

# DIGEST OF INSURANCE LAW

## DISTRICT OF COLUMBIA

Courtesy of  
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Washington, D.C.

### CIVIL JUDICIAL SYSTEM

Judicial power in District of Columbia is vested in the following federal courts and District of Columbia courts: Supreme Court of United States, United States Court of Appeals for District of Columbia Circuit, United States District Court for District of Columbia, District of Columbia Court of Appeals, and Superior Court of District of Columbia.

Superior Court of District of Columbia has original jurisdiction over all local matters, including any violation of rules and regulations adopted by Washington Metropolitan Area Transit Authority, if committed in District of Columbia. Superior Court consists of following divisions: Civil Division, Criminal Division, Family Division, Probate Division, and Tax Division.

Small Claims and Conciliation Branch of Civil Division has exclusive jurisdiction of any action within jurisdiction of Superior Court which is only for recovery of money, if amount in controversy does not exceed \$5,000.00, exclusive of interest, attorneys' fees, protest fees, and costs. Action which affects interest in real property may not be brought in this Branch. D.C. Code §11-1321 (2001).

District of Columbia Court of Appeals, highest court of District of Columbia, has status of state supreme court. *Hickey v. District of Columbia Court of Appeals*, 457 F. Supp. 584 (D.D.C. 1978). District of Columbia Court of Appeals shall consist of a chief judge and eight associate judges. D.C. Code §11-702 (2001). District of Columbia Court of Appeals has jurisdiction of appeals from all final orders and judgments and certain interlocutory orders of Superior Court. Review of judgments of Small Claims and Conciliation Branch of Civil Division is available only by application for allowance of appeal, filed in District of Columbia Court of Appeals. D.C. Code §11-721 (2001).

### LAW

#### Abbreviations

A.2d – Atlantic Reporter, Second Series.

A.3d – Atlantic Reporter, Third Series.  
App. D.C. – Appeal Cases, District of Columbia, 1843-1941.  
D.C. – Court of Appeals; previously D.C. Mun. App.  
D.C. Cir. – U.S. Court of Appeals for the District of Columbia Circuit; previously Supreme Court of District of Columbia (D.C.).  
D.C. Mun. App. – Municipal Court of Appeals.  
D. Wash. L. Rptr. – Daily Washington Law.  
F. – Federal Reporter 1918 - date.  
F.2d – Federal Reporter, Second Series.  
F.3d – Federal Reporter, Third Series.  
U.S. App. D.C. – U.S. Court of Appeals Reports, 1941-date.  
Note: As of February 1, 1971, the Court Reform Act declared that the highest court in the District of Columbia is the District of Columbia Court of Appeals and eliminated the power of the United States Court of Appeals to review its judgments. *See* D.C. Code §11-101 *et seq.* (2001); *M.A.P. v. Ryan*, 285 A.2d 310 (D.C. 1971).

#### Statutory References

District of Columbia statutory provisions relating to insurance, insurance companies and insurance brokers and agents appear in D.C. Code Title 31 (2001). Other relevant Code portions are Titles 40 (Liens), 50 (Motor Vehicles and Traffic), and 35 (Railroads and Other Carriers). Statutory provisions governing workers' compensation are set forth in Title 32, Chapter 15.

### ACCIDENT AND HEALTH INSURANCE

See "ACCIDENTAL MEANS" AND "DISABILITY."

Disease Induced by Accident. Where health and accident policy provided coverage for disability caused by sickness which was defined as illness or disease causing loss, and it was undisputed that corrective surgery for insured's back condition was not permissible because of



insured's prior heart condition, loss was caused substantially by "sickness" within policy terms. *Combined Ins. Co. of America v. McGillen*, 316 A.2d 854 (D.C. 1974).

But where insured met with accident, trauma of which contributed only in part to his death, death also being caused by pre-existing diseases from which insured was suffering at time of accident, and where it could not be shown that insured's loss of life resulted from trauma "directly and independently of all other causes," there can be no recovery under policy providing for coverage in event of death of insured resulting directly and independently of all other causes from bodily injuries sustained through purely accidental means. *Shulman v. Mut. Benefit Health and Acc. Ass'n*, 267 F.2d 627 (D.C. Cir. 1959).

Preexisting diseased condition does not preclude recovery under accidental death policy providing protection against loss resulting directly and independently of all other causes from bodily injury caused by accident, where subsequent accidental injury is efficient, predominant cause of loss. *Barker v. INA Life Ins. Co.*, 607 F. Supp. 1075 (D.D.C. 1985).

Whether death was within scope of policy, providing for payment of benefits for death caused by external, violent and accidental means, where both accident and disease are present, depends upon whether death was attributable to accident or to disease and upon factor of proximate cause. *Smith v. Peoples Life Ins.*, 222 A.2d 253 (D.C. 1966).

Action on Policy—Presumption and Burden of Proof. Where hospitalization policy specifically provided that subscriber was not covered for period of ten months for any condition which preexisted contract, insured presented prima facie case by proving existence of contract, hospitalization and unpaid bill which made it incumbent on insurer to present competent evidence tending to show that hospitalization was for preexisting condition not covered by contract, and insured then had burden to overcome such evidence and provide by preponderance of evidence that hospitalization was within provisions of contract. *Group Hospitalization, Inc. v. Foley*, 255 A.2d 499 (D.C. 1969).

Adverse judgment suit by widow to collect on policy which was payable only if deceased had sustained injury through external violent and accidental means, rendered after evidence disclosed that deceased had suffered a stroke independent of and immediately prior to automobile collision, did not collaterally estop widow from bringing an action for wrongful death against owner and driver of other car. *Smith v. Hood*, 396 F.2d 692 (D.C. Cir. 1968).

Provisions of policy against forfeiture. For construction of incontestability clause regarding computation of one-year period prior to effective date of clause in accident and health policy, see *Westhoven v. New England Mut. Life Ins. Co.*, 384 A.2d 36 (D.C. 1978).

Excepted Risks. Zone of safety standard did not govern limits of insurance policy which covers insured while "passenger" on, or while "getting off" common carrier; language in policy was sufficiently clear to preclude resort to significantly broader definition of tort liability based not on terms of each particular contract but on general principles of public policy. *Edwards v. Mutual of Omaha Ins. Co.*, 530 A.2d 1190 (D.C. 1987). Travel accident policy did not cover World Bank employee's death where employee died in plane crash while on annual leave, and policy provided coverage only for travel directly to or from duty station or travel undertaken on business of employer and directly authorized by employer. *Chiriboga v. Int'l Bank for Reconstruction & Dev.*, 616 F. Supp. 963 (D.D.C. 1985). Long-term disability policy, which provided coverage to age 65 of all disabilities that were "result of physical injury," but 24 months coverage for disabilities caused by mental or nervous disease or disorder provided coverage for employee who was disabled as result of mental disability triggered by stabbing in chest during robbery. *Akins v. Washington Metro. Transit Auth.*, 729 F. Supp. 903 (D.D.C. 1990).

District of Columbia makes clear distinction between death that is accidental, though unintended and unforeseen, and death resulting from accidental means, and since death caused by insured's hypersensitivity to protein in antibiotic given him as treatment for respiratory infection was not one "effected by accidental means," there could be no recovery under policy provision for double indemnity in case of "death by accidental means." *Acacia Mut. Life Ins. Co. v. Galleher*, 144 A.2d 550 (D.C. 1958).

Notice and Proof of Loss. General provisions for notice and proof of loss for accident and health policies are set out in D.C. Code Title 31 (2001).

## ACCIDENTAL MEANS

See "ACCIDENT AND HEALTH INSURANCE"; "LIABILITY INSURANCE."

Presumptions and burden of proof. Where industrial accident policy required bodily injury sustained through external, violent and accidental means resulting directly and independently of all other causes in death of insured as basis of compensation, burden was on beneficiary suing on policy to prove death of insured was proximately caused by such means free from pre-existing dis-

ease. *Smith v. Peoples Life Ins. Co.*, 222 A.2d 253 (D.C. 1966).

Unlike plaintiff suing on ordinary life policy with exception to death by suicide, beneficiary under policy insuring against violent and accidental death has burden throughout to prove by preponderance of evidence that insured's death was in fact accidental, and presumption in favor of accident does not shift burden of proof, but merely burden of proceeding. *United Ins. Co. v. Nicholson*, 119 A.2d 925 (D.C. 1956).

What constitutes accidental means in general. Generally mere fact that person insured against accidental injury, or death, voluntarily and wrongfully assaulted another, will not be sufficient to characterize as nonaccidental all possible injuries which he received in course of, or as consequence of his attack, but such injuries may be regarded as accidental unless they were natural or probable result of insured's actions reasonably foreseeable by him, or by reasonably prudent man in his position. *Byrd v. Nationwide Mut. Ins. Co.*, 415 A.2d 807 (D.C. 1980).

Under policy insuring against accidental death, but excepting loss resulting from intentionally inflicted injury, phrase excepting coverage in cases of intentionally inflicted injury was not ambiguous and policy therefore did not cover death of insured from stab wounds intentionally inflicted by third party. *Southwestern Life Ins. Co. v. Houston*, 306 A.2d 657 (D.C. 1973). "Dies by his own hand or act" within life policies limiting liability upon death of insured is synonymous with "dies by suicide" and contemplates a voluntary, intentional self-destruction. *Dent v. Virginia Mut. Benefit Life Ins.*, 226 A.2d 166 (D.C. 1967); see also *Bacon v. Life & Cas. Ins. Co. of TN*, 121 A.2d 724 (D.C. 1956) (no coverage where insured only against death by accidental means while standing or walking on public highway and where death occurred while insured was half in and half out of moving car); *Raley v. Life & Cas.*, 117 A.2d 110 (D.C. 1955) (death by sunstroke is by accidental means); *Hoage v. Employers' Liability Assur. Corp.*, 64 F.2d 715 (D.C. Cir. 1933), cert. denied, 290 U.S. 637 (1933) (injury caused by exposure to intense cold was by accidental means); *Railway Mail Ass'n. v. Stauffer*, 152 F.2d 146 (D.C. Cir. 1945) (death by hemorrhage caused by attempt to get out of bed against doctor's orders was not by accidental means).

## ADJUSTERS

Adjuster's inadvertent, but unjustified failure to defend or settle accident victim's lawsuit against insured tort-feasor, resulting in default judgment being entered against tort-feasor, constituted breach of contract, and, after tort-feasor assigned his rights against insurer and

adjuster to accident victim, accident victim was entitled to judgment against insurer in full amount of default judgment, which was in excess of policy limit. *Gray v. Grain Dealers Mut. Ins. Co.*, 684 F. Supp. 1108 (D.D.C. 1988), aff'd, 871 F.2d 1128 (D.C. Cir. 1989).

Evidence was sufficient to establish ratification by corporate officers or managing officials of insurer of actions of claim personnel performed in willful and oppressive manner in dealing with insured and to support award of punitive damages against insurer. *Central Armature Works, Inc. v. American Motorists Ins. Co.*, 520 F. Supp. 283 (D.D.C. 1980); see also *Washington v. Group Hospitalization, Inc.*, 585 F. Supp. 517 (D.D.C. 1984) (discussing tort of insurer's bad faith refusal to pay insurance claims).

## AGE

See "AUTOMOBILES," "INFANTS," "NEGLIGENCE," and Law Digest Tables.

Age of majority is 18 years. D.C. Code §46-101 (2001). Minors not liable on contracts, except for necessities furnished at a fair price. *Mut. Life v. Schiavone*, 71 F.2d 980 (D.C. Cir. 1934).

## AGENTS AND BROKERS

Authority. General agent may bind insurer by oral contract, soliciting agent may not. *Resnick v. Wolf & Cohen, Inc.*, 49 A.2d 809 (D.C. 1946).

Duties and responsibilities of agent. *Jonathan Woodner Co. v. Aetna Ins. Co.*, 442 F.2d 754 (D.C. Cir. 1971). See *Zitelman v. Metropolitan Ins. Agency*, 482 A.2d 426 (D.C. 1984); *Adkins & Ainley v. Busada*, 270 A.2d 135 (D.C. 1970); *Shea v. Jackson*, 245 A.2d 120 (D.C. 1968).

For Whom. Brokers are normally agents of person who first employs them and, if employed to procure insurance, are agents of the insured. *Travelers Indem. Co. v. Booker*, 657 F. Supp. 280 (D.D.C. 1987). Statute providing, "Any policy writing agent or salaried employee authorized by any company to solicit policies therefore shall be held to be agent of company which issued or effected policy solicited or applied for, anything in application or policy to contrary notwithstanding" does not exclude possibility of dual agency relationship; accordingly, since in instant case insurance agency acted as both insurers' agent and insureds' broker, payment of insurance premium refunds to agency by insurer constituted payment to insureds. *Jonathan Woodner Co. v. Aetna Ins. Co.*, 442 F.2d 754 (D.C. Cir. 1971).

Liability of Agent. If agent, which negligently binds insurer for price less than agent is required to ob-

tain, has authority to bind insurer and insurer would have accepted risk, amount recoverable from agent by insurer, is limited to difference between premiums paid and which would have been paid if policy issued included coverage agreed on. *Max Holtzman, Inc. v. K&T Co. Inc.*, 375 A.2d 510 (D.C. 1977).

Liability of insurance broker is shaped by facts of his relationship with his client. *Aetna Cas. & Sur. Co. v. Walter Ogus, Inc.*, 396 F.2d 667 (D.C. Cir. 1967).

Insurance broker who undertakes to procure insurance for another and through fault or neglect fails to do so is liable for damages thereby resulting. *Shea v. Jackson*, 245 A.2d 120 (D.C. 1968).

One may be bound by agent's misrepresentations if they are made in exercise of apparent authority and relate to matter entrusted to his management or control and party dealt with has no knowledge of misrepresentations. *Tel-Ads, Inc. v. Trans-Lux Playhouse, Inc.*, 232 F. Supp. 198 (D.D.C. 1964).

### ARBITRATION

Arbitration agreement is a contract. Court will not rewrite it for parties. *Hercules & Co. Ltd. v. Shama Restaurant Corp.*, 613 A.2d 916 (D.C. 1992).

Where there is ambiguity as to whether matter is within scope of arbitrators authority question resolved in favor of arbitration. *American Fed'n of Gov't Employees, Local 3721 v. District of Columbia*, 563 A.2d 361 (D.C. 1989); *Sindler v. Batleman*, 416 A.2d 238 (D.C. 1980).

### ATTORNEYS

Appointment and Authority. Pro hac vice counsel, once admitted, are not subject to disqualification any more readily than are regularly admitted counsel. *Koller v. Richardson-Merrell, Inc.*, 737 F.2d 1038 (D.C. Cir. 1984), *vacated on other grounds*, 472 U.S. 424 (1985).

Conflict of Interest. Clients do not hold veto power over their former attorney's ability to represent opponent in another matter, and mere fact that client confidences have been imparted under prior attorney-client relationship is not sufficient ground for disqualification. *Laker Airways Ltd. v. Pan American*, 103 F.R.D. 22 (D.D.C. 1984), *aff'd sub nom. Laker Airways Ltd. v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984).

Legal Malpractice. To state claim for legal malpractice under District of Columbia law, party must prove that: attorney-client relationship existed; attorney breached duty of reasonable care and negligence resulted in proximately caused damage to client. *Mills v. Cooter*, 647 A.2d 1118 (D.C. 1994); *Smith v. Haden*, 872 F.

Supp. 1040 (D.D.C. 1994), *aff'd*, 69 F.3d 606 (D.C. Cir. 1995). Intended beneficiary of will could bring malpractice action against drafting attorneys despite lack of privity between attorneys and beneficiary. *Needham v. Hamilton*, 459 A.2d 1060 (D.C. 1983). Attorneys may be subject to censure, suspension, or disbarment upon finding they committed malpractice. D.C. Code §11-2502 (1995).

District of Columbia now recognizes the defense of judgmental immunity doctrine in legal malpractice cases. *Biomet Inc. v. Finnegan Henderson, LLP*, 967 A.2d 662 (D.C. 2009). Doctrine provides that "an informed professional judgment made with reasonable care and skill cannot be the basis of a legal malpractice claim." *Id.* at 666.

When attorney is retained to represent corporation, he represents entity, not individual shareholders, officers, or directors. *Egan v. McNamara*, 467 A.2d 733 (D.C. 1983).

Existence of attorney-client relationship is issue to be resolved by trier of fact and is predicated on the circumstances of each case. *In re Lieber*, 442 A.2d 153 (D.C. 1982). Neither written agreement nor payment of fees is necessary to create attorney-client relationship. *Id.* Client's informal conversation with attorney, without any additional contact between them, could not establish attorney-client relationship between client and attorney's law firm and could not make law firm responsible for failure to pursue relevant legal claims within required time. *Farmer v. Mount Vernon Realty, Inc.*, 720 F. Supp. 223 (D.D.C. 1989).

Legal malpractice action in District of Columbia may not be brought more than three years from the time right to maintain action accrues. *Byers v. Burlinson*, 713 F.2d 856 (D.C. Cir. 1983). Where relationship between the fact of injury and conduct obscures the time of injury, discovery rule applies to determine when limitations period begins to run. *Knight v. Furlow*, 553 A.2d 1232 (D.C. 1989).

Statute of limitations in a legal malpractice case begins to run on the date the attorney ceases to represent the client on the specific matter in which the malpractice is alleged. *R.D.H. Communications, Ltd. v. Winston*, 700 A.2d 766 (D.C. 1997).

Requiring attorney to return full amount of fee to client is warranted when attorney's neglect causes client's case to be dismissed. *In re Taylor*, 511 A.2d 386 (D.C. 1986); *In re Roundtree*, 467 A.2d 143 (D.C. 1983).

In cases where attorney has missed deadline for filing suit, injury occurs for purposes of determining limi-

tations period “when the client’s action was legally subject to dismissal, rather than the actual, but fortuitous, date of dismissal.” *Bleck v. Power*, 955 A.2d 712 (D.C. 2008).

Standard of care for attorney is what a reasonably prudent lawyer would have done under same or similar circumstances. *Waldman v. Levine*, 544 A.2d 683 (D.C. 1988). Attorney’s failure to follow client’s explicit instructions constitutes negligence. *Id.*

Former client’s bad faith does not bar its claim for legal malpractice. *Breezevale Ltd. v. Dickinson*, 783 A.2d 573 (D.C. 2001) (en banc).

Fees. It is within attorney power, at start of case, to settle terms under which litigation will be pursued, courts are not empowered to enforce that which was never agreed to among attorney and parties regarding arrangements for attorney fees. *Nat’l Ass’n for Med Health, Inc. v. Califano*, 717 F.2d 1451, cert. denied, *Wagshal v. Crozer-Chester Med. Ctr.*, 469 U.S. 817 (1984). Attorney who enters into contingency fee agreement with client, substantially performs, and is then prevented by client from completing performance is entitled to full amount specified in agreement. *Kaushiva v. Hutter*, 454 A.2d 1373 (D.C. 1983), cert. denied, 464 U.S. 820 (1983).

Settlement. Attorney cannot, absent specific authority, accept settlement offer on behalf of client. *Bronson v. Borst*, 404 A.2d 960 (D.C. 1979); *Makins v. District of Columbia*, 861 A.2d 590 (D.C. 2004) (en banc). Attorney-client privilege will not preclude examination of attorney’s correspondence and files for sole purpose of determining attorney’s authorization from client to settle personal injury claim with insurance company. *Hollenkamp v. Rock Creek*, 109 D. Wash. L. Rptr. 209 (D.C. Sup. Ct. 1981).

## AUTOMOBILES

See “LIABILITY INSURANCE”; “NEGLIGENCE”; “NO-FAULT.”

See “Braking Distances” tables. See Law Digest Tables.

Age. Automobile drivers’ licenses not issued to persons under 17 years of age for private or under 18 years of age for commercial use. D.C. Code §50-1401.01 (a)(1) (2001). Learners permit may be issued to persons 16 years of age and older. D.C. Code §50-1401.01 (a)(2) (2001).

Agency. Operator deemed agent of owner if operating with consent, express or implied, of owner. Proof of ownership of automobile prima facie evidence that person operating it does so with consent of owner. D.C.

Code §50-1301.08 (2002); see also *Curtis v. Cuff*, 537 A.2d 1072 (D.C. 1987) (rebuttal of consent presumption entitled defendant to judgment as matter of law); *Estate of Chappelle v. Sanders*, 442 A.2d 157 (D.C. 1982) (concealment of operator’s identity did not toll statute of limitations; identity of owner of vehicle was known and under statute, timely claim could have been filed).

Comparative/Contributory Negligence. Comparative negligence has never been the law in the District of Columbia. *Nat’l Health Lab. Inc. v. Ahmadi*, 596 A.2d 555 (D.C. 1991). Questions of fact concerning negligence and contributory negligence with respect to automobile accident were for the jury. *Tilghman v. Johnson*, 513 A.2d 1350 (D.C. 1986). Driver of ambulance entering intersection against red light was sole cause of collision between ambulance and defendant’s automobile. *District of Columbia v. Lapiana*, 194 A.2d 303 (D.C. 1963). Trial court, which concluded that pedestrian who was struck by police van was contributorily negligent in violating traffic regulations by failing to use a crosswalk to cross street, did not err in refusing to consider evidence of common practice of pedestrians in location of accident to cross street outside of crosswalk. *Robinson v. District of Columbia*, 580 A.2d 1255 (D.C. 1990), *aff’d*, 644 A.2d 1004 (D.C. 1994).

Evidence sustained finding that both drivers had been negligent and that their concurring acts of negligence had been proximate cause of accident. *Spain v. Anderson*, 151 A.2d 770 (D.C. 1959).

Compulsory Insurance Coverage. For restrictions imposed on civil liability actions involving motor vehicle accidents under D.C. Compulsory No-fault Motor Vehicle Insurance Law, see D.C. Code §31-2401 (2001), *et seq.*

Damages. If an automobile is practically destroyed or so completely destroyed as not to be susceptible of repair, measure of damages is its reasonable market value immediately before accident less its salvage value. *Royer v. Deihl*, 55 A.2d 722 (D.C. 1947).

DWI. For statutory parameters regarding driving while intoxicated, see D.C. Code §50-2201.05 (2001). Evidence of results of blood alcohol tests administered within reasonable time after operation of vehicle is sufficient, without more to establish per se offense of driving while intoxicated. *Ransford v. District of Columbia*, 583 A.2d 186 (D.C. 1990). Statute also applies to bicyclists. *Everton v. D.C.*, 993 A.2d 595 (D.C. 2010).

Guest Cases. No Code provision. In general, liability of owner or operator to guest is governed by ordinary rules applying to negligence cases. *Paxson v. Davis*, 65 F. 2d 492 (D.C. Cir. 1933), cert. denied, 290 U.S. 643 (1933) (Negligence of automobile driver based on reck-

less, careless, and excessive speed at time automobile overturned in ditch, injuring guests, held question for jury).

In automobile guest's action against host and bus owner for injuries sustained in collision between automobile and bus, guest's testimony which, if true, would establish that host was not negligent, did not entitle host to directed verdict, where guest's testimony was contradicted. *Alamo v. Del Rosario*, 98 F.2d 328 (D.C. Cir. 1938). Evidence was sufficient to demonstrate that passenger knew or should have known that driver of automobile was drunk and established driver's defense of contributory negligence/assumption of risk to wrongful death suit after passenger was killed in auto accident. *Janifer v. Jandebur*, 551 A.2d 1351 (D.C. 1989).

Last Clear Chance. Not proper to submit automobile pedestrian case to jury on last clear chance doctrine since such doctrine presupposes perilous situation created by negligence of plaintiff and defendant, and there was no evidence pedestrian's perilous situation was created by driver's negligent act. *Broderick v. Gletner*, 249 A.2d 738 (D.C. 1969). Pedestrian crossing street in position of danger with respect to defendant's approaching automobile and pedestrian unaware of automobile's approach, sufficient to warrant submission under last clear chance doctrine. *Piper v. Andrews*, 216 F. Supp. 758 (D.D.C. 1963). Given evidence that driver of police van could have avoided hitting pedestrian, who violated traffic regulations by failing to walk in crosswalk, jury question was presented as to whether driver had last clear chance to avoid the accident. *Robinson v. District of Columbia*, 580 A.2d 1255 (D.C. 1990), *aff'd*, 644 A.2d 1004 (1994). Even if driver of auto in action arising from intersection collision between auto and bus was contributorily negligent as matter of law for failing to look effectively before passing stop sign and entering intersection, such negligence would not bar her right to recover where driver of bus had last clear chance to avoid accident. *Washington Metro. Area Transit Auth. v. Jones*, 443 A.2d 45 (D.C. 1982).

Master and Servant. Statutory presumption that owner has consented to operator's use of his vehicle is rebuttable by uncontradicted and manifestly credible testimony to contrary. *Alsbrooks v. Washington Deliveries*, 281 A.2d 220 (D.C. 1971); *Miller v. United States, Inc.*, 67 F.R.D. 486 (D.D.C. 1975). Employee's unauthorized operation of delivery truck which resulted in collision was not negligence chargeable to employer where employer did not know or have reason to know that employee would take vehicle for his own purpose. *Eastern Aquatics Inc. v. Washington*, 213 A.2d 293 (D.C. 1965). Flight of employee-motorist from scene of vehicle collision did not constitute turning aside by em-

ployee-motorist from business of principal in which he was engaged at time of collision, and, accordingly, assault which he committed upon other motorist who was pursuing him in effort to get identification data required by statute was not independent trespass, but employer was liable therefor. *Neary v. Hertz Corp.*, 231 F. Supp. 480 (D.D.C. 1964).

Pedestrians. Pedestrians have right of way when crossing roadway within crosswalk or intersection. D.C. Code §50-2201.28 (2001).

Seat Belts. Use of safety belts mandatory in District of Columbia. See D.C. Code §§50-1801-1807 (2001).

Service of Process on Nonresident Motorists. D.C. Code provides alternative methods for acquiring in personam jurisdiction over nonresident motorist; 1) under Long Arm Statute, D.C. Code §13-401 *et seq.*, (2001) and 2) under Motor Vehicles Safety Responsibility Act, D.C. Code §50-1301.07 (2001).

Solicitation. It is unlawful for legal and other practitioners to solicit business from a client, patient, or customer within 21 days of a motor vehicle accident. D.C. Code §22-3255.14 (2009); *Bergman v. District of Columbia*, 986 A.2d 1208 (2010). Prohibition does not apply to legal practitioners soliciting business through the mail, when there is a preexisting relationship between the practitioner and the solicited, or when the accident victim initiates contact. *Id.*; D.C. Code §22-3225.14(a)(2) (2009).

Speed Limit. Vehicle shall not be operated at greater speed than permitted by regulations promulgated under this statute. D.C. Code §50-2201.04 (2001).

Uninsured Motorist Fund. Established for purpose of awarding compensation to victim of accident sustaining injury therefrom and would not otherwise be compensated for loss. D.C. Code §31-2408.01 (2001).

## BAD FAITH BREACH OF INSURANCE CONTRACT

Where Defendant brought cross-claim which included bad-faith breach of contract cause of action, the United States District Court for the District of Columbia established that the District of Columbia does not recognize tort causes of action for bad-faith breach of insurance contracts. *Fireman's Fund Ins. Co. v. CTIA*, 480 F. Supp. 2d 7 (D.D.C. 2007).

## BROKERS

See "AGENTS AND BROKERS."

## BURGLARY INSURANCE

Where employee or employees actually responsible for loss of merchandise from store cannot be ascertained, clear and convincing evidence, which by process of elimination positively excludes all possible explanations of loss other than employee dishonesty, satisfies requirement of comprehensive policy insuring retailer against any merchandise loss which is conclusively proved to have been caused by fraud or dishonesty of insured's employees. *Alexandre of London v. INA*, 183 F. Supp. 715 (D.D.C. 1960).

Under mercantile open stock burglary policy which required that records be kept by insured for accurately determining amount of loss, insurer was not liable for loss where accounting data merely revealed loss of inventory and there was no indication that any shortage was caused by any particular burglary. *Paper v. Boston Ins. Co.*, 243 F.2d 601 (D.C. Cir. 1957).

"Mysterious disappearance" addition to theft policy reduces quantum of proof necessary to establish theft by permitting finding of theft from proof of mysterious disappearance under circumstances suggesting probability of theft. *Austin v. American Cas. Co.*, 193 A.2d 741 (D.C. 1963).

Where suitcase was stolen from back seat of automobile while parked in commercial garage to which public did not have free access, it was not left "unattended" within meaning of homeowners policy excluding coverage of property while unattended or in automobile. *Travelers Ins. Co. v. Tomor*, 283 A.2d 827 (D.C. 1971).

## CANCELLATION

See "LIABILITY INSURANCE."

Purpose of D.C. Code §35-2109 (b) (1997) (now D.C. Code §31-2409 (2001)), which requires insurer to provide notice of cancellation at least 30 days prior to effective date, is to give insured adequate time to procure new coverage before coverage under his old motor vehicle policy lapses. *Johnson v. Cumis Ins. Soc., Inc.*, 624 F. Supp. 1170 (D.D.C. 1986).

Group health insurer itself was required to directly notify individual subscribers of cancellation of policy such that employer's notice of cancellation to insured employee was ineffective. *Mueller v. Health Plus, Inc.*, 589 A.2d 439 (D.C. 1991).

Rescission of life policy because it contained disadvantageous installment payment settlement, rather than lump-sum settlement, was not warranted, notwithstanding claim of beneficiary that contract was unconscionable, where there was no evidence of fraud or du-

ress. *Kessler v. Lincoln Nat'l Life Ins. Co.*, 620 F. Supp. 282 (D.D.C. 1985).

Insurer's knowledge that policy applicant had misled her own driving record put insurer on "inquiry notice," and thus insurer was not entitled to rescind after collision. *Gov't Employees Ins. Co. v. Govan*, 451 A.2d 884 (D.C. 1982).

Under District of Columbia law, misrepresentation materially affecting hazard assumed by insurer and its decision to accept risk of insuring applicant is ground for abrogating policy of insurance, even if misrepresentation is unintentional. *Blair v. Inter-Ocean Ins. Co.*, 589 F.2d 730 (D.C. Cir. 1978).

Where automobile policy entitled insurer to cancel policy for no reason if cancellation was accomplished within 60-day period, and policy was canceled within 60 days of date insured applied for policy, insurer was not liable for injuries resulting from insured's automobile accident which occurred after effective date of cancellation. *Johnson v. Bernard Ins. Agency, Inc.*, 532 F.2d 1382 (D.C. Cir. 1976).

Where clause in automobile policy stated that policy may be canceled by written notice to insured and that mailing of notice shall be sufficient proof of notice and where applicable law deemed policy canceled when notice of cancellation was mailed, insurer which proved that notice of cancellation was mailed prior to date of injury could not be held liable on policy. *Young v. State Farm Mut. Auto. Ins. Co.*, 213 A.2d 890 (D.C. 1965).

## CONSTRUCTION OF POLICY

See "LIABILITY INSURANCE."

District of Columbia Code contains provisions relevant to policy contents, false statements and standard provisions required. See D.C. Code §31-101 *et seq.* (2001).

Ambiguity exists in insurance policy only when its terms make policy reasonably susceptible to different constructions and interpretations, one resulting in coverage one resulting in exclusion. *Carey Canada, Inc. v. Columbia Cas. Co.*, 940 F.2d 1548 (D.C. Cir. 1991).

Terms of policy, if very clear and unambiguous, express contract between parties and will be enforced unless they violate statute or public policy. *Chiriboga v. Int'l Bank for Reconstruction & Dev.*, 616 F. Supp. 963 (D.D.C. 1985).

In interpreting insurance policy, court must first determine whether language is plain and unambiguous and therefore controlling as matter of law or whether words are ambiguous and in need of interpretation through

rules of construction and objective evidence of parties' intent; interpretation requires using the same rules as generally used in interpreting other written contracts. *Keene Corp. v. Ins. Co. of North America*, 597 F. Supp. 946 (D.D.C. 1984), *vacated on other grounds*, 631 F. Supp. 34 (D.D.C. 1985).

Ambiguities in insurance contracts will be construed in favor of insured wherever reasonable. *Continental Cas. Co. v. Cole*, 809 F.2d 891 (D.C. Cir. 1987); *see also Meade v. Prudential Ins. Co. of Am.*, 477 A.2d 726 (D.C. 1984). If both the recitals and the operative part of a contract are clear, but they are inconsistent with each other, the operative part is to be preferred. *Kogod v. Stanley Co. of America*, 186 F.2d 763 (D.C. Cir. 1951); *Perry v. Perry*, 190 F.2d 601 (D.C. Cir. 1951).

Insurer impliedly consents to all reasonable conditions and regulations imposed on it by jurisdiction in which contract is made, including any statutory incontestability provisions, and provisions required by statute to be included in policy prevail over inconsistent terms in policy as written by company. *Mfrs. Life Ins. Co. v. Capitol Datsun, Inc.*, 566 F.2d 354 (D.C. Cir. 1977).

For insurance purposes, term "legal representative" is not synonymous with "personal representative", and it includes, at least, heirs at law. *Young v. Firemen's Ins. Co. of Washington, D.C.*, 463 A.2d 675 (D.C. 1983).

Term "bodily injury" in comprehensive liability policies meant any part of single injurious process that asbestos-related disease entailed. *Keene Corp. v. Ins. Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

Terms "disease" and "disorder" in insurance contracts are construed to mean serious, permanent ailments. *Jones v. Reliance Ins. Co.*, 607 F.2d 1 (D.C. Cir. 1979), *rev'd on other grounds*, *Harbor Ins. Co. v. Schnabel Found. Co.*, 946 F.2d 930 (D.C. Cir. 1991), *cert. denied*, 504 U.S. 931 (1992).

Coverage. See "LIABILITY INSURANCE"; "ACCIDENTAL MEANS"; "FIRE INSURANCE."

Condition in automobile policy that "any amount payable" under terms of uninsured motorist coverage would be reduced by amounts payable under workers' compensation referred to insurer's promise "to pay all sums" to which insured was legally entitled from tortfeasor, and not to policy's liability limits. *American Ins. Co. v. Tutt*, 314 A.2d 481 (D.C. 1974).

Insured's refusal to sign proof of loss form based on belief that doing so would result in waiver of its claim for higher coverage under another provision of policy was reasonable. *Centennial Ins. Co. v. Dowd's, Inc.*, 306 A.2d 648 (D.C. 1973). Policy providing cover-

age for property damage due to occurrence during the policy period did not apply to damage caused by collapse of wall in October of 1979, where policy expired in August of 1979, even though the insured had done all of its work on the wall prior to the expiration of the policy. *Wrecking Corp. of America v. INA*, 574 A.2d 1348 (D.C. 1990).

Group disability income policy, requiring physician to be actively performing full-time duties of occupation, covered physician who spent five full days per week and additional time on weekends at her office, regardless of physician's subjective state of mind. *Cont'l Cas. Co. v. Beelar*, 405 F.2d 377 (D.C. Cir. 1968).

For interpretation of policy covering "shipper" as applied to theft of satchel of money from hotel guard, *see Statler Hilton v. Wells Fargo*, 370 A.2d 1358 (D.C. 1977).

For interpretation of "valuable papers and records" policy, *see Aetna Cas. and Sur. Co. v. Casolaro*, 314 F.2d 279 (D.C. Cir. 1963).

For choice of law rules applicable in actions involving insurance policies *see Gray v. Grain Dealers Mut. Ins. Co.*, 871 F.2d 1128 (D.C. Cir. 1989); *Lee v. Wheeler*, 810 F.2d 303 (D.C. Cir. 1987).

When interpreting automobile liability policy, court adopts law of state which parties understood to be insured's principal location during policy term unless another state has more significant relationship to transaction and parties. *Vaughan v. Nationwide Mut. Ins. Co.*, 702 A.2d 198 (D.C. 1997).

## CONSUMER PROTECTION PROCEDURES ACT

District of Columbia Consumer Protection Procedures Act is codified at D.C. Code §28-3901 *et seq.* (2003).

Actual Injury Required. A person who brings a District of Columbia Consumer Protection Procedures enforcement action must have suffered or be in imminent danger of suffering an injury-in-fact. *Grayson v. AT&T Corp.*, 15 A.3d 219 (D.C. 2011).

Remedies. District of Columbia Consumer Protection Procedures Act provides broad array of remedies to plaintiff who successfully demonstrates actual injury as a result of an unlawful trade practice, including: treble damages, attorney's fees, punitive damages, and injunctive relief. *Id.*; D.C. Code §28-3905(k)(2) (2003).

## DAMAGES

Excessive Verdicts. Verdict is considered "excessive" if it is so large that it is beyond all reason, is so

great as to shock conscience, or so inordinately large as obviously to exceed maximum limit of reasonable range which jury may properly operate. *Otis Elevator Co. v. Tuerr*, 616 A.2d 1254 (D.C. 1992).

**Arbitration Awards.** An arbitration decision can have res judicata effect, even if underlying claim involves federal security laws. *Davis v. Chevy Chase Fin. Ltd.*, 667 F.2d 160 (D.C. Cir. 1981). Party whose claims have been decided in arbitration may not then bring the same claims under new labels. *Schattner v. Girard, Inc.*, 668 F.2d 1366 (D.C. Cir. 1981). The same is true of claims that should have been submitted to arbitration. *Id.*

**Comparative Negligence.** Not recognized in the District of Columbia. *Nat. Health Labs., Inc. v. Ahmadi*, 596 A.2d 555 (D.C. 1991).

**Psychic Injuries-Mental Pain and Suffering.** For mental distress to be compensable, claimed distress must be serious and verifiable. *Williams v. Baker*, 572 A.2d 1062 (D.C. 1990).

**Infliction of emotional distress.** Infliction of emotional distress can result from either intentional or negligent conduct. Under D.C., plaintiff can recover from negligent infliction of emotional distress in two situations: where distress results from direct physical injury; and where there is no physical impact, but defendant's negligence places plaintiff in a zone of physical danger where plaintiff fears for his or her own safety. *Ryczek v. Guest Services, Inc.*, 877 F. Supp. 754 (D.D.C. 1995); *Williams v. Baker*, 572 A.2d 1062 (D.C. 1990). However, the emotional distress must be "serious and verifiable." *Jones v. Howard Univ., Inc.*, 589 A.2d 419 (D.C. 1991). To succeed on claim of intentional infliction, plaintiff must show "that the defendant engaged in: (1) extreme and outrageous conduct that (2) intentionally or recklessly caused (3) severe emotional distress to another." *Jung v. Jung*, 791 A.2d 46 (D.C. 2002).

**Lost future earnings.** Jury may consider impact of future inflation in determining plaintiff's future loss of income in personal injury cases if there is competent evidence setting future rate of inflation within reasonable limits. *District of Columbia v. Barriteau*, 399 A.2d 563 (D.C. 1979).

**Collateral source.** Plaintiff may invoke collateral source rule either when payment in question came from source wholly independent of liable party or when plaintiff may be said to have contracted for prospect of "double recovery," otherwise, rule is not available to plaintiff. *District of Columbia v. Jackson*, 451 A.2d 867 (D.C. 1982). Retirement and disability pensions may constitute collateral sources. *Morgan v. District of Columbia*, 449 A.2d 1102, *vacated on other grounds*, 468 A.2d 1306 (D.C. 1982). Payments already awarded to principal

must be applied to calculation of award to agent. *Hagans Mgmt. Co., Inc. v. Nichols*, 409 A.2d 179 (D.C. 1979). It is better that injured party receive double recovery than for wrongdoer to be relieved of its liability for damages. *Reid v. District of Columbia*, 391 A.2d 776, *amended*, 399 A.2d 1293 (D.C. 1979). Settlement with one later proven not to have been tort-feasor requires reduction in judgment against tort-feasor. *Hall v. Gen. Motors*, 647 F.2d 175 (D.C. Cir. 1980).

**Punitive Damages.** Punitive damages are not favored in law. *Sere v. Group Hospitalization, Inc.*, 443 A.2d 33 (D.C. 1982), *cert. denied*, 459 U.S. 912 (1982). Purpose of punitive damages is to punish person for outrageous conduct which is malicious, wanton, reckless, or in willful disregard for another's rights and to deter him and others from similar activity in the future. *Nepera Chem. Inc. v. Sea-Land Service, Inc.*, 794 F.2d 688 (D.C. Cir. 1986); *see also Vassiliades v. Garfinckel's*, 492 A.2d 580 (D.C. 1985). Where basis of complaint is breach of contract, punitive damages will lie only where alleged breach merges with, and assumes character of willful tort. *Srouf v. Barnes*, 670 F. Supp. 18 (D.D.C. 1987); *Hammerman v. Peacock*, 607 F. Supp. 911 (D.D.C. 1985). Punitive damages for tortious act are available when defendant's unlawful conduct is accompanied by fraud, ill will, disregard of plaintiff's rights or other circumstances tending to aggravate the injury. *Dyer v. William S. Bergman*, 657 A.2d 1132 (D.C. 1995). Plaintiff's claim for punitive damages requires proof by clear and convincing evidence of the commission of the tort and of the outrageousness of the conduct. *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929 (D.C. 1995). Death of tort-feasor terminates liability for punitive damages. *Id.*

Whether actual damages are prerequisite to punitive damages is issue on which there is split of opinion between D.C. Court of Appeals and U.S. Court of Appeals for D.C. Circuit. Local court holds that actual damages are prerequisite to award of punitive damages. *Zanville v. Garza*, 561 A.2d 1000 (D.C. 1989); *Dresser v. Sunderland Apt. Tenants Ass'n*, 465 A.2d 835 (D.C. 1983). Federal court holds that compensatory damages need not be shown to establish basis for assessment of punitive damages. *Camalier & Buckley - Madison, Inc. v. Madison Hotel, Inc.*, 513 F.2d 407 (D.C. Cir. 1975); *but see Jordan v. Medley*, 711 F.2d 211 (D.C. Cir. 1983) (award of punitive damages impermissible without valid basis for compensatory damages). However, plaintiff need not prove anything more than nominal actual damages to justify imposition of punitive damages. *Robinson v. Sarisky*, 535 A.2d 901 (D.C. 1988); *see also Howard University v. Wilkins*, \_\_A.3d\_\_, 2011 D.C. App. Lexis 367 (D.C. 2011) (affirming jury award of \$1.00 in compensatory damages and \$42,677.50 in punitive damages).



Liquidated Damages. Parties to contract may agree in advance to sum certain to be forfeited as liquidated damages for breach of contract; such bargained-for liquidated damages clause is valid unless found to constitute penalty. *Burns v. Hanover Ins. Co.*, 454 A.2d 325 (D.C. 1982).

### DEATH

See Law Digest Tables, Negligence Table.

Under law of District of Columbia, if tort results in death, two causes of action arise, one under Survival Statute (D.C. Code §12-101) (1995), and other under Wrongful Death Act (D.C. Code §16-2701) (1997). *Waldon v. Corington*, 415 A.2d 1070 (D.C. 1980). Each of these causes of action has its own elements of damages. *Semler v. Psychiatric Inst. of Washington*, 575 F.2d 922 (D.C. Cir. 1978); *Graves v. United States*, 517 F. Supp. 95 (D.D.C. 1981); *Greater Southeast Cmty. Hosp. v. Williams*, 482 A.2d 394 (D.C. 1984) (stating each is an independent cause of action “focusing on different injuries”). Purpose of Survival Act is to place decedent’s estate in position it would have occupied but for premature termination of decedent’s life. *Lewis v. Lewis*, 708 A.2d 249, 251 (D.C. 1998). Purpose of Wrongful Death Act is to provide close relatives with benefits they might have reasonably expected to receive from decedent had decedent lived. *Id.*

### DISABILITY

See “ACCIDENT AND HEALTH INSURANCE.”

If insured was disabled within accident policy, his right to continued receipt of disability payments was not lost by his failure to submit to regular treatment by doctor, if he was no longer able to afford expense, and if it did not appear that regular medical treatment would have been of any benefit. *Sullivan v. North American Acc. Ins. Co.*, 150 A.2d 467 (D.C. 1959).

For interpretation of federal employee’s special disability policy, see *World Ins. Co. v. Carey*, 118 A.2d 390 (D.C. 1955).

### EMPLOYMENT LAW

The District of Columbia Human Rights Act is codified at D.C. Code §2-1401 *et seq.* (2001). The Act permits an employee discriminated against on the basis of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, or political affiliation to bring an action against his or her employer. D.C. Code §2-1402.11(a)(1)(2001).

Jurisdiction under the District of Columbia Human Rights Act turns not on the place of employment but where the events alleged to be discriminatory took place or the effects of the discrimination are felt. Thus, a California employee could bring suit under the Act in the District of Columbia, the location of his employer’s headquarters, because that is where allegedly discriminatory decisions that impacted his employment were made. *Monteilh v. AFSCME*, 982 A.2d 301 (D.C. 2009).

An at-will employee who learns of changes in benefits and subsequently elects to remain on the job for a reasonable time thereafter has impliedly consented to the new employment terms. *Kauffman v. Int’l Bhd. of Teamsters*, 950 A.2d 44 (D.C. 2008).

The filing of a federal employment discrimination claim in a state agency with appropriate jurisdiction extends the time period in which to file with EEOC to 300 (rather than 180) days from the discovery of the discriminatory act. *Ivey v. District of Columbia*, 949 A.2d 607 (D.C. 2008). See “AUTOMOBILES”; “NO-FAULT” and Law Digest Tables—Automobiles Financial Responsibility Table.

### FINANCIAL RESPONSIBILITY LAWS

See “AUTOMOBILES”; “NO-FAULT” and Law Digest Tables—Automobiles Financial Responsibility Table.

Remedial statute designed to protect innocent persons injured by negligent operation of motor vehicles is Motor Vehicle Safety Responsibility Act. See D.C. Code §31-2401, *et seq.* (2001).

### FIRE INSURANCE

Arson. In order to convict of arson, “the government must prove that appellant maliciously burned or attempted to burn any dwelling, or house.” *Phenis v. United States*, 909 A.2d 138 (D.C. 2006); D.C. Code §22-301 (2008).

Creation of Agency to Procure Insurance. Consideration was not necessary to bind insurance agency to agency agreement where employee of agency undertook to do what insureds requested, and employee acted within scope of her employment in stating that she would insure that plaintiffs were added as named insureds to fire policy. *Zitelman v. Metropolitan Ins. Agency*, 482 A.2d 426 (D.C. 1984).

Proof of Loss. Submission of informal proof of loss does not bring about waiver of fire policy provision requiring formal proof of loss. *Adelman v. St. Louis Fire & Marine Ins.*, 293 F.2d 869 (D.C. Cir. 1961), *cert. denied* 368 U.S. 937 (1961). Proof of loss likewise held insuffi-



cient in *Glenco Corp. v. American Equitable Assur.*, 289 F.2d 899 (D.C. Cir. 1961).

Failure to submit to examination and produce records without justification bars recovery. *Loughlin v. Firemen's Ins. Co.*, 186 F.2d 357 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 921 (1951).

### GUEST CASES

See "AUTOMOBILES."

In action for damages based on negligent maintenance of basement stairs, hosts owed duty of maintaining their property in reasonably safe condition under all circumstances. *Cooper v. Goodwin*, 478 F.2d 653 (D.C. Cir. 1973); *see also Rong Yao Zhou v. Jennifer Mall Rest. Inc.*, 534 A.2d 1268 (D.C. 1987) (discussing duty of tavern owner to patrons).

Landowner must act as reasonable man, with respect to lawful entrants, in maintaining his property in safe condition in view of all circumstances including likelihood of injury to others, seriousness of injury, and burden of avoiding risk. *Hopkins v. Baker*, 553 F.2d 1339 (D.C. Cir. 1977). Circumstances of the visitor's entry, including foreseeability of visitor's presence, have some relation to question of landowner liability. *Sandoe v. Lefta Assoc.*, 559 A.2d 732 (D.C. 1988). A landowner is responsible for intentional, wanton, or willful injury to trespassers. *Foshee v. Consolidated Rail Corp.*, 849 F.2d 657 (D.C. Cir. 1988); *Jeffries v. Potomac Dev. Co.*, 822 F.2d 87 (D.C. Cir. 1987); *Firfer v. United States*, 208 F.2d 524 (D.C. Cir. 1953).

### HOSPITALS

See "MALPRACTICE."

As part of its duty to protect public, hospital which was custodial ward of criminally insane patients was obligated to prevent escape of its dangerous patients, and plaintiff, who was injured by virtue of patient's unauthorized leave, could properly seek recovery for breach of duty by hospital. *White v. United States*, 780 F.2d 97 (D.C. Cir. 1986).

"Locality doctrine" has no relevance to medical practice in District of Columbia. *Morrison v. MacNamara*, 407 A.2d 555 (D.C. 1979).

In medical malpractice case, *res ipsa loquitur* applies when consequences of professional treatment ordinarily do not occur in absence of negligence, are caused by agency or instrumentality within defendant's exclusive control, and are not due to any voluntary action or contribution on part of plaintiff. *Quin v. George Washington Univ.*, 407 A.2d 580 (D.C. 1979).

Doctrine of *res ipsa loquitur* not applicable absent expert testimony that deformity would result only from improper treatment. *Harris v. Cafritz Mem. Hosp.*, 364 A.2d 135 (D.C. 1976), *cert. denied*, 430 U.S. 968 (1972).

The basic principle of *res ipsa* is that the cause of the injury must have been within the exclusive control of the defendant. A plaintiff's susceptibility to injury may not be considered when making the causation determination required for *res ipsa* liability. *Gubbins v. Hurson*, 987 A.2d 466 (D.C. 2010).

Test for admissibility of medical records is whether they are composed solely of regularly recorded facts as to patient's condition or treatment on which observations of competent physicians would not differ. *Daniels v. Beeks*, 532 A.2d 125 (D.C. 1987).

Where evidence did not establish liability squarely on surgeon or hospital, burden shifts to surgeon and hospital for each to prove, if possible, lack of responsibility for harm caused. *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1977).

If hospital renders services usually performed by physician, it is held to same degree of care that applies to private physician. *Alden v. Providence Hosp.*, 382 F.2d 163 (D.C. Cir. 1967).

Last Clear Chance. Where jury determined that patient gave informed consent for surgery, last clear chance could not apply since doctor was not initially liable. *Hall v. Carter*, 825 A.2d 954 (D.C. 2003).

Warranties. In certain limited circumstances, a physician and his patient may enter into a contractual arrangement that both extends physicians ordinary duty of care and hold physician liable for the result of a particular medical treatment; in order for such a contract to be enforceable, courts require that the warranty be expressly made by physician and relied on by patient, and that the warranty deed is supported by consideration. *Scarzella v. Saxon*, 436 A.2d 358 (D.C. 1981).

### HUSBAND AND WIFE

Existence of lawful marital relationship at time of tortious conduct toward and resultant injury to one spouse is required before other spouse can bring action for loss of consortium, where tortious conduct and fact of injury were both known or knowable prior to marriage. *Stager v. Schneider*, 494 A.2d 1307 (D.C. 1985).

Fact that a person is or was married shall not impair rights and responsibilities of such person to engage in any civil litigation of any sort with or against anyone, including such person's spouse, to same extent as unmarried person. D.C. Code §46-601 (2001).

Interspousal Immunity. Husband not barred from maintaining action against wife on behalf of unemancipated child for injuries child sustained in automobile accident due to mother's negligence. *Rousey v. Rousey*, 528 A.2d 416 (D.C. 1987).

### INFANTS

See "AGE"; "NEGLIGENCE"; "AUTOMOBILES."

Viable fetus is "person" under common law with right to be free of nonfatal tortious injury, and child born alive has cause of action for such injuries. *Greater Southeast Cmty. Hosp. v. Williams*, 482 A.2d 394 (D.C. 1984).

Service of process on infant cannot properly be accomplished by leaving copy of summons and complaint with person of suitable age at his usual place of abode. *Hamer v. Eastern Credit Ass'n, Inc.*, 192 A.2d 127 (D.C. 1963).

"Wrongful birth" is a valid cause of action to recover extraordinary expenses incurred as a result of the child's abnormalities. *Haymon v. Wilkerson*, 535 A.2d 880 (D.C. 1987). A parent is not entitled to costs of rearing a healthy but unplanned child. *Flowers v. District of Columbia*, 478 A.2d 1073 (D.C. 1984).

### LIABILITY INSURANCE

Contribution among joint tort-feasors. There is no statutory provision on point. Punitive damages, but not compensatory damages, may be apportioned among joint tort-feasors, because punitive damages must be related to degree of culpability and defendant's ability to pay if they are to carry intended sanction. *Remeikis v. Boss & Phelps, Inc.*, 419 A.2d 986 (D.C. 1980). When settlement is made with one joint tort-feasor, and verdict is obtained against other, and jury finds contribution appropriate, defendant tort-feasor should be required to pay only one-half total original verdict. *Martello v. Hawley*, 300 F.2d 721 (D.C. Cir. 1962). Concurrently negligent tort-feasors should be subject to contribution; joint judgment is not prerequisite. *Bell v. Westinghouse Elec. Corp.*, 483 A.2d 324, 328 (D.C. 1984), *appeal after remand*, 507 A.2d 548 (D.C. 1986).

Other Insurance. Where there are two applicable policies, one with pro rata other insurance clause and other with excess other insurance clause, provisions of each will be interpreted to give effect to intent of contracting parties. *Jones v. Medox, Inc.*, 430 A.2d 488 (D.C. 1981); *see also Glacier General Assur. Co. v. Cont'l Cas. Co.*, 605 F. Supp. 126 (D.D.C. 1985) (discussing proration of liability where dual coverage existed under "other insurance" clauses).

Even where insurer agrees to pay limits under automobile liability policy to insured, insurer still obligated to make "supplementary payments" to injured party, not having modified such duty under policy. *Knippen v. Glens Falls Ins. Co.*, 564 F.2d 525 (D.C. Cir. 1977).

If allegations of insured's complaint may bring claim within coverage of policy, insurance company must honor its duty to defend, even if ultimately relieved of any duty to indemnify. *American Cont'l Ins. Co. v. Pooya*, 666 A.2d 1193 (D.C. 1995); *Cont'l Cas. Co. v. Cole*, 809 F.2d 891 (D.C. Cir. 1987); *Salus Corp. v. Cont'l Cas. Co.*, 478 A.2d 1067 (D.C. 1984).

For statement of three-part test applied to determine whether insured's delay in notifying his insurance company of occurrence was reasonable, *see Diamond Service Co., Inc. v. Utica Mut. Ins. Co.*, 476 A.2d 648 (D.C. 1984); *see also Spears v. Nationwide Mut. Ins. Co.*, 254 F. Supp. 2d 144 (D.D.C. 2003).

Construction of Terms. It is duty of insurer to spell out in plainest terms any exclusionary or delimiting policy provisions and having failed to do so, words employed in policy must be given their common meaning and all ambiguities resolved against the insurer. *Loffler v. Boston Ins. Co.*, 120 A.2d 691 (D.C. 1956). "Plainest terms" are terms "understandable to the man in the street." *Chase v. State Farm Fire & Cas. Co.*, 780 A.2d 1123, 1127 (D.C. 2001).

Duty to Defend. Duty to disclaim coverage or to reserve rights is a part of the duty to defend, and if the carrier has a duty to defend the insured, the carrier will be estopped from denying coverage in a later proceeding if the carrier has conducted the defense of the insured with knowledge of any defense to liability. *American Cont'l Co. v. Pooya*, 666 A.2d 1193 (D.C. 1995).

"An insurer who refuses to defend risks being held responsible for indemnification for the insured's defense costs over which it had no control." *Berkeley v. Home Ins. Co.*, 68 F.3d 1409 (D.C. Cir. 1995).

### LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Where injury is latent, claim does not accrue for limitation purposes until plaintiff discovers injury, and where causation of injury is unknown, action accrues when both injury and its cause has been, or should have been discovered; where injury and causation are known, but not that there has been any wrongdoing, action accrues when plaintiff discovers or should have discovered wrongdoing. *Baker v. A.H. Robins Co., Inc.*, 613 F. Supp. 994 (D.D.C. 1985); *Dawson v. Eli Lilly and Co.*,

543 F. Supp. 1330 (D.D.C. 1982). Where legal or medical injury is not readily apparent, District of Columbia Courts follow “discovery” rule which tolls running of statute of limitations until plaintiff-client discovers or reasonably should have discovered her injury. D.C. Code §12-301 (1995); *Byers v. Burlison*, 713 F.2d 856 (D.C. Cir. 1983), *on remand*, 100 F.R.D. 436 (D.D.C. 1983).

Fraud. In fraud case, statute of limitations will not begin running until date fraud is discovered, or reasonably should have been. *Kropinski v. World Plan Executive Council-US*, 853 F.2d 948 (D.C. Cir. 1988). Lack of ordinary diligence which would have discovered fraud may be excused where party perpetrating fraud and party affected have fiduciary relationship. *Ray v. Queen*, 747 A.2d 1137 (D.C. 2000).

Third-party complaint for indemnity can be maintained, even though statute of limitations had run so as to preclude plaintiff from suing third-party defendants. *Tsz Ki Yim v. Home Indem. Co.*, 95 F.R.D. 349 (D.D.C. 1982).

Pendency of wrongful death action does not toll statute of limitations on claims under Survival Act. *Wharton v. Jones*, 285 F. Supp. 634 (D.D.C. 1968).

Under “discovery rule” cause of action accrues for limitations purposes when plaintiff has knowledge of, or by exercise of reasonable diligence should have knowledge of, existence of injury, its cause in fact, and some evidence of wrongdoing. *Knight v. Furlow*, 553 A.2d 1232 (D.C. 1989); *Bussineau v. President & Dir. of Georgetown College*, 518 A.2d 423 (D.C. 1986); *but see District of Columbia v. Dunmore*, 662 A.2d 1356 (D.C. 1995) (discovery rule does not apply to suits brought against the District of Columbia under D.C. Code §12-309 (1995)).

### MEDICAL MALPRACTICE

Limitation. One-year statute of limitations for battery applied to cause of action against surgeon for alleged performance of unconsented-to tubal ligation during Caesarean section delivery; three year statute of limitation did not apply. D.C. Code §12-301 (4) (1995); *Kelton v. District of Columbia*, 413 A.2d 919 (D.C. 1980).

In order to prevail in medical malpractice action, plaintiff must prove applicable standard of care, deviation from that standard, and causal relationship between deviation and alleged injury. *Posada v. Kilpatrick*, 547 A.2d 163 (D.C. 1988). Expert testimony typically required to establish each of the foregoing elements “except where proof is so obvious as to lie within the ken of the average lay juror.” *Snyder v. George Wash. Univ.*, 890 A.2d 237, 244 (D.C. 2006).

Physician’s duty to disclose is governed by same legal principles applicable to others in comparable situations with modifications only to extent medical judgment is involved. *Canterbury v. Spence*, 464 F.2d 772 (D.C. 1972); *see also Harike v. McKelway*, 707 F.2d 1544 (D.C. 1983), *cert. denied*, 464 U.S. 983 (1984) (discussing physician’s duty to disclose); *Henderson v. Milobsky*, 595 F.2d 654 (D.C. Cir. 1978). Generally, in medical malpractice actions, “a causal relationship between the doctor’s failure adequately to divulge and damage to the patient exists when disclosure of significant risks incidental to treatment would have resulted in a decision against it.” *Anderson v. Jones*, 606 A.2d 185 (D.C. 1992).

“Locality doctrine” has no applicability to any medical practice. *Capitol Hill Hosp. v. Jones*, 532 A.2d 89 (D.C. 1987).

Jury may infer negligence under doctrine of *res ipsa loquitur* in medical malpractice action if results of professional treatment are those which ordinarily would not occur when due care is exercised. *Woodfolk v. Group Health Ass’n, Inc.*, 644 A.2d 1367 (D.C. 1994); *Quin v. George Washington Univ.*, 407 A.2d 580 (D.C. 1979).

Independent tort of lack of informed consent is species of negligence. *Kozup v. Georgetown Univ.*, 851 F.2d 437 (D.C. Cir. 1988).

Ordinarily there must be expert testimony in medical malpractice cases. *Robbins v. Footer*, 553 F.2d 123 (D.C. Cir. 1977); *Eibl v. Kogan*, 494 A.2d 640 (D.C. 1985).

But expert testimony is not required when the lay jury can rely on common experience and knowledge. *Washington Hosp. Ctr. v. Martin*, 454 A.2d 306 (D.C. 1982). Lay witness testimony can competently establish lack of informed consent. *Crain v. Allison*, 443 A.2d 558 (D.C. 1982).

Physician’s conduct must be evaluated in terms of risks inherent in chosen method of treatment as well as whether running of risks are justified as prerequisite to correcting patient’s condition. *Haven v. Randolph*, 494 F.2d 1069 (D.C. 1974).

Surgical sponge left in abdomen establishes *prima facie* negligence, under doctrine of *res ipsa loquitur*. *Burke v. Washington Hosp. Ctr.*, 475 F.2d 364 (D.C. Cir. 1973).

HMO was vicariously liable for negligence of its consulting physician. *Schleier v. Kaiser Found. Health Plan of the Mid-Atlantic States, Inc.*, 876 F.2d 174 (D.C. Cir. 1989).

“Wrongful birth” is a valid cause of action to recover extraordinary expenses incurred as a result of the child’s abnormalities. *Cauman v. George Washington Univ.*, 630 A.2d 1104 (D.C. 1993); *Haymon v. Wilkerson*, 535 A.2d 880 (D.C. 1987).

A parent is not entitled to costs of rearing a healthy but unplanned child. *Flowers v. District of Columbia*, 478 A.2d 1073 (D.C. 1984). Women can recover for physical and emotional injuries arising from negligent mismanagement of her pregnancy and a resulting miscarriage. *District of Columbia v. McNeill*, 613 A.2d 940 (D.C. 1992).

Statutory physician-patient privilege is intended to prevent disclosure of information concerning patient’s ailments which might result in embarrassment. *In re Wilson’s Estate v. Thornton* 416 A.2d 228 (D.C. 1980); D.C. Code §14-307 (1995).

## LEGAL MALPRACTICE

See “ATTORNEYS.”

### NEGLIGENCE

Requisite standard of care in various contexts is discussed in following cases: *Richardson v. Gregory*, 281 F.2d 626 (D.C. Cir. 1960) (automobile-pedestrian case); *Princemont Constr. Corp. v. Smith*, 433 F.2d 1217 (D.C. Cir. 1970) (road-working operations); *Bowman v. Redding & Co.*, 449 F.2d 956 (D.C. Cir. 1971) (construction site); *White v. United States*, 780 F.2d 97 (D.C. Cir. 1986) (discharge from mental hospital); *Ellis v. Safeway Stores*, 410 A.2d 1381 (D.C. 1979) (grocery store accident); *Feldt v. Marriott Corp.*, 322 A.2d 913 (D.C. 1974) (false arrest); *ITT Continental Baking Co. v. Ellison*, 370 A.2d 1353 (D.C. 1977) (fall in supermarket); *Estrada v. Potomac Elec. Power Co.*, 488 A.2d 1359 (D.C. 1985) (injuries to trespasser on private property).

Proximate Cause. Substantial factor test is applicable whenever there are concurring causes of single injury. *Sinai v. Polinger Co.*, 498 A.2d 520 (D.C. 1985); *Lacy v. District of Columbia*, 424 A.2d 317 (D.C. 1980). One cannot escape liability for one’s own negligence merely because another person may have been contributorily negligent. *Hill v. McDonald*, 442 A.2d 133 (D.C. 1982).

Attractive Nuisance. Danger of moving train so obvious that any nine-year-old child allowed at large would readily discover it and realize risk involved in coming within area made dangerous by it. *Holland v. Balt. & Ohio R.R. Co.*, 431 A.2d 597 (D.C. 1981), *aff’d in part, vacated in part, Foshee v. Consol. Rail Corp.*, 849 F.2d 657 (D.C. Cir. 1988); *see also Edwards v. Consol. Rail*

*Corp.*, 567 F. Supp. 1087 (D.D.C. 1983), *aff’d*, 733 F.2d 966 (D.C. Cir.), *cert. denied*, 469 U.S. 883 (1984).

Res Ipsa Loquitur. Res ipsa loquitur permits inference of negligence where plaintiff establishes following three elements: 1) that event would not ordinarily occur in absence of negligence, 2) event was caused by instrumentality in defendant’s exclusive control, and 3) there was no voluntary action or contribution on plaintiff’s part. *District of Columbia v. Billingsley*, 667 A.2d 837 (D.C. 1995); *Bell v. May Dept. Stores Co.*, 866 F.2d 452 (D.C. Cir. 1989); *Marshall v. Townsend*, 464 A.2d 144 (D.C. 1983).

Comparative Negligence. District of Columbia law does not recognize doctrine of comparative negligence. *District of Columbia v. C.F. & B., Inc.*, 442 F. Supp. 251 (D.D.C. 1977); *National Health Lab. v. Ahmadi*, 596 A.2d 555 (D.C. App. 1991) (Medical Malpractice). Only exception to this rule is in actions by employee against common carrier. D.C. Code §35-302 (2002).

Assumption of Risk. Key to assumption of risk is voluntariness, while contributory negligence is “unreasonable conduct,” and when a situation may be considered a voluntary exposure to an unreasonable risk, such hybrid defense is regarded as a type of contributory negligence. *District of Columbia v. Mitchell*, 533 A.2d 629 (D.C. 1987); *Phillips v. Fujitec America, Inc.*, 3 A.3d 324 (2010) (explaining that when risk voluntarily encountered by the plaintiff is also unreasonable, contributory negligence, rather than assumption of the risk, furnishes the applicable analytical framework).

Contributory Negligence. Generally, contributory negligence is good defense to action based on negligence. *Karma Constr. Co., Inc. v. King*, 296 A.2d 604 (D.C. 1972). Under doctrine of contributory negligence, plaintiff is barred from recovery if his negligence was substantial factor in causing his injury, even if defendant was also negligent. *Sinai v. Polinger Co.*, 498 A.2d 520 (D.C. 1985); *see also Phillips v. Fujitec America, Inc.*, 3 A.3d 324 (A plaintiff is contributorily negligent if his or her own negligence “proximately contributed to the injury” incurred). In determining whether minor is contributorily negligent, jury must consider his age, education, training and experience. *Stevens v. Hall*, 391 A.2d 792 (D.C. 1978).

Imputed Negligence. For negligence to be imputed to occupant of car, occupant must retain control of operation and destination of car. *Baber v. Akers Motor Lines*, 215 F.2d 843 (D.C. Cir. 1954). Parent’s negligence is not imputed to child. *Piatek v. Gov’t Services, Inc.*, 296 F.2d 430 (D.C. Cir. 1961).

Landlord and Tenant. Liability of landlord to tenant for negligence of independent contractor in repairing



premises discussed and defined. *Hill v. McDonald*, 442 A.2d 133 (D.C.1982). Though respondeat superior does not apply, landlord is liable to tenant for torts of independent contractor. *Id.* Liability of landlord to persons is considered in: *McKey v. Fairbairn*, 345 F.2d 739 (D.C. Cir. 1965) (no notice of leak causing moisture on floor on which plaintiff slipped); *Clarke v. O'Connor*, 435 F.2d 104 (D.C. Cir. 1970) (duty to provide safe window fan); *Graham v. M.&J. Corp.*, 424 A.2d 103 (D.C. 1980) (same). Landlord's liability to licensee and trespasser considered in *Casper v. Barber & Ross*, 288 F.2d 379 (D.C. Cir. 1961); *Gould v. DeBeve*, 330 F.2d 826 (D.C. Cir. 1964); *Luck v. B. & O. R.R. Co.*, 510 F.2d 663 (D.C. Cir. 1974). Violation of housing regulations establishing standard of conduct for landlord is evidence of negligence. *Klein v. Price*, 331 F.2d 800 (D.C. Cir. 1964); *Clarke v. O'Connor*, 435 F.2d 104 (D.C. Cir. 1970). Standard of care for social guest defined in *Cooper v. Goodwin*, 478 F.2d 653 (D.C. Cir. 1973).

Duty of landowner to abstain from willful or wanton conduct against trespassers does not arise unless that landowner has actual, rather than merely constructive, knowledge of trespasser's presence on property and is cognizant that he or she is in danger of immediate rather than merely possible harm. *Estrada v. Potomac Elec. Power Co.*, 488 A.2d 1359 (D.C. 1985).

Last Clear Chance. Doctrine discussed and defined in: *Felton v. Wagner*, 512 A.2d 291 (D.C. 1986); *Bowman v. Redding & Co.*, 449 F.2d 956 (D.C. Cir. 1971); *Byrd v. Hawkins*, 404 A.2d 941 (D.C. 1979). Doctrine is inapplicable if emergency is so sudden that there is no time to avoid collision. *Law v. Virginia Stage Lines, Inc.*, 444 F.2d 990 (D.C. Cir. 1971); *see also District of Columbia v. Huysman*, 650 A.2d 1323 (D.C. 1994).

### NO-FAULT INSURANCE

On June 22, 1982, Council of District of Columbia passed Compulsory No-Fault Motor Vehicle Insurance Act of 1982. New Act took effect October 1, 1983. District's legislation goes further than most other states' "no-fault" automobile insurance legislation in eliminating fault as factor. D.C. Code §31-2401, *et seq.*

Constitutionality of D.C.'s No-Fault Insurance Statute was upheld in *Davis v. District of Columbia Dept of Consumer & Regulatory Affairs*, 561 A.2d 169 (D.C. 1989) (does not unconstitutionally burden right to travel); *Dimond v. District of Columbia*, 618 F. Supp. 519 (D.D.C. 1984), *aff'd in part, rev'd in part*, 792 F.2d 179 (D.C. Cir. 1986) (does not deprive insureds of substantive due process).

Statute of limitations for maintaining action under No-Fault Act begins to run when injured party knows, or

exercising reasonable diligence should know, that party qualifies under one of six exceptions in Act, rather than date of injury. *Stackhouse v. Schneider*, 559 A.2d 306 (D.C. 1989).

Coverage. Act applied to D.C. residents who own motor vehicles required to be registered or who must obtain reciprocity stickers in District and nonresidents who own or operate motor vehicles in District. D.C. Code §31-2401, *et seq.* (2001). Motorcycles, tractors, rail or track vehicles, taxicabs and battery-operated wheelchairs, when operated by handicapped person at speed under ten miles per hour are excluded from definition of motor vehicles. Non-residents injured in the District by uninsured motorists are not entitled to "PIP" benefits pursuant to the compulsory No-fault Act. *Davis v. Dept. of Consumer & Reg. Affairs*, 561 A.2d 169 (D.C. 1989).

Definition of owner includes federal, state and local governments, organizations of virtually every kind ("any . . . entity having property or title to vehicle or bicycle used . . . in District"), including Washington Metropolitan Area Transit Authority, District of Columbia, and diplomats' vehicles. D.C. Code §31-2402 (21) (2001); Opinion of Corporation Council of District of Columbia, February 3, 1983.

Victims are not covered unless accident arises out of "maintenance or use" of motor vehicles, which means "any activity involving or related to operation or transportation by motor vehicle, including occupying, entering into, alighting from, repairing, or servicing." D.C. Code §31-2402 (14) (2001).

Required coverage and available benefits. Required insurance and benefits available to victims outlined in D.C. Code §§31-2401, 2403, 2404 (2001). Owners of motor vehicles must carry personal injury protection ("PIP"), property damage liability protection, third party liability protection for accidents outside District (not required for nonresidents owning or operating vehicles in District), and uninsured motorist protection. District of Columbia residents who fail to maintain insurance, as required by law, are still subject to the restrictions on common law tort actions. *Monroe v. Foreman*, 540 A.2d 736 (D.C. 1988).

Required limits of coverage are set forth in D.C. Code §31-2406 (2001).

Certain benefits must be deducted from PIP award; these include amounts received with respect to injury from workers' compensation, and temporary non-occupational disability insurance, D.C. Code §31-2410 (2001). Thus, an employer who has paid workers' compensation benefits that partially or fully satisfy the required personal injury protection benefits may obtain

reimbursement from the insurer of the liable third party. *McCrae v. Marques*, 688 F. Supp. 653 (D.D.C. 1987).

“Exemption” of taxicabs from District of Columbia no-fault law applies only to mandatory insurance provision; exemption does not prevent taxicab owner or driver from claiming benefits under law, nor does it entitle him to avoid law’s limitations on civil liability. *Arthur v. Avis Rent-A-Car System, Inc.*, 613 F. Supp. 82 (D.D.C. 1985); *Nasaka v. Data Access Systems*, 602 F. Supp. 761 (D.D.C. 1985).

Election to receive “PIP” benefits will not bar a civil action if the injured party qualifies under one of the six exceptions of §31-2405 (2001). The statute of limitations for maintaining such an action begins when the injured party knows, or exercising reasonable diligence should know, that they qualify under the Act. *Stackhouse v. Schneider*, 559 A.2d 306 (D.C. 1989).

Foreign insurers are not required to offer optional PIP insurance to nonresidents who are statutorily required to purchase other specified coverage as condition of operating motor vehicle in District of Columbia. *Dove v. Dairyland Ins. Co.*, 562 A.2d 1199 (D.C. 1989).

Motorcyclist who did not carry insurance on motorcycle was not entitled to recover personal injury protection benefits from insurer of his own automobile in D.C. at time of accident, however, he was entitled to PIP from insurer for the automobile which was involved in the accident with his motorcycle. *Coleman v. Cumis Ins. Soc., Inc.*, 558 A.2d 1169 (D.C. 1989).

Minimum amounts of uninsured motorist coverage must be included in every policy or will be inserted as a matter of law. *Tapscott v. Dairyland Ins. Co.*, 673 F. Supp. 611 (D.D.C. 1987).

Personal Injury Protection is optional. D.C. Code §31-2404.

## PENALTY AND ATTORNEY FEES

Where an attorney’s neglect has resulted in undue delay in the progress of a case, but his client has not been at fault and no prejudice has been worked upon the opposing party, justice is better served by punishing the attorney rather than dismissing or harming his client’s case. *Butler v. Pearson*, 636 F.2d 526 (D.C. Cir. 1980).

## PRIVILEGED COMMUNICATION

See “ATTORNEYS.”

Attorney/Client. Attorney/client privilege and secret refers to information gained in professional relationship that client has requested be held inviolate or disclosure which would be likely to be detrimental to client.

Attorney may break privilege when reasonably necessary to prevent criminal act reasonably believed to result in death or substantial bodily harm, bribery, or intimidation of any persons involved in proceedings before a tribunal. Duty of confidentiality and privilege continues after termination of relationship. Waiver and privilege is that of the client, not of the attorney. D.C. R. Prof. Cond. 1.6 (1997).

Clergy/Penitent. Confession or communication made to priest, clergyman, rabbi or other duly licensed, ordained, consecrated minister of religion or accredited practitioners of Christian Science, in his or her professional capacity, are considered to be privileged communications and may not be examined in any civil or criminal proceedings. D.C. Code §14-309 (1995).

Doctor/Patient. Physician and patient privilege is extended to the patient and can only be waived by him or his legal representative. *Carmody v. Capital Traction Co.*, 43 App. D.C. 245 (D.C. Cir. 1915). Information communicated in unlawful efforts to procure administration of any controlled substance is deemed not privileged. D.C. Code §48.931.01 (2001). Waiver of physician/patient privilege by filing medical malpractice action was consent to disclosure of confidential information. *Street v. Hedgepath*, 607 A.2d 1238 (D.C. 1992).

Spousal. Husband or his wife, competent or not, cannot be compelled to testify to any confidential or private communication made by one to the other during the marriage. D.C. Code §14-306 (1995). Privilege not to reveal confidential marital communications survives the death of one spouse, but it does not extend to noncommunicative acts. *United States v. Burks*, 470 F.2d 432 (D.C. Cir. 1972). Marital privilege is applicable to common-law marriages, which are recognized by the District of Columbia. Necessity exception to confidential communications privilege includes crimes done to a child or either spouse. *Johnson v. United States*, 616 A.2d 1216 (D.C. 1992), *cert. denied*, 507 U.S. 996 (1993). Where testimony concerns matters that took place before the marriage, there is no basis to invoke the privilege concerning confidential marital communication. *Goulart v. Barry*, 119 D. Wash. L. Rptr. 1197 (Super. Ct. 1991). Assault on wife by husband is not a “communication” and is certainly not a “confidential” one so that wife is competent to testify in criminal proceedings as to assault on her made by her husband. *Morgan v. United States*, 363 A.2d 999 (D.C. 1976), *cert. denied*, 431 U.S. 919 (1977). Marital privilege is waived if third party is present when the conversation took place. *Beard v. United States*, 535 A.2d 1373 (D.C. 1988).

Communication made by an impaired person through an interpreter is privileged. Privilege also extends to interpreter. D.C. Code §2-1908 (formerly codi-

fied at §31-2708). *Barrera v. United States*, 599 A.2d 1119 (D.C. 1991).

### PRODUCTS LIABILITY

Strict liability in tort is imposed on manufacturer when article placed in market proves to have defect that causes injury to person or property. *Cottom v. McGuire Funeral Service*, 262 A.2d 807 (D.C. 1970). Both tort and warranty theories of liability are recognized. *Payne v. Soft Sheen Products, Inc.*, 486 A.2d 712 (D.C. 1985). Privity is not required in implied warranty actions. *Picker X-Ray Corp. v. General Motors Corp.*, 185 A.2d 919 (D.C. 1962). In strict liability case, focus is on product itself, and not on manufacturer's conduct. *Warner Fruehauf Trailer Co., Inc. v. Boston*, 654 A.2d 1272 (D.C. 1995). When direct evidence is unavailable to demonstrate alleged defect in products liability case, circumstantial evidence is sufficient. *Guardian Ins. v. Anacostia Chrysler-Plymouth*, 320 A.2d 315 (D.C. 1974). Reasonableness of product design is jury question. *Knippen v. Ford Motor Co.*, 546 F.2d 993 (D.C. Cir. 1976). Burden of proof is described in *Stewart v. Ford Motor Co.*, 553 F.2d 130 (D.C. Cir. 1977). Plaintiff suing in tort must prove causation, and thus in products liability case, must identify manufacturer or distributor of product which caused, or was substantially the cause of, his or her injury. *Clayton v. Owens-Corning*, 662 A.2d 1374 (D.C. 1995). Sufficiency of product warning is jury question. *Burch v. Amsterdam Corp.*, 366 A.2d 1079 (D.C. 1976). Law of products liability applicable to new home. *Berman v. Watergate West*, 391 A.2d 1351 (D.C. 1978). Standard of care applicable to duty to warn is described in *Russell v. G.A.F. Corp.*, 422 A.2d 989 (D.C. 1980). Issue of fault is relevant to adequacy of labeling. *Young v. Up-Right Scaffolds*, 637 F.2d 810 (D.C. Cir. 1980). Liability is imposed only for creation of unreasonable danger. *Westinghouse Elec. Corp. v. Nutt*, 407 A.2d 606 (D.C. 1979). Contributory negligence is not a defense to strict liability, misuse is a defense. *Payne v. Soft Sheen Products, Inc.*, 486 A.2d 712 (D.C. 1985). Product manufacturer's or seller's failure to warn user of foreseeable risks associated with use of product may give rise to cause of action sounding in either negligence or strict liability. *East Penn Mfg. Co. v. Pineda*, 578 A.2d 1113 (D.C. 1990). Manufacturer is strictly liable for damage caused by his product if there was a feasible way to design a safer product and ordinary consumer would conclude that manufacturer ought to have used alternative design. *Hull v. Eaton Corp.*, 825 F.2d 448 (D.C. Cir. 1987). Under market share theory of liability in products liability action, mere difficulty in identifying sources of product is insufficient; plaintiff must make genuine attempt to identify party responsible

for harm. *Bly v. Tri-Continental Industry, Inc.*, 663 A.2d 1232 (D.C. 1995).

### RELEASE

Whether words of "release" or of "covenant" are used, effect should be same. Partial satisfaction of claim against joint tort-feasors taken in compromise and release of liability of one or some of tort-feasors does not discharge others. *McKenna v. Austin*, 134 F.2d 659 (D.C. Cir. 1943).

Like any other contract, a release must be supported by sufficient consideration and is not valid if procured by duress. *Interdonato v. Interdonato*, 521 A.2d 1124 (D.C. 1987).

Operation and Effect in General. Release executed by collision damage insurer purporting to release tort-feasor from any and all claims did not release tort-feasor from claim by bodily injury insurer asserting subrogation rights against tort-feasor. *Motors Ins. Corp. v. Home Indem. Co.*, 284 A.2d 58 (D.C. 1971).

Although majority rule is that release of either principal or agent ipso facto releases other, growing minority of courts hold that release of principal does not bar suit against agent for underlying tort unless release is so intended. *Hill v. McDonald*, 442 A.2d 133 (D.C. 1982).

### REPRESENTATIONS AND WARRANTIES

See "AGENTS AND BROKERS."

Insured is obligated to read papers dealing with ordered insurance and is deemed to know contents of policy, but such duty may be excused if insured is induced to sign contract without reading it as result of misrepresentation by insurer. *Mills v. Cosmopolitan Ins. Agency*, 424 A.2d 43 (D.C. 1980).

Applicant's affirmative false statement on material matter in application for insurance constitutes sufficient grounds for voiding policy. *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Mason, Perrin & Kanovsky*, 765 F. Supp. 15 (D.D.C. 1991).

False statement in application for insurance policy bars recovery if statement either was made to deceive or if it materially affected acceptance of risk or hazard assumed by insurer, *Johnson v. Prudential Ins. Co. of America*, 589 F. Supp. 30 (D.D.C. 1983), *aff'd*, 744 F.2d 878 (D.C. Cir. 1984); even if misrepresentation was unintentional. *Skinner v. Aetna Life Ins. Co.*, 607 F. Supp. 403 (D.D.C. 1985), *aff'd*, 804 F.2d 148 (D.C. Cir. 1986).

Where misrepresentation in life insurance policy would affect company's acceptance of risk, or where misrepresentation is made with intent to deceive, there



need be no causal relationship between misrepresented matter and insured's death. *Jones v. Prudential Ins. Co. of America*, 388 A.2d 476 (D.C. 1978).

Father's statement in application that child to be insured had no other life insurance was held to be material misrepresentation. *Jannenga v. Nationwide Life Ins. Co.*, 288 F.2d 169 (D.C. Cir. 1961).

### SERVICE OF PROCESS

See "AUTOMOBILES"; Law Digest Tables; D.C. Code §13-301 *et seq.* (1995); D.C. Superior Court Civil Rules, Rule 4.

Corporations. Registered agent as agent for service; service when no registered agent. D.C. Code §29-101.12 (2001).

Non-resident Motorist. Service of process on non-resident. D.C. Code §50-1301.07 (2001).

Showing of diligent but futile efforts to ascertain whereabouts of defendant is prerequisite to order substituting publication for personal service. D.C. Code §13-338, 13-340 (b) (1995); *Bearstop v. Bearstop*, 377 A.2d 405 (D.C. 1977).

Key element in abuse of process claim is whether process was used to achieve end unobtainable by law, not regularly or legally obtainable. *Epps v. Vogel*, 454 A.2d 320 (D.C. 1982).

Certified mail, return receipt requested, was service upon defendant reasonably calculated to give adequate notice. *In the matter of Washington*, 513 A.2d 245 (D.C. 1986); *Caravel Office Bldg. Co. v. Peruvian Air Attache*, 347 A.2d 280 (D.C. 1975).

### SUBROGATION

Subrogation is defined in *Amalgamated Cas. Ins. Co. v. Winslow*, 135 F.2d 663 (D.C. Cir. 1943); *Travelers Ins. Co. v. District of Columbia*, 382 A.2d 269 (D.C. 1978). See also *Williams v. Lumbermen's Mut. Cas. Co.*, 664 A.2d 342 (D.C. 1995); *Travelers Ins. Co. v. Haden*, 418 A.2d 1078 (D.C. 1980).

Insurer under D.C. Workers' Compensation Act is subrogated to employer's rights against negligent third person causing injury to compensated employee, if employee accepts compensation pursuant to award and employer does not sue third person within six months from award. *Travelers Ins. Co. v. Haden*, 418 A.2d 1078 (D.C. 1980); D.C. Code §12-309 (1973).

### WAIVER AND ESTOPPEL

Waiver is act or course of conduct by insurer which reasonably leads insured to believe that breach of policy

will not be enforced; Estoppel generally results when insurance company assumes defense of action or claim with knowledge of defense of non liability under policy. *Diamond Serv. Co. v. Utica Mut. Ins. Co.*, 476 A.2d 648 (D.C. 1984).

Waiver of policy defense, unlike estoppel, does not require that insured acted to his detriment in reliance upon position taken by insurer. *Thomas v. Otis*, 199 F. Supp. 1 (D.D.C. 1961), *aff'd sub nom.*, *Nationwide Mut. Ins. Co. v. Thomas*, 306 F.2d 767 (D.C. Cir. 1962).

Neither doctrine of waiver nor doctrine of estoppel can be used to extend coverage or scope of policy. *Walker v. American Ice Co.*, 254 F. Supp. 736 (D.D.C. 1966).

Under appropriate circumstances, principles of equitable estoppel may preclude statutory defense by insurer of misstatement in application for policy. D.C. Code §31-4314 (2008). *Metropolitan Life Ins. Co. v. Johnson*, 363 A.2d 984 (D.C. 1976).

Essence of waiver of lapse of policy for nonpayment of premium is act or course of conduct which, on part of insurer, reasonably leads insured to believe that lapse will not be enforced. *George Washington Life Ins. Co. v. Morgan*, 118 A.2d 685 (D.C. 1955).

### WORKERS' COMPENSATION

See D.C. Code §32-1501, *et seq.* (2001).

Constitutionality of new D.C. Workers' Compensation law was upheld in *District of Columbia v. Greater Washington Central Labor Council*, 442 A.2d 110 (D.C. 1982), *cert. denied*, 460 U.S. 1016 (1983).

Jurisdiction. The Act applies to an employee who is injured in the District, or if the injury occurs outside the District, if the employment is localized principally in the District. D.C. Code §32-1503. "Localized principally" is defined in *Hughes v. District of Columbia Dep't. of Empl. Servs.*, 498 A.2d 567 (D.C. 1985).

The Act covers worker's injury or disease if employment events giving rise to injury occurred before Act took effect, but worker did not become aware of injury and its job-relatedness until after that time, unless there is no subject matter jurisdiction of claim under the Act or other state law, in which event Longshore and Harbor Workers' Compensation Act, as extended to District of Columbia private sector workers, applies. *Railco v. Gardner*, 564 A.2d 1167 (D.C. 1989).

"Employee" Broadly Defined Under the District of Columbia Workers' Compensation Act. D.C. Code §32-1501(9)(g). Undocumented aliens are "employees" within the meaning of the Act. *Asylum Company v. Dis-*

*trict of Columbia Dep't of Empl. Servs.*, 10 A.3d 619 (2010).

A general contractor is not an “employer,” immune from tort liability, in suit brought by injured employee of subcontractor where subcontractor secured workers’ compensation benefits for employee. *Meiggs v. Associated Builders, Inc.*, 545 A.2d 631 (D.C. 1988), *cert. denied*, 490 U.S. 1116 (1989).

Employer who pays workers’ compensation benefits without award is not thereby barred from pursuing whatever nonstatutory rights he may have against third-party wrongdoers. *Travelers Ins. Co. v. District of Columbia*, 382 A.2d 269 (D.C. 1978).

Workers’ Compensation law also does not bar actions brought by third parties against employers based upon express contractual indemnification provisions. *Myco, Inc. v. Super Concrete, Inc.*, 565 A.2d 293 (D.C. 1989).

Workers’ compensation insurer is subrogated to employer’s implied right of reimbursement out of employee’s third-party recovery. *Travelers Ins. Co. v. Haden*, 418 A.2d 1078 (D.C. 1980).

It is not purpose of workers’ compensation to provide injured employee with double recovery. *Meiggs v. Associated Builders, Inc.*, 545 A.2d 631 (D.C. 1988),

*cert. denied*, 490 U.S. 1116 (1989); *Ceco Corp. v. Coleman*, 441 A.2d 940 (D.C. 1982).

Reasonable to conclude District of Columbia Workers’ Compensation Act barred supplemental compensation for any period for which employee received benefits under law of another jurisdiction for same injury. *Reichley v. District of Columbia Dep't. of Empl. Servs.*, 531 A.2d 244 (D.C. 1987).

For compensation schedules, including those for employees with preexisting disabilities, D.C. Code §32-1508 (2001).

Penalties are imposed on employers and carriers who delay the payment of any installment of compensation to an employee in bad faith. D.C. Code §32-1528 (2001).

Psychological Injury. The D.C. Court of Appeals abrogated the “objective standard” which it previously used to determine whether a pre-existing psychological condition exacerbated by a physical injury suffered during the course of employment would have afflicted an “average third person” without the prior condition for purposes of workers’ compensation coverage eligibility. As such, “an employer must take an employee as it finds him or her.” *McCamey v. District of Columbia Dep't of Empl. Servs.*, 947 A.2d 1191 (D.C. 2008).