v. Delmarva*, Del. Supr., 547 A.2d 124 (1988)) and children.

Omnibus Clause. "Actual use" omnibus clause did not exclude coverage of driver operating car with permission of owner's daughter, but without permission of owner. *Allstate Ins. Co. v. Nationwide*, Del. Supr., 273 A.2d 261 (1970). "Actual operation" clause gives opposite result. *Selected Risk Ins. Co. v. Travelers Ins. Co.*, Del. Super., 287 A.2d 675 (1972).

## AVIATION

Uniform State Aeronautics Law has been enacted in Delaware. 2 Del. Code §301 *et seq.*

## BROKERS

See "AGENTS AND BROKERS."

## CANCELLATION

Basically controlled by 18 Del. Code §3903 *et seq.* Cancellation and non-renewal permitted only for statutory reasons. 18 Del. Code §3904 (a). Cancellation not effective unless 30 days notice stating reason; except for non-payment, requiring only 10 days. Non-renewal not effective unless 30 days notice stating reason; except no notice required with non-payment. Procurement of new policy on same auto by insured automatically cancels prior policy. Notice of cancellation on non-renewal requires certified mail to last known address. Notice must include availability of assigned risk plan and right to apply to Commissioner.

Assigned risk policies have increased burdens, controlled by Insurance Commissioner's Regulation 17. No notice distinction exists between cancellation and non-renewal. Assigned risk plan is to protect public. Required notice to cancel or not renew must be mailed to insured. Then, if premium not received by date due, carrier must mail a notice of policy's termination to insured, which is not effective until 10 days after the notice date. Policy is automatically reinstated if payment made within 30 days of original due date. Finally, insurer must report termination to Insurance Commissioner for effective cancellation or non-renewal. *State Farm v. Mundorf*, Del. Supr., 659 A.2d 215 (1995).

Payment to either company agent or non-associated broker constitutes delivery for purposes of insured's timely compliance. *Bradford v. Travelers*, Del. Supr., 301 A.2d 519 (1972).

Excluded driver provisions in a policy require notice sufficient to satisfy cancellation requirements. *Cox v. Ragland*, Del. Supr., 1996 WL 769632. But endorsements excluding coverage to parents when minor child driving are valid. *Kivlin v. Nationwide*, Del. Supr., 765 A.2d 536 (2000).

## CHATTEL MORTGAGE

See "FIRE INSURANCE."

## CONSTRUCTION OF POLICY

Ambiguous terms in insurance policy, considered to be contracts of adhesion, are construed against the carrier/drafter. However, plain language is not made ambiguous by relationships of adhesion, and will be enforced without distortion, if otherwise proper. Mere disagreement on construction of language does not create

ambiguity. *City Investing v. Continental Cas.*, Del. Supr., 624 A.2d 1191 (1993).

Duty to defend typically looks to allegations of complaint at outset of case. *American Ins. v. Risk Enterprise Mgmt.*, Del. Supr., 76 A.2d 826 (2000).

### CONTRIBUTION

See "LIABILITY INSURANCE."

Uniform Contribution Among Tort-feasors Law has been enacted in Delaware. 10 Del. Code §§6301-6308. Defendant is not entitled to credit of amounts paid by settling co-defendant unless that co-defendant is found liable at trial. *The Medical Ctr. of DE v. Mullins*, Del. Supr., No. 637 A.2d 6 (1994).

Prior employers of injured employee share immunity from common law suit under Worker's Compensation Law (19 Del. Code §2304) and are not subject to claim for contribution under Uniform Contribution Among Tort-feasors Law. *Farrall v. Armstrong Cork Co.*, Del. Super., 457 A.2d 763 (1983).

### DAMAGES

See also "DEATH."

Collateral source rule applied (so long as original source was unconnected to defendant). *Yarrington v. Thornburg*, Del. Supr., 205 A.2d 1 (1964). Whether action is ex contractu or ex delicto, measure of damages, in absence of any showing of willful, wanton or intentional wrongdoing is loss or injury resulting directly or proximately from wrongful act. *White v. Metropolitan Merchandise Mart*, Del. Super., 107 A.2d 892 (1954). Although plaintiff is not required to show damages with absolute certainty, law does not permit recovery of damages which are merely speculative or conjectural. *Laskowski v. Wallis*, Del. Supr., 205 A.2d 825 (1964). Jury verdict will not be disturbed as excessive or insufficient unless it shocks court's conscience and injustice of allowing it to stand is clear. *Storey v. Castner*, Del. Supr., 314 A.2d 187 (1973). However, in cases where defendant does not rebut expert medical testimony regarding damages, or concedes that the accident caused at least some damages, a zero verdict is necessarily against the weight of the evidence and a re-trial or additur is appropriate. *Amalfitano v. Baker*, Del. Supr., 794 A.2d 575 (2001); *McCaleb v. Klein*, Del. Super., C.A. No., 01C-10-238, Abelman, J. (Feb. 3, 2005).

Damages may include present value of future lost earnings. *Steppi v. Stromwasser*, Del. Supr., 297 A.2d 26 (1972). Impact of income taxes on future earnings is not to be taken into account in determining award for loss of

earnings. *McNally v. Eckman*, Del. Supr., 466 A.2d 363 (1983). Under survival statute recovery may be had for lost earnings beyond date of death. 10 Del. Code §3704 (a); *Guthridge v. Pen-Mod*, Del. Super., 239 A.2d 709 (1967). Punitive damages are not recoverable in survival action under 10 Del. Code §3704 (a); *Magee v. Rose*, Del. Super., 405 A.2d 143 (1979).

Punitive damages may be awarded if jury finds that defendant's actions were motivated by some form of malice. Defendant's conduct must reflect conscious indifference or "I don't care" attitude towards rights of plaintiff. *Chloroben Chemical Corp. v. Comegys*, Del. Supr., 464 A.2d 887 (1983). If error of judgment involved, danger must be readily apparent and consciously ignored. *Jardel Co. v. Hughes*, Del. Supr., 523 A.2d 518 (1987). Amount of such damages should be reasonably related to all of surrounding circumstances. *Guthridge v. Pen-Mod*, Del. Super., 239 A.2d 709 (1967). As general rule, punitive damages are not recoverable for breach of contract. *White v. Metropolitan Merchandise Mart*, Del. Super., 107 A.2d 892 (1954). If breach of contract amounts to tort, however, punitive damages may be available. *Casson v. Nationwide*, Del. Super., 455 A.2d 361 (1982). Delaware Supreme Court has found that it is not against public policy for insurance contracts to cover punitive damages. *Whalen v. On-Deck*, Del. Supr., 514 A.2d 1072 (1986). And where policy provides coverage for "all damages" coverage will include punitive damages. *Jones v. State Farm*, Del. Supr., 610 A. 2d 1352 (1992).

Where negligence proximately causes fright in one within immediate area of physical danger from that negligence, which in turn produces physical consequences, such as would be elements of damage if bodily injury had been suffered, injured party may recover. *Robb v. Pennsylvania R.R. Co.*, Del. Supr., 210 A.2d 709 (1965).

To support recovery for mental anguish, fright alone, unaccompanied by physical results is insufficient. *Nutt v. A.C.&S.*, Del. Super., 466 A.2d 18 (1983), *aff'd sub nom*, *Mergenthaler v. Asbestos Corp. of America*, Del. Supr., 480 A.2d 647 (1984). Essential element of any claim for mental anguish is that claimant have present physical injury. *Id.* Intentional infliction of emotional distress may provide legal predicate for damages, even in absence of bodily harm. *Cummings v. Pinder*, Del. Supr., 574 A.2d 843 (1990).

Punitive damages in products liability cases are available only upon showing of outrageous conduct by tort-feasor, and strong factual predicate for compensatory damages must first be established. *Sheppard v. A.C.&S. Co.*, Del. Super., 484 A.2d 521 (1984).



Interest on judgment from date of bodily injury, if plaintiff makes written demand at least 30 days prior to trial in amount less than verdict, 6 Del. Code §2301 (d), at 5% over Federal Reserve rate. 6 Del. Code §2301 (a). Also, if plaintiff obtains a verdict from jury or judgment from the Court more favorable than arbitration order, and defendant demanded a trial de novo, interest on amount of the arbitration order shall be payable in accordance with 6 Del. Code §2301 beginning with the date of the order. Superior Court Civil Rule 16.1(k)(11)(D)(iii).

### DEATH

Presumption arises from unexplained absence for period of seven years. *Bradford v. Culbreth*, Del. Super., 10 A.2d 534 (1939).

Where surviving spouse brings death action, she may recover, as part of her damages, amounts deceased husband would have spent on his children. *Bennett v. Andree*, Del. Supr., 252 A.2d 100 (1969). Statute of Limitations Discovery rule operates to delay running of limitations period of this section regardless of whether injured person or his survivors bring suit. *Dimedio v. Consolidated Rail Corp.*, 649 F. Supp. 1340 (D. Del. 1986).

"Death" damages recoverable under survival statute, 10 Del. Code §3704 (a). *Loden v. Getty Oil*, Del. Supr., 359 A.2d 161 (1976). Survival action contemplates compensatory damages for conscious pain and suffering following injury but prior to death. However, plaintiff has burden of proving actual existence of consciousness and of pain. *Magee v. Rose*, Del. Super., 405 A.2d 143 (1979).

Action for wrongful death for benefit of wife, husband, parent, child and sibling of decedent, or, if none, for benefit of any person related to decedent by blood or marriage. Neither parent nor sibling has claim for mental anguish if a spouse or a child survives decedent. In no event does another "person related" have a claim for mental anguish. 10 Del. Code §3724. Wrongful death damages are awarded in proportion to injury resulting and divided among beneficiaries in shares as directed by verdict. 10 Del. Code §3724 (c).

Determination of amount of damages will be based on consideration of all facts and circumstances in order to fairly compensate for injury resulting from wrongful death. Jury may consider such factors as: loss of expected pecuniary benefits to beneficiaries; loss of contributions for support; loss of consortium services; reasonable funeral expenses up to \$2,000; and mental anguish

but only as to spouse, children and parents or those related in loco parentis. 10 Del. Code §3724.

### FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables and "NO-FAULT INSURANCE."

No owner of vehicle registered in this state shall operate or authorize operation of such vehicle unless owner has insurance in specified amount and for specified coverages. 21 Del. Code §2118. Effective July 19, 1983, minimum coverage for personal injury is \$15,000 for any one person injured and \$30,000 for all persons injured in one accident. For property damage, minimum coverage is \$5,000. 21 Del. Code §2902. No-fault act requires \$10,000 liability limits for non-vehicle property losses. 21 Del. Code §2118 (a) (3). Owner of 15 or more vehicles may obtain certificate as self-insurer if financial arrangements to pay tort liabilities are substantially equivalent to complying insurance policy. 21 Del. Code §2904.

Public Carriers - Motor Buses. Regulations may be prescribed for filing bonds, carrying insurance. All carriers operating buses, whose current liquid assets do not exceed current liabilities by at least \$100,00 must carry insurance, as prescribed by Transportation Authority, but not less than: \$25,000 per person injured, \$50,000 for all persons injured, \$10,000 for property damage, excluding cargo. 2 Del. Code §1818.

Public Carriers - Other. Transportation Authority may set minimum amounts and kinds of insurance to be carried by public carriers provided no carrier may operate without coverage of \$100,000 per person, \$200,000 per accident for taxicabs, \$300,000 per accident for limousines, and \$30,000 property damage (exclusive of cargo) per accident. 2 Del. Code §1802A (d).

Rental Cars. Owner of car rented without driver, who does not carry liability insurance of \$10,000 per person, \$20,000 for all persons, and \$5,000 for property damage, shall be jointly and severally liable with renter for latter's negligence in operating vehicle. 21 Del. Code §6102. Coverage for driver, not authorized on car rental agreement, but who had Lessee's permission to drive, is required to be same as that provided for Lessee, regardless of whether amount of coverage was minimum amount specified by this section or a greater amount. *Stokes v. Reliance Ins. Co.*, Del. Super., 521 A.2d 638 (1986).

No registration shall be issued or renewed for any vehicle not covered by insurance meeting no-fault requirements. 21 Del. Code §2118 (k). Irrespective of



rental contract, primary coverage follows vehicle ownership (i.e. lessor). *State Farm v. Clarendon*, Del. Supr., 604 A.2d 384 (1992).

Whenever person fails to satisfy judgment from automobile accident within sixty days, his driver's license and registration may be suspended until judgment is paid or satisfactory arrangements for payment are made. 21 Del. Code §2941, 2942.

### FIRE INSURANCE

Assignment. Proper person to sue is person with whom contract was made. *Schilansky v. Merchant's & Manufacturer's*, Del. Supr., 55 A. 1014 (1903).

If repair or reconstruction is prohibited by municipal authorities, loss is deemed "constructive total loss." *Fidelity & Guar. Ins. v. Mondzelewski*, Del. Supr., 115 A.2d 697 (1955).

Where total loss is shown, whether actual or constructive, appraisal provisions of policy are overridden by valued policy ordinance, and appraisers' award is not binding on insured. *Fidelity & Guar. v. Mondzelewski*, Del. Supr., 117 A.2d 369 (1955). Such ordinance does not apply to partial loss.

Real value of property loss means fair market value, not replacement value. *Metropolitan Mut. Fire Ins. Co. v. Carmen Holding Co.*, Del. Supr., 220 A.2d 778 (1966).

Where judgment is rendered against insurer upon policy of property insurance, court shall allow plaintiff reasonable sum as attorney's fees. 18 Del. Code §4102.

Wife is not barred from fire insurance recovery due to husband intentionally burning down property owned by them as tenants by entirety. *Steigler v. I.N.A.*, Del. Supr., 384 A.2d 398 (1978). Because rights of husband and wife are separate under insurance contract, insurer's payment of wife's claim for her portion of policy benefits for fire loss on jointly owned property does not operate as waiver of policy-imposed limitation period with respect to husband, where arson charges against husband are dropped after limitation period expires. *Closser v. Pennsylvania Mut. Fire Ins. Co.*, Del. Supr., 457 A.2d 1081 (1983).

### FRAUD

See "AGENTS AND BROKERS"; "REPRESENTATIONS AND WARRANTIES."

### GUEST CASES

Automobile guest statute (21 Del. Code §6101) repealed effective June 23, 1983. Property owners guest statute (25 Del. Code §1501) remains in effect, subject to limitations regarding attractive nuisance. *Fox v. Fox*, Del. Supr., 729 A.2d 825 (1999). See "AUTOMOBILES." Premises guest statute is also subject to virtual strict liability of dog bite statute. 7 Del. Code §1711.

### HUSBAND AND WIFE

See Law Digest Tables.

Community Property Rights. Community property system does not exist in Delaware.

Loss of Service and Medical Expense. Husband may sue for loss of service and medical expenses as result of injuries caused his wife. *Townsend v. Wilmington City Ry.*, Del. Super., 78 A. 635 (1907). Wife has cause of action for loss of consortium of husband whose injuries were due to defendant's negligence. *Yonner v. Adams*, Del. Super., 167 A.2d 717 (1961). Whether right exists is one of substantive and not remedial law under conflicts of law. *Folk v. York-Shipley*, Del. Super., 233 A.2d 451 (1967). Doctrine of interspousal tort immunity is no longer recognized. *Beattie v. Beattie*, Del. Supr., 630 A.2d 1096 (1993).

### INFANTS

See "AUTOMOBILES, Age."

Age of majority is eighteen. 1 Del. Code §701.

Infant must appear by guardian and not in person or merely by attorney. *King v. Cordrey*, Del. Super., 177 A. 303 (1935). After commencement of action by infant, order may be made on his petition, admitting to prosecute by certain person as next friend. *Howell v. American Bridge*, Del. Super., 53 A. 53 (1902). Infant, originally suing by next friend, may prosecute on own behalf upon reaching majority. *Flint v. Flint*, Del. Super., 82 A. 538 (1912).

Parental immunity doctrine has been only abrogated to extent of liability coverage in context of actions for negligence arising from automobile accident, brought on behalf of unemancipated minor child against parent. *Williams v. Williams*, Del. Supr., 369 A.2d 669 (1976). Parental immunity doctrine continues to bar contribution claims for negligent supervision, although defense of sole responsibility on part of negligent parents prevails. *Schneider v. Coe*, Del. Supr., 405 A.2d 682 (1979).



## LIABILITY INSURANCE

Collateral Source Rule applied. *Yarrington v. Thornburg*, Del. Supr., 205 A.2d 1 (1964).

Any exclusion must be both customary and consistent with 21 Del. Code §2118 to be enforceable. Even then, it is enforceable only beyond minimum coverage (\$15,000). *Cubler v. State Farm*, Del. Supr., 679 A.2d 66 (1996).

Liability insurer under duty to conduct settlement negotiations in good faith, or be liable for excess judgment, and pre-trial offer to settle for policy limits does not itself negate bad faith, when carrier had previously rejected plaintiff's offer to settle for policy limits. *Maguire v. Allstate Ins. Co.*, 341 F. Supp. 866 (D. Del. 1972). See also "DAMAGES" and 6 Del. Code §2301 (d) on pre-judgment interest.

Collateral Estoppel/Exclusions. Insured convicted of murder/rape. That is jury rejection of not guilty by mental illness. Victim's estate cannot relitigate claim against insurer of perpetrator re: exclusion for intentional acts. *Nationwide v. Flagg*, Del. Super., 789 A.2d 586 (2001).

When insured fails to prove compliance with notice provision of his policy, insurer is not freed from liability unless it proves it has been prejudiced thereby. *State Farm v. Johnson*, Del. Supr., 320 A.2d 345 (1974).

Insurer must give prompt and timely written notice to claimant informing him/her of applicable state statute of limitations regarding action for his damages, during pendency of any claim to insurer's casualty insurance policy. 18 Del. Code §3914. The absence of such notice bars insurer (through tort-feasor) from asserting defense of statute of limitations. *Samoluk v. Basco*, Del. Super., 528 A.2d 1203 (1987).

Accommodation or partial payments by insurer tolls statute of limitations unless written notice of limitation period is given. 10 Del. Code §4317. This applies only to personal injury claims and not property damage. *Hanby v. Cross*, Del. Super., 364 A.2d 834 (1976).

Uninsured Motorist. "Uninsured vehicle coverage" is required by statute, subject only to rejection in writing on form furnished by insurer describing coverage rejected by insured named therein, or by renewal of such policy unless coverage then requested by insured in writing. 18 Del. Code §3902 (a). Amount of coverage shall be not less than minimum limits under financial responsibility law (15/30/5), with property damage subject to \$250 deductible, unless written agreement otherwise,

and property damage to include loss of use of vehicle. 18 Del. Code §3902 (a).

Uninsured vehicle is statutorily defined as including: 1) one without any auto liability bond, insurance or security at time of accident in at least minimum amounts required by financial responsibility law at place where auto principally garaged; 2) one for which coverage is denied or insurer becomes insolvent; 3) hit and run vehicle which causes bodily injury or property damage, either by physical contact with insured or insured vehicle, or by non-contact if both driver and owner of non-contact vehicle unknown, provided insured notifies insurer within 30 days or as soon as practicable and provided insured or legal representative has legal action arising out of accident. 18 Del. Code §3902 (a) (3).

Underinsured Motorist. Underinsured motor vehicle is one for which bodily injury liability coverage may be in effect, but limits for which total less than underinsured motorist coverage amount which shall be stated on the policy declaration sheet. 18 Del. Code §3902 (b) (effective August 18, 1983). Every insurer must offer option to purchase additional coverage for personal injury or death up to amount of \$300,000, but not to exceed basic policy personal injury liability limits, which additional insurance shall be underinsured coverage, acceptance of which operates to amend uninsured coverage to pay for bodily injury damages recoverable by insured or legal representative from driver of underinsured motor vehicle. Rejection of additional coverage for "underinsured" benefits need not be in writing. *Humm v. Aetna Cas. & Sur. Co.*, Del. Supr., 656 A.2d 712 (1995). Although burden to prove coverage less than liability coverage is on insurer. Insurer not obligated to make any underinsured coverage payment until all applicable bodily injury insurance policy limits exhausted by payment of settlement or judgments. 18 Del. Code §3902 (b). Execution of release for tort-feasor's policy limits does not preclude recovery against underinsurance carrier. 18 Del. Code §3902 (6) (4), superseding. *Nationwide Mut. Ins. Co. v. Nacchia*, Del. Supr., C.A. No. 338, 1992 (July 20, 1993).

Insurer under affirmative duty to offer "uninsured coverage" up to \$300,000 or amount of policy limits for personal injury liability, whichever less, failing which policy subject to reformation as if offered and accepted. *State Farm Mut. Auto Ins. Co. v. Hallowell*, *supra*. Failure to offer uninsured coverage in compliance with 18 Del. Code §3902 (b) will keep offer of such coverage open and insured may elect coverage at any time, even after accident. *Arms v. State Farm Mut. Auto. Ins. Co.*, Del. Super., 465 A.2d 360 (1983). Insurer must offer additional uninsured motorist coverage when ever new



policy, other than renewal (defined as automatic continuation of old policy) is issued. *State Farm v. Arms*, Del. Supr., 477 A.2d 1060 (1984). 18 Del. Code §3902 (b), any substantive change in policy, including change in number of vehicles covered, constitutes new policy. *Whaley v. Allstate*, 595 F. Supp. 1023 (D. Del. 1984). Under case law applicable to causes arising prior to effect of revised statutory provisions above, "underinsured coverage" need not have been offered except that to extent coverage available to liable tort-feasor was less than minimum required limits, underinsurance protection up to statutory minimum limit was implied. *State Farm v. Hollowell*, Del. Supr., 426 A.2d 822 (1981).

"Stacking" of uninsured/underinsured coverage limits where two or more vehicles insured under one policy is precluded by statute. 18 Del. Code §3902 (c). *Alfieri v. Kile*, Del. Super., C.A. No. 78C-JA-81, Martin, J. (Dec. 16, 1985). "Other insurance" provision is valid where applicable. *Id.* at 381-84. Exclusion in policy which precludes uninsured motorist coverage as to any accident occurring during the use of any vehicle by insured to carry passengers or property where insured receives fee, violates provisions of 18 Del. Code §3902, and is not enforceable, since such coverage is personal to insured and not applicable to specific vehicle or use. *Jeanes v. Nationwide Ins. Co.*, Del. Ch., 532 A.2d 595 (1987). Exclusions of underinsured or uninsured coverage generally not permitted unless express statutory grant. *Frank v. Horizon*, Del. Supr., 533 A.2d 1199 (1989).

In underinsurance claim, amount paid by tort-feasor's policy shall be deducted from damages, not UIM policy limits. *Hurst v. Nationwide Mut. Ins. Co.*, Del. Supr., 652 A.2d 10 (1995), *overruling Aetna Cas. & Sur. Co. v. Kenner*, Del. Supr., 570 A.2d 1172 (1990); *Nationwide Mut. Ins. Co. v. Peebles*, Del. Supr., 688 A.2d 1374 (1997). A vehicle is not underinsured if total liability limits are equal to applicable UIM policy limits regardless of amount recovered by plaintiff from liability limits or the number of plaintiffs recovering. *Nationwide Mut. Ins. Co. v. Williams*, Del. Supr., 695 A.2d 1124 (1997); 2 Del. Law Review, No. 1 P.71. Plaintiff may not stack multiple UIM policies to determine UIM limits, but may select any applicable policy for threshold. *Colonial Ins. v. Ayers*, Del. Supr. (2001) 2001 WL 463341. However, stacking is permitted once statutory threshold for UIM coverage has been satisfied by any one policy. *Deptula v. Horace Mann Ins. Co.*, Del. Supr., 842 A.2d 1235 (2004).

## LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

See also, "LIABILITY INSURANCE."

Absent express statute to contrary, policy provision of limitation period shorter than that in statute controls. *Wesselman v. Travelers Indem. Co.*, Del. Supr., 345 A.2d 423 (1975); *Woodward v. Farm Family Cas. Ins. Co.*, Del. Supr., 996 A.2d 638 (2002).

Contribution and Indemnity. Statute of limitations does not begin to run from date of accident. For indemnity action, time period of limitation begins when cause of action arises by indemnitee's liability becoming fixed. *Chesapeake Utility v. Chesapeake & Potomac Tel. Co.*, Del. Super., 401 A.2d 101 (1979). For contribution, statute of limitations begins to run when defendant either has judgment entered against him or has paid more than his proper share. *Royal Car Wash v. Mayor & Council of Wilmington*, Del. Super., 240 A.2d 144 (1968).

Accrual of Actions. Tort action arises at time of wrongful act. *Isaacson, Stolper & Co. v. Artisan's Savings Bank*, Del. Supr., 330 A.2d 130 (1974). Contract action arises at time of breach. *Bradford v. Travelers Indem. Co.*, Del. Super., 301 A.2d 519 (1972). Breach of implied warranty occurs at time of sale. *Harvey v. Sears, Roebuck & Co.*, Del. Super., 315 A.2d 599 (1973). Personal injuries resulting from breach of warranty on transactions falling within U.C.C. governed by U.C.C. limitation period of 4 years from accrual of cause of action. *Johnson v. Hockessin Tractor*, Del. Supr., 420 A.2d 154 (1980). See 6 Del. Code §2-725. But if negligence claim is joined with claim for breach of warranty, negligence portion must be brought within two years. *Sayers v. Leon N. Weiner & Assoc.*, Del. Super., 442 A.2d 98 (1981).

Medical Malpractice. No action against health care provider for personal injury arising out of malpractice shall be brought after two years from date injury occurred, unless such injury was unknown to injured person and not discoverable by reasonable diligence, in which case such action may be brought up to three years from date injury occurred. Minor has later of time provided here, or sixth birthday. 18 Del. Code §6856.

Limitations here do not give rise to constitutional claim, even where plaintiff was minor at time of alleged injury. *Cole v. Planned Parenthood*, Del. Supr., 530 A.2d 1119 (1987). Continuing treatment doctrine recognized in medical malpractice actions wherein statute is tolled during period that patient is under care of physician who commits malpractice if patient does not know



or does not have reason to know of wrong. *Ewing v. Beck*, Del. Supr., 520 A.2d 653 (1987).

When an inherently unknowable injury has been suffered by one blamelessly ignorant of act or omission and injury complained of, and harmful effect develops gradually over period of time, the injury is "sustained" when the harmful effect first manifests itself and becomes physically ascertainable. *Layton v. Allen*, Del. Super., 246 A.2d 794 (1968), as expanded by *Bendix Corporation v. Stagg*, Del. Supr., 486 A.2d 1150 (1984). "Time of discovery" rule has been applied in following situations: accountant's error on tax matter, *Isaacson, Stopler & Co. v. Artisan's Savings Bank*, Del. Supr., 330 A.2d 130 (1974); attorney's error, re: property title, *Child v. Rodgers*, Del. Super., 377 A.2d 374 (1977), *aff'd in part, rev'd in part*, 401 A.2d 68 (1979); action on title insurance policy, *Pioneer Title Ins. Co. v. Sabo*, Del. Super., 382 A.2d 265 (1978); defective septic system, *Rudginski v. Pullella*, Del. Super., 378 A.2d 646 (1977); negligent electrical wiring by contractor, *Travis v. Taralia*, Del. Super., C.A. No. 84C-MR-85, Poppiti, J. (April 23, 1986); product liability action involving latent diseases. *Bendix Co. v. Stagg*, Del. Supr., 486 A.2d 1150 (1984).

Fraudulent concealment of cause of action suspends operation of statute of limitations until plaintiff could have made discovery by reasonable diligence. *Sellon v. GMC*, 571 F. Supp. 1094 (D. Del. 1983). Plaintiff's failure to exercise due diligence to discover rights bars claim brought more than two years after date of injury. *Shockley v. Dyer*, Del. Supr., 456 A.2d 798 (1983).

Suits for PIP benefits under no-fault act (21 Del. Code §2118) must be filed within three years of denial by insurer of payment (and within three years of payment for subrogation claims). *Harper v. State Farm*, Del. Supr., 703 A.2d 136 (1997). Statute of limitations governing action by insured against his insurer to recover uninsured motorist benefits is three (3) years beginning when insurer denies coverage and notifies insured of denial. *Allstate Ins. Co. v. Spinelli*, Del. Supr., 443 A.2d 1286 (1982).

Cause of action to recover benefits for fire loss accrues on date of fire, not when claim is denied. *Closser v. Pennsylvania Mut. Fire Ins. Co.*, Del. Supr., 457 A.2d 1081 (1983). Plaintiffs fire loss claim time-barred due to failure to file suit within 12 months of fire as required by insurance policy. *R.A. Passerin v. International Underwriters*, Del. Supr. No. 256-1984, (Feb. 22, 1985). Action against broker for negligent procurement of insurance coverage accrues from no later than receipt of pre-

mium, not date of loss. *Kaufman v. C.L. McCabe & Sons*, Del. Supr., 603 A.2d 831 (1992).

Statute of limitations governing actions that accrue prior to defendant's death, but which are brought after his or her death is eight months from date of granting of letters. 12 Del. Code §2102 (a). However, nothing in that section affects or prevents, to limits of insurance protection only, any proceeding to establish liability of decedent or personal representative for which he or she is protected by liability insurance. 12 Del. Code §2102 (f).

## MALPRACTICE

Medical. Malpractice review panel is convened upon demand of any party 18 Del. Code §6808. Panel makes finding as to whether defendant (s) acted or failed to act within standard of care. Findings of panel are appealable to Superior Court. *Id.* Panel findings are not binding on Superior Court, but are admissible as evidence. 18 Del. Code §6812.

Expert medical testimony is required for finding of liability, except not required if malpractice review panel opinion is admitted into evidence and found negligence caused personal injury or death.

Defendant in medical malpractice action seeking summary judgment is required to produce expert to satisfy initial burden of proving conformance to community standards. *Suraez v. Wilmington Med. Ctr.*, Del. Super., 526 A.2d 574 (1987).

Expert testimony not required if rebuttable inference of negligently caused personal injury or death under one or more of three prescribed circumstances. 18 Del. Code §6853. In health care malpractice cases, attorney's fees are limited according to scheduled amounts. 18 Del. Code §6865.

Legal. In order to prove damages in legal malpractice claim, client must show that but for negligence complained of, client would have been successful in prosecuting or defending action in question. *Woulard v. Kennedy*, Del. Super., C. A. No. 83C-AP-33, O'Hara, J. (Aug. 20, 1985).

Educational. Delaware does not recognize a cause of action for educational malpractice against a driving school. *Moss Rehab. v. White*, Del. Supr., 692 A.2d 902 (1997).

## MOTOR CARRIERS

See also, "AUTOMOBILES."

License Requirements. Any person employed for principal purpose of operating motor vehicle and any



person who drives motor vehicle while in use as public or common carrier of persons or property is "chauffeur." 21 Del. Code §101. Applicant for chauffeur's license must be at least eighteen years of age and have had at least one year's previous experience as operator of motor vehicle. 21 Del. Code §2707.

Every motor vehicle, trailer, semi-trailer, and pole trailer before being driven or moved on highway must have been registered, have certificate of title and current registration plates issued, and display plates in manner provided. 21 Del. Code §2101, 2115, 2126.

Size of Vehicle and Loads. Regulated. 21 Del. Code §4502.

Weights of Vehicles and Loads. Regulated. 21 Del. Code §4503.

## NEGLIGENCE

See Law Digest Tables.

See "AUTOMOBILES."

Attractive Nuisance. Doctrine discussed in *Beaston v. James Julian*, Del. Super., 120 A.2d 317 (1956). Applies to both guest and trespassing children per Restatement, but must be condition of the realty. *Fox v. Fox*, Del. Supr., 729 A.2d 825 (1999).

Choice of Law. Delaware applies most significant relationship test of Second Restatement. *Travelers Indem. Co. v. Lake*, Del. Supr., 594 A.2d 38 (1991).

Property Guest Statute. Covers trespassers, but has been limited to apply only to private residential or farm premises. 25 Del. Code §1501. However, common law provides that landowner owes a guest or trespasser only the duty to refrain from willful or wanton conduct. *Hoesch v. National R.R. Pass.*, Del. Supr., 677 A.2d 29 (1996). Tenants, landlords, owners and possessors of land are protected from suit by guests by virtue of this statute. *Stratford Apts. v. Fleming*, Del. Supr., 305 A.2d 624 (1973). Guests may recover for injuries caused by willful, wanton, or intentional conduct on part of owner or occupier. 25 Del. Code §1501. Social guests invited onto property owned by landlord to visit tenant are not, as to landlord, guests within scope of 25 Del. Code §1501. *Bell v. Halfen*, Del. Supr., 493 A.2d 304 (1985).

Landowners. Owner or occupier of land owes no duty to keep premises safe for entry of use by others for recreational purposes, or to give any warning of dangerous condition on premises (exception 7 Del. Code §5906), where owner either directly or indirectly invites or permits property to be used for recreational purposes without charge. 7 Del. Code §5901 *et seq.* Statute does

not limit owner's liability for willful or malicious failure to guard or warn against dangerous condition existing on land. 7 Del. Code §5906. In order to claim statute's protection, owner or occupier must directly or indirectly invite public to enter his or her land without charge for recreational purposes; landowner who undertakes affirmatively either to warn or bar public from entry cannot claim statute's protection. *Gibson v. Keith*, Del. Supr., 492 A.2d 241 (1985). Owner may cease to have duties where actual control of property is relinquished to another entity (such as property management concern). Plaintiff must show some control. *Argoe v. Commerce Square Apts.*, Del. Super., C.A. 96C-02-026 (1999) [p. 21].

Comparative Negligence. Doctrine has been adopted by statute, replacing contributory negligence, and applies to all actions for wrongful death or injury to person or property. 10 Del. Code §8132 (effective July 17, 1984). Fact that plaintiff may have been contributorily negligent will not bar recovery where such negligence was not greater than negligence of defendant or combined negligence of multiple defendants. Damages shall be diminished by court in proportion to amount of negligence attributed to plaintiff. Passive assumption of risk is an aspect of comparative negligence, not a complete bar to recovery.

No duty exists to anticipate negligence of another. *Levine v. Lam*, Del. Supr., 226 A.2d 925 (1967). Defense not available to defendant whose conduct is wanton or willful. *Gushen v. Penn Central Transp. Co.*, Del. Supr., 280 A.2d 708 (1971). However, "contributory wantonness" is defense to defendant's willful or reckless misconduct. *Wagner v. Shanks*, Del. Supr., 194 A.2d 701 (1963).

Pedestrian must exercise care for own safety, but trip on sidewalk irregularity not negligence as matter of law. *Frieman v. Evans*, Del. Super. (9AC-02-321) (1996).

Liability of one driver "waving" another into traffic is jury question. *Singleterry v. Moore Truck*, Del. Super. (95C-02-022) (1996).

Contribution Among Joint Tort-feasors. Uniform Act adopted. 10 Del. Code §6301, *et seq.* Where one tort-feasor immune from suit, other cannot compel contribution. *Ianire v. University of Delaware*, Del. Super., 255 A.2d 687 (1969). Release by injured party of employer of allegedly negligent employee does not bar action against employee. *Blackshear v. Clark*, Del. Supr., 391 A.2d 747 (1978).



Emergency Doctrine. Recognized in *Dadds v. Pennsylvania R.R. Co.*, Del. Supr., 251 A.2d 559 (1969). But cannot be invoked by one whose negligence helped cause emergency. *Panaro v. Cullen*, Del. Supr., 185 A.2d 889 (1962).

Good Samaritan Doctrine. Any person who voluntarily and without expectation of compensation renders emergency aid to one in need is not liable for injuries to or death of assistee caused by act or omission during administration of such aid, unless the injuries or death are caused willfully, wantonly, recklessly, or through gross negligence by the volunteer. 16 Del. Code §6801. This immunity extends to employees of nonprofit and government rescue units and to registered and licensed practical nurses rendering emergency care at the scene of an emergency. 16 Del. Code §6801 and §6802.

If the emergency is criminal in nature (i.e. death, serious physical injury, robbery burglary, kidnapping, forced sexual intercourse or threat during attempt), a good faith volunteer will be similarly non-labile for damages resulting from intervention, unless the acts of assistance amount to gross negligence or willful or wanton misconduct. 16 Del. Code §6830.

Governmental Immunity. Limitations on tort liability of state, county and municipal governmental entities are provided by Tort Claims Act. 10 Del. Code §4001, *et seq.* Municipal Tort Claims Act abolished distinction between governmental and proprietary functions. *Fiat Motors v. Mayor & Council of Wilmington*, Del. Supr., 498 A.2d 1062 (1985).

State has not waived doctrine of legislative immunity where insurance has not been provided. *Doe v. Cates*, Del. Supr., 499 A.2d 1175 (1985). Where State sued party, waiver of immunity and State may be subject to costs in same manner as private litigant. *Bureau of Child Support Enforcement v. Taylor*, Del. Super., C.A. No. 83A-DE-4, Balick, J. (March 13, 1985).

Sovereign immunity applied where child injured while sledding at state park when insurance contract provided no coverage for sovereignty. *Hidy v. Baker*, Del. Super., C.A. No. 84C-DE-62, Martin, J. (Jan. 9, 1986). Governmental entity such as housing authority may be sued for its own negligent acts or omissions causing property damage and/or bodily harm in ownership, maintenance or use of any motor vehicle, machinery or equipment or in construction, operation or maintenance of any public building or appurtenances with certain designated exceptions. *Herbst v. Wilmington Housing Auth.*, Del. Super., C.A. No. 81C-JN-141, Pop-piti, J. (Jan. 25, 1985).

Municipal entities are immune only for negligent acts or omissions; immunity is not granted for acts or omissions which transcend simple negligence. *Farris v. Moeckel*, 664 F. Supp. 881 (D. Del. 1987).

Imputed Negligence. Doctrine recognized whereby driver's negligence imputed to owner-passenger unless owner-passenger asleep. *Greyhound Lines v. Caster*, Del. Supr., 216 A.2d 689 (1966). Comparative negligence of plaintiff's servant imputed to plaintiff. *E. I. DuPont & Co. v. I. D. Griffith*, Del. Supr., 130 A.2d 783 (1957). Husband's negligence not imputed to wife, passenger in her own car, in action by wife against other driver for damage to her car. *Roach v. Parker*, Del. Super., 107 A.2d 798 (1954). Last Clear Chance. Doctrine is abolished with adoption of comparative negligence. *Laws v. Webb*, Del. Supr., 658 A.2d 1000 (1995).

Proximate Cause. Discussed in *McReon v. Goldstein*, Del. Supr., 164 A.2d 260 (1960); *Wyatt v. Clendaniel*, Del. Supr., 320 A.2d 738 (1974). Finding of negligence does not, *ipso facto*, translate to finding of proximate cause. *Wilmington C.C. v. Cowee*, Del. Supr., 747 A.2d 1987 (2000) [p. 23].

Rescue Doctrine. Recognized but not applied in *Schwartzman v. Delaware Coach Co.*, Del. Super., 264 A.2d 519 (1970).

Right of Way. Statutes do not supersede duty to maintain proper lookout. *Szewczyk v. Doubet*, Del. Supr., 354 A.2d 426 (1976). Motorist with right of way must still exercise due care. *Taylor v. Brown*, Del. Super., 335 A.2d 263 (1975).

Seat Belts and Child Restraints. Failure to use not admissible into evidence. 21 Del. Code §4802 (i); *Lipscomb v. Diamiani*, Del. Super., 226 A.2d 914 (1967).

Strict Liability. Delaware generally does not have strict tort liability, except for injuries caused by leased products. *Martin v. Ryder Truck Rental*, Del. Supr., 353 A.2d 581 (1976). However, the Dog Bite statute provides for an additional exception. Under 7 Del. Code §1711: dog owner is liable for any injury caused by dog, unless injured was teasing or trespassing. Regarding primacy of property guest immunity, 25 Del. Code §1501, where in conflict with the Dog Bite statute, the newer and more narrowly tailored Dog Bite statute is controlling. *Bemiller v. Rodriguez*, Del. Super., C.A. No. 99C-12-002 Stokes, J. (Aug. 21, 2000); *McCormick v. Hoddinott*, Del. Super., 865 A.2d 523 (2004).

## NO-FAULT INSURANCE

See also, "LIABILITY INSURANCE."



Under 21 Del. Code §2118, no owner of motor vehicle, other than self-insurer under 21 Del. Code §2904, shall operate or authorize any other person to operate such vehicle unless owner has insurance on such vehicle providing: 1) Indemnity from legal liability for bodily injury, death or property damage arising out of ownership, maintenance or use of vehicle to limit, exclusive of interest and costs, of at least limits prescribed by Financial Responsibility Law (15/30/5). 2) Compensation to injured persons for reasonable and necessary expenses (minimum limit \$15,000 for any one person and \$30,000 aggregate) incurred or ascertainable within two years from date of accident for: medical, hospital, dental, surgical, medicine, x-ray, ambulance, prosthetic services, professional nursing and funeral services, including all customary charges and cost of burial plot for one person, not to exceed sum of \$3,000. Compensation may include expenses for non-medical remedial care and treatment rendered in accordance with recognized religious method of healing; net amount of lost earnings, including net lost earnings of self-employed person; necessary extra expense for personal services; and, where verified in writing by qualified medical practitioner within two years from date of accident, cost of surgical or dental procedures that will be necessary and are then medically ascertainable but impractical or impossible to perform during that two-year period, including expenses for related medical treatment, and net lost earnings lost in connection with such dental or surgical procedures and for period of time reasonably necessary to recover from such procedures but not to exceed 90 days. Payment of these latter costs payable either at time ascertained or at time actually incurred, at insurer's option.

Coverage applicable to each person occupying covered vehicle and to any other person injured in accident involving it, other than occupant of another vehicle. Coverage also applicable to pedestrians, which category includes bicyclists and moped operators, for injury by accident with covered vehicle. Insurers cannot exclude coverage to those eligible for workers compensation benefits. 21 Del. Code §2118 (e).

Insurer cannot deny coverage to insured who contributed to his bodily injury by driving under the influence of alcohol and any such D.W.I. exclusion is unenforceable. *Bass v. Horizon Assur. Co.*, Del. Supr., 562 A.2d 1194 (1989). 3) Compensation for property damage, other than damage to vehicle, from accident involving covered vehicle, with minimum limits of \$10,000. 4) Compensation for damage to insured vehicle, up to actual value at time of loss, and loss of use, up to \$10 per day, \$300 total.

Motor vehicle owner may elect to exclude in whole or in part these coverages by use of certain deductibles and exclusions in accordance with filings made by carrier with Insurance Dept. Required coverage may be subject to conditions and exclusions customary to field of liability, casualty and property insurance.

Statute of limitations for actions is three years from date of payment denial. *Harper v. State Farm*, Del. Supr., 703 A.2d 136 (1997). Carrier's failure to provide proper notice to plaintiff that statute for PIP is expiring, that the date is as stated, and that the effect is to preclude the claim, will toll statute. *Sawczuk v. State Farm*, Del. Super., C.A. No. 83C-DE-54, Taylor, J. (Sept. 12, 1985).

Any person eligible for no-fault benefits is precluded from pleading or introducing into evidence in action against tort-feasor those damages for which no-fault compensation is available without regard to elective reductions in coverage and whether or not benefits actually recoverable. 21 Del. Code §2118 (h). Section not applicable if no-fault benefits paid pursuant to out of state policy. *Read v. Hoffecker*, Del. Supr., 616 A.2d 835 (1992).

Insurers providing benefits are subrogated to rights of persons for whom benefits are provided, including rights to workmen's compensation benefits, but subrogated rights are limited to the maximum available tort-feasor's liability insurance coverage after injured party's claim has first been settled or otherwise resolved. 21 Del. Code §2118 (g) (1). Joinder of carrier's action for no-fault benefits with injured party's suit against a tort-feasor is not permitted. 21 Del. Code §2118 (g) (4).

Decedent's estate entitled to decedent's earnings, which would have been paid during 2 year period following accident, but not his actuarial lifetime earnings. *USF&G v. Neighbors*, Del. Supr., 421 A.2d 888 (1980). No-fault insurer not exonerated from liability for payment of benefits merely because medical expenses were not personal obligation of insured (carrier obligated to reimburse federal government for medical expenses incurred in treatment of accident victims at military hospital). *State Farm v. Kulow*, Del. Supr., 483 A.2d 1121 (1984). No-fault coverage not required for passenger when vehicle is being driven without owner's consent. *Menefee v. State Farm*, Del. Super., C.A. No. 83C-DE-53, Balick, J. (July 11, 1986).

Every no-fault policy shall require insurer to submit to arbitration any claims for losses and for damage to vehicle, including insured vehicle, including loss of use, upon request of party claiming loss. Request shall be in writing and mailed to Insurance Commissioner within 90 days from claim denial. Arbitration administered by In-

insurance Commissioner or nominee. Commissioner shall establish panel of arbitrators consisting of attorneys and insurance adjusters. For each arbitration, Commissioner shall select three individuals from panel, at least one of whom shall be attorney. Right to require arbitration optional; losing party may appeal de novo to Superior Court if notice of appeal filed within 30 days of decision. Disputes among insurers as to liability or amounts paid pursuant to No-Fault Act above shall be arbitrated according to statutory requirements. 21 Del. Code §2118 (f) (3).

Whoever violates any subsection of no-fault statute is subject to fine (minimum of \$150, maximum of \$1,000) or imprisonment (minimum of 10 days, maximum of 30 days), or both, and shall have his driving license and/or privileges suspended for 3 months. For subsequent offenses within 3 years of former offense, minimum fine of \$500, with maximum of \$2,000 and/or imprisoned not less than 30 nor more than 60 days, and shall have his driving license and/or privileges suspended for 6 months. 21 Del. Code §2118 (r). No registration issued or renewed for any vehicle not covered by insurance meeting requirements. 21 Del. Code §2118 (k).

Every insurer authorized to transact motor vehicle liability insurance in state shall file with Commissioner form stating that its motor vehicle liability policies, wherever issued shall be deemed to provide required insurance when vehicle operated in this state. 21 Del. Code §2118 (j). 21 Del. Code §2118B provides for processing and payment of no-fault benefits. Insurer must provide no-fault application within 10 days of notice of claim. Upon request for payment of benefits, insurer must make payment or advise claimant of denial and reasons therefore within 30 days of request. Failure of insurer to follow statute will entitle claimant to receive penalties and costs of suit, if litigation ensues. If delay is in bad faith, claimant will be awarded attorney's fees.

### PENALTY AND ATTORNEY FEES

Extremely limited in Delaware to specific statutory causes of action, or attorney failure to provide discovery or respond to court order.

### PRIVILEGED COMMUNICATIONS

Lawyer-client may be claimed by client or administrator. Lawyer may claim, on presumed authority, but only on behalf of client. D.R.E. 502.

Physician and psychotherapist-patient includes psychologist. Physician may claim, on presumed authority, but only on behalf of patient. D.R.E. 503. Filing of per-

sonal injury lawsuit creates waiver of privilege. *Green v. Bloodsworth*, Del. Supr., 501 A.2d 1257 (1985).

Husband-wife may be claimed by either spouse. Does not apply where one spouse is charged with a wrong against the other or the other's child. D.R.E. 504. Acrimonious nature of relationship does not affect privilege. *Weedon v. State*, Del. Supr., 647 A.2d 1078 (1994).

Religious communication may be claimed by clergyman on behalf of communicator. D.R.E. 505. No privilege exists between clergymen, unless one is spiritual advisor of the other. *Pagano v. Hadley*, Del. Dist. Ct., 100 FRD 758 (1984).

Political vote (D.R.E. 506), Trade Secrets (D.R.E. 507), Governmental (D.R.E. 508), Reporters (D.R.E. 513) exist in limited circumstances.

### PRODUCT LIABILITY

Warranties extend to parties who may be reasonably expected to use, consume, or be affected by goods, 6 Del. Code §2-318. Under this section secondary purchaser who claims protection of a warranty is subject to same disclaimers, modifications or remedy limitation clauses that were the basis of underlying sales agreement between original purchaser and seller. *Lecates v. Hertrich Pontiac Buick Co.*, Del. Super., 515 A.2d 163 (1986).

Strict liability in tort applies only to bailment lease situation. *Martin v. Ryder Truck Rental*, Del. Supr., 353 A.2d 581 (1976). Bailments include go-carts, *Golt v. Sports Complex*, Del. Supr., 644 A.2d 989 (1994), and roller skates (unreported). But, a "demonstrator" vehicle is neither a sale nor a bailment nor a lease. At least to preclude summary judgment, a dealership could be strictly liable for defects in the vehicle. *Beattie v. Beattie*, Del. Super., 786 A.2d 549 (2001). Strict liability in tort does not apply to any sales transaction governed by U.C.C., *Cline v. Prowler Industries*, Del. Supr., 418 A.2d 968 (1980), even if sale occurs in another jurisdiction. *Sellon v. GMC*, 571 F. Supp. 1094 (D. Del. 1983), or if sale occurs in Delaware and accident occurs in another jurisdiction. *Hervey v. Leisure World Corp.*, Del. Super., C.A. 90C-JL-14 Balick, J. (June 18, 1991).

Jury finding that manufacturer was not negligent in design of product is not inconsistent with finding of breach of warranty. *Bell Sports v. Yarusso*, Del. Supr., 759 A.2d 582 (2000).

Contractor's knowledge of danger of saw without guard was superior to owner's. Thus, owner owed no duty to warn. *Fritz v. Yeager*, Del. Supr., 790 A.2d 469 (2002).



## RELEASE

Release set aside for mutual mistake of fact. *Reason v. Lewis*, Del. Supr., 260 A.2d 708 (1969). Not set aside for unilateral mistake, or as to consequences of known injury. *Nogan v. Berry*, Del. Supr., 193 A.2d 79 (1963); *Hye v. Riggan*, Del. Super., 208 A.2d 513 (1964). Where language of release is ambiguous, it will be construed against drafting party. *Adams v. Jankouskas*, Del. Supr., 452 A.2d 148 (1982).

See also, "Uniform Contribution Among Joint Tortfeasors Law," adopted at 10 Del. Code §6301, *et seq.* Execution of release of underinsured tort-feasor for policy limits does not preclude recovery against underinsurance carrier. 18 Del. Code §3902 (b) (4), superseding. *Nationwide Mut. Ins. Co. v. Nacchia*, Del. Supr., C.A. No. 338, 1992 (July 20, 1993).

## REPRESENTATIONS AND WARRANTIES

All statements and descriptions in application for insurance by insured shall be deemed representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent recovery under policy unless either: fraudulent; or material to acceptance of risk or to hazard assumed; or insurer in good faith would not have issued policy, or would not have issued it at same premium, or would not have issued policy in as large amount, or would not have provided coverage for hazard resulting in loss if true facts had been made known. 18 Del. Code §2711.

Chronic alcoholism or mental illness held material to acceptance of risk. *Prudential Ins. Co. v. Gutowski*, Del. Supr., 113 A.2d 579 (1955).

## SERVICE OF PROCESS

Service of Process Upon Non-Resident Motorists. Any non-resident owner, operator or driver of any motor vehicle who accepts privilege extended by law to non-residents of Delaware to operate or drive such motor vehicle in Delaware, shall by such acceptance be deemed to have appointed and constituted Delaware Secretary of State as such person's agent for acceptance of legal process in any civil action against such non-resident growing out of any accident or collision occurring in Delaware in which said motor vehicle is involved. 10 Del. Code §3112.

Under this section, "by having the same operated or driven," applies to non-resident owner who authorizes or permits his agent to operate his motor vehicles on Delaware roadways on his behalf and within scope of his servants employment; it does not apply to non-resident

owner who merely permits another person to use his motor vehicle in absence of master-servant or agency relationship. *Finkbiner v. Mullins*, Del. Super., 532 A.2d 609 (1987).

Term "operator" includes non-resident employer whose agent or employee is involved in motor vehicle accident. *Snyder v. Beam*, Del. Super., 380 A.2d 1374 (1977). Where plaintiff failed to follow non-resident motorist service statute, court dismissed complaint. *Morris v. Green*, Del. Supr., 355-1984, McNeilly, J. (July 23, 1985).

## SUBROGATION

Insurer obtains no rights of subrogation until it makes payment of claim. *Tyre v. Andrews*, Del. Supr., 104 A.2d 775 (1954). Insurers that have provided benefits under no-fault law have subrogation rights. 21 Del. Code §2118 (f); *Harper v. State Farm*, Del. Supr., 703 A.2d 136 (1997). See "NO-FAULT INSURANCE."

Insurer's right of recovery of worker's compensation payments from employee's recovery against third party subject to waiver under principles of equity to act in good faith toward employee in prosecution of his third party action. *Baio v. Commercial Union Ins. Co.*, Del. Supr., 410 A.2d 502 (1979). In third party claim, workers compensation carrier must pay share in costs of litigation proportionate to the amount of its recovery. *Keeler v. Hartford Mut. Ins. Co.*, Del. Supr., 672 A.2d 1012 (1996). Insurer is precluded from recovering from employee amounts to which employee was eligible from personal injury protection benefits carrier pursuant to 21 Del. Code §2118, 19 Del. Code §2363 (e). 19 Del. Code §2363 gives workers' compensation carrier right of subrogation against proceeds paid to employee pursuant to uninsured motorist coverage purchased by employer. *Harris v. New Castle County*, Del. Supr., C.A. No. 83C-JN-40, O'Hara, J. (March 28, 1985), *aff'd*, Del. Supr., No. 134-1985 (August 1, 1986).

Insurer, as subrogee, is entitled to benefit of tolling of statute of limitations. *Blue Cross of Delaware v. Government Employees Ins. Co.*, Del. Supr., C.A. No. 82C-FE-32, Balick, J. (April 23, 1984). Legislature intentionally omitted subrogation rights for underinsured motorist carrier once tort-feasor met minimum requirements of liability insurance. *Jenifer v. Home Ins. Co.*, Del. Supr., C.A. No. 84C-AP-11, Stiffler, J. (Dec. 5, 1985).

Insurer has right to recover subrogation from United States. *Waters v. U.S.*, Del. Supr., 787 A.2d 71 (2001).



## UNFAIR INSURANCE PRACTICES

Controlled by statute. 18 Del. Code §2301, *et seq.* Unfair claim settlement practices governed by statute. 18 Del. Code §2304 (16).

## WAIVER AND ESTOPPEL

See also "SUBROGATION."

Policy condition may be waived by authorized acts and declarations of company's agent. But broker who is purchaser's "agent" may not waive contractual limitation period or create estoppel against insurer. *Ottendorfer v. Aetna Ins. Co.*, Del. Supr., 231 A.2d 263 (1967). Actions of broker are not imputable to insurance company. *Mt. Vernon Fire Ins. v. Pied Piper*, Del. Super., 445 A.2d 949 (1982). Burden of proof rests with party raising theory of estoppel and he or she must show misleading conduct by insurer and reliance by insured by clear and convincing evidence. *First Federal S & L v. Nationwide Mut. Fire Ins.*, Del. Supr., 460 A.2d 543 (1983). Insured may rely on agent's interpretation of policy when such interpretation is plausible, although legally incorrect, but when interpretation is in patent conflict with policy terms, insured acts unreasonably in relying thereon. *National Fire Ins. Co. v. Eastern Shore Labs*, Del. Super., 301 A.2d 526 (1973).

## WARRANTIES

See "REPRESENTATIONS AND WARRANTIES."

## WORKERS' COMPENSATION

See Law Digest Tables and "SUBROGATION."

Delaware Workers' Compensation statute is set forth at 19 Del. Code §2301 *et seq.*

If injury following primary compensable injury is caused by claimant's own negligence claim of causation is broken and subsequent injury not compensable. *Amoco Chem. Corp. v. Hill*, Del. Super., 318 A.2d 614 (1974).

Hourly compensation claims based on hourly rate at time of accident, even if that rate is significantly above or below average. *Rubick v. Security Instr. Corp.*, Del. Supr., 766 A.2d 15 (2000). To extent injury is permanent, entitlement is fixed. *Johnson Controls v. Fields*, Del. Supr., 758 A.2d 506 (2000).

Statute (19 Del. Code §2353 (a)) where worker forfeits rights to compensation for refusal of medical treatment requires Board to determine that the treatment is reasonable for that specific claimant. *Brittingham v. St. Michael's Rectory*, Del. Supr., 788 A.2d 519 (2002).

Unusual Exertion. Showing of unusual exertion is not prerequisite of compensability even where injury was at least partly due to aggravation of preexisting physical weakness which related back to time prior to employment. *Duvall v. Connell Roofing*, Del. Supr., 564 A.2d 1132 (1989). Injury is compensable if ordinary stress and strain of employment is substantial cause of injury. *Id.* Under "usual exertion" test, roofer who suffered back injury could recover worker's compensation benefits, even though suffered from preexisting back condition and was performing routine duties at time of injury. *Id.* Workers' compensation award cannot stand on medical testimony alone, if medical testimony shows nothing more than mere possibility that injury is related to accident. *General Motors Corp. v. Freeman*, Del. Supr., 164 A.2d 686 (1960).

Occupational Disease. Total disability caused by occupational disease treated same as if caused by accident. 19 Del. Code §2328. For hazard to occasion compensable claim for occupational disease, hazard must be related to particular employment, distinct from and greater than hazard attending employment in general. *Anderson v. GMC*, Del. Supr., 442 A.2d 1359 (1982).

Mental Disorders. Psychological disorders resulting from industrial accident are compensable provided there is sufficient causal connection between accident and disorder. *Light v. MAD*, Del. Super., C.A. No. 84A -FE-8, Gebelein, J. (Aug. 7, 1985). Traumatic neurosis is recognized as basis for workmen's compensation claim if it causes physical disablement. *DiSabatino Bros. v. Wortman*, Del. Supr., 453 A.2d 102 (1982). Post-operative psychosomatic condition limiting employee's ability to return to work is compensable, particularly if condition follows compensable injury and is direct and natural result thereof. *Fiorucci v. C. F. Braun*, Del. Super., 173 A.2d 635 (1961). Because mental trauma is compensable injury, employee is barred from bringing action for intentional infliction of mental distress against employer. *Battista v. Chrysler Corp.*, Del. Super., 454 A.2d 286 (1982). That part of disability attributed to psychogenic causes, related to identifiable parts of body, is compensable. *Sturgill v. M. & M.*, Del. Supr., 329 A.2d 360 (1974). Loss of use resulting from pain caused by accident is compensable whether attributable to organic or psychogenic factors. *Wilmington Fibre Specialty Co. v. Rynders*, Del. Supr., 336 A.2d 580 (1975). Disability award upheld based upon post-injury depression. *State v. Flinn*, Del. Supr., 220-1985, Horsey, J. (Dec. 23, 1985).

Disfigurement. Award of compensation for disfigurement which is visible and offensive when clothed normally is available without regard to earning power.



*Beam v. Chrysler Corp.*, Del. Supr., 332 A.2d 143 (1975).

Psychological illness can be compensable under act even if not preceded by trauma. *Battista v. Chrysler Corp.*, Del. Super., 517 A.2d 295 (1986).

Displaced Worker. Total disability may be found in spite of sporadic earnings, if claimant's physical condition is such as to disqualify him from regular employment commensurate with his qualifications and training. *Bigelow v. Sears*, Del. Supr., 260 A.2d 906 (1969). "Displaced worker" is one who while not completely incapacitated from work, is so handicapped by compensable injury that he will no longer be employed regularly in any well known branch of competitive labor market and will require specially created job if he is to be steadily employed. *Henry v. Formosa Plastics Corp.*, Del. Super., C.A. No. 84A-MY-15, O'Hara, J. (July 12, 1985). If employee who has work limitation and employer is unable to provide employment because of limitation makes reasonable job search and no evidence that reason other than physical limits caused him not to obtain job, then displaced worker. *Hawkes v. Radisson Wilmington Hotel*, Del. Super., 84A-MR-25, Taylor, J. (March 27, 1985).

Employee Dishonesty. Employee forfeits right to benefits if, in applying for employment, he knowingly and willfully made false statement as to physical condition, and employer relied substantially thereon in hiring, and statement was causally connected to injury. *Air Mod Corp. v. Newton*, Del. Supr., 215 A.2d 434 (1965). Lack of causal connection found in *General Motors Corp. v. Cresto*, Del. Super., 265 A.2d 42 (1970). Benefits may not be denied solely on grounds that employees would not have hired if employer was aware of his or her true physical condition. Employer must demonstrate causal relationship between misrepresented physical condition and subsequent injury. Proof only that claimant had increased risk of injury is insufficient. *Mountaire of Delmarva v. Glacken*, Del. Supr., 487 A.2d 1137 (1984).

Exclusivity. Exclusive remedy of employee is compensation. 19 Del. Code §2304. No employee actions based on any degree of negligence, whether slight or gross, including intentional tort may be brought under common law. *Kofron v. Amoco Chemical Corp.*, Del. Supr., 441 A.2d 226 (1982). Defamation held not to be personal injury within exclusivity provisions of §2304. Other torts for which civil action will include libel, malicious prosecution, false imprisonment and false arrest. *Battista v. Chrysler Corp.*, Del. Super., 454 A.2d 286 (1982). But, claims that involve true, deliberate intent of employer to injure employee fall outside Compensation Statute. *Rafferty v. Hartman Walsh*, Del. Supr., 760 A.2d 157 (2000).

Indemnification. Written agreement between general contractor and sub-contractor for indemnification against one's own negligence, even when specifically agreed to apply law of foreign jurisdiction which approves such agreements, is not enforceable, because it is repugnant to Delaware's legislatively defined public policy as expressed in 6 Del. Code §2704 (a). *Alberici Constr. Co. v. Mid-west Conv. Co.*, Del. Supr., 750 A.2d 518 (2000).

Where employee is injured by combined negligence of employer and another, employer is not liable for contribution to other tort-feasor because of his immunity from direct action by employee. *Ianire v. University of Delaware*, Del. Super., 255 A.2d 687 (1969). Where employer breached independent contractual duty to third-party, exclusivity of compensation remedy does not bar third-party from maintaining action against employer. *SW (Del.) v. American Consumers Indus.*, Del. Supr., 450 A.2d 887 (1982).

Awards of compensation boards are res judicata and, thus, immune from collateral attack, except when award for some reason is void. *Taylor v. Hatzel & Buehler*, Del. Supr., 258 A.2d 905 (1969).

Bad Faith. Action exists by employee against carrier for handling claim in bad faith. *Pierce v. International Ins. Co. of Ill.*, Del. Supr., 671 A.2d 1361 (1996).