

# DIGEST OF INSURANCE LAW

## HAWAII

Courtesy of  
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### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

District Courts have jurisdiction of all civil actions, except as otherwise provided, where amount in controversy does not exceed \$20,000, and exclusive jurisdiction in all civil actions, where debt, amount or damages or value of property claimed does not exceed \$10,000 with noted exceptions. Non jury Haw. Rev. Stat. §604-5.

Circuit Courts have general original civil jurisdiction. State is divided into four judicial circuits, one for each county.

Jurisdiction of Circuit Courts is concurrent with district courts in all civil actions, where amount in controversy exceeds \$5,000 and matter is triable by jury. Haw. Rev. Stat. §603-21.5, §604-5.

Venue defect can be waived. *Kauai v. Kauai County*, 47 Haw. 271 (1963).

Hawaii has adopted mandatory arbitration program for civil actions in tort at circuit court level with probable jury award value of \$150,000.00 dollars or less Haw. Rev. Stat. §601-20.

#### Appellate Courts

Supreme Court, composed of chief justice and four associates, has appellate jurisdiction of all appealable matters and original jurisdiction of all questions arising under writs directed to courts of inferior jurisdiction and returnable before Supreme Court, and propositions at law certified by federal district or appellate courts. Haw. Rev. Stat. §602-1, 602-5. Effective July 1, 2006, appeals pending in the supreme court as of effective date may be transferred to intermediate appellate court or retained at the supreme court as the chief justice, in the chief justice's sole discretion, directs. HRS §602-57.

Intermediate Court of Appeals, composed of Chief Judge and five associate judges has concurrent jurisdiction with Supreme Court of all matters except questions of jurisdiction of Supreme Court Haw. Rev. Stat. §602-51, 602-57. Appeals from District and Circuit Courts are heard either by Supreme Court or Intermediate Court of Appeals (as assigned by Supreme Court).

Appeals shall be allowed in civil matters from all final judgments, orders or decrees of circuit and district courts and land court, except as otherwise provided Haw. Rev. Stat. §641-1. Effect July 1, 2006, appeals shall be allowed in to intermediate appellate court, subject to chapter 602 Iv.

An appeal may be made when appellant files notice of his appeal and bond within 30 days after entry of judgment or order appealed from. Haw. R. App. P. 4(a).

Appeals may be allowed upon like terms as to filing of bond and payment of costs, by circuit judge in his discretion from interlocutory judgments, orders or decrees, wherever he thinks same advisable for more speedy termination of litigation, Haw. Rev. Stat. §641-1 (b).

Stay of Proceedings. Filing of notice of appeal does not operate as automatic stay. Haw. R. Civ. P., 72 (i).

Appellant may present supersedeas bond for approval on such terms as court may require. Haw. R. App. P., 7 and 8.

There is no appeal as of right from Intermediate Court of Appeals to Supreme Court, review is available only by certiorari. Haw. Rev. Stat. §602-59.

### LAW

#### Abbreviations

- F. Supp. – Federal Supplement.
- F.2d – Federal Reports Second Series.
- Haw. – Hawaii Reports (Supreme Court and Intermediate Court of Appeals).
- Haw. App. – Hawaii Intermediate Court of Appeals Reports. (See Hawaii Reports for opinions published after 1994).
- Haw. R. App. P. – Hawaii Rules of Appellate Procedure.
- Haw. R. Civ. P. – Hawaii Rules of Civil Procedure.
- Haw. Rev. Stat. – Hawaii Revised Statutes.
- P. – Pacific Reporter.
- P.2d – Pacific Reporter, Second Series.



Hawaii Insurance Law was repealed and the New Hawaii Insurance Code (Haw. Rev. Stat. §431:1-100 to §431:20-125) was substituted.

### ACCIDENT AND HEALTH INSURANCE

Definition of Sickness. Only if it first manifests itself after date of issue, did not exclude coverage due to infection with HIV where denial based upon disease or condition excluded by name or description. *Estate of Doe v. Paul Revere*, 86 Haw. 262 (1997).

Where blood poisoning results from abrasion of skin of foot by shoe and death or disability follows, death or disability is properly attributable to accidental bodily injury, *Colburn v. USF&G*, 25 Haw. 536 (1920) and new act requires all accident sickness insurance policies issued in Hawaii to include coverage of alcohol dependency, drug dependency and mental health. Act 202, effective July 1, 1989. AIDS-amended provision conferring confidentiality for AIDS, ARC and HIV records. Haw. Rev. Stat. §431:9-105 to 243.

### ACCIDENTAL MEANS

Accidental harm is synonymous with bodily injury, this includes emotional distress. *First Ins. v. Lawrence*, 77 Haw. 2 (1994).

Motor vehicle accident defined as bodily injury, death, sickness or other disease caused by accident. Haw. Rev. Stat. §294-2 (1). *Rodriguez v. State*, 52 Haw. 156 (1970).

### ADJUSTERS

License required for adjusters and qualifications for same defined. Hawaii residence or residence in state granting reciprocity is required, Haw. Rev. Stat. §431:9-105 to 243.

### AGE

See "AUTOMOBILES," "NEGLIGENCE," "INFANTS."

In General-Age of Majority - 18 years.

Legal Drinking Age-21 years.

### AGENTS AND BROKERS

Agents. Complete and comprehensive code adopted in 1955, as amended 1959 and 1984, is in force providing procedures for organization of domestic insurance corporations and licensing of foreign and alien companies. Agents comprehensively covered by code, Haw. Rev. Stat. §431:9-105 to 243. No provisions for brokers,

except as relating to surplus line broker Haw. Rev. Stat. §431:8 and real estate brokers Haw. Rev. Stat. §467.

### ARBITRATION

See Haw. Rev. Stat. Chapter 658A - Uniform Arbitration Act enacted July 1, 2002 replaced prior arbitration chapter. Public Policy and Haw. Rev. Stat. Ch. 658 encourage arbitration. *Association of Owners of Kukui Plaza v. Swinerton & Walberg*, 68 Haw. 99 (1985); *Beclar Corp. v. Young*, 7 Haw. App. 183 (1988).

Arbitration must be agreed to by parties and evinced by written agreement. *Moss v. American Intern. Adj. Co.*, 86 Haw. 59 (1997)

### ATTORNEYS

Appointment and Authority. License by Supreme required. No reciprocity for attorneys licensed in other states. Bar exam required for all applicants. Haw. Rev. Stat. Ch. 605.

Legal Malpractice. 6 year statute of limitations applies. Where relationship between attorney and non-client was such that a duty of care would be recognized, non-client can sue under negligence or contract. *Blair v. Ing*, 95 Haw. 247 (2001).

Fees. Statutory schedule repealed Haw. Rev. Stat. §607-14 amended, now court may grant reasonable fee not to exceed 25% of judgment also allowance for attorney's fee must be written into the agreement. Recoverable in frivolous actions. Haw. Rev. Stat. §607-14.5. Recoverable in successful policy holder suit to enforce coverage. Haw. Rev. Stat. §431:10-242. Fees concerning fees on promissory notes or other written contract. See Haw. Rev. Stat. §607-14 (1993). Attorneys fees normally not awarded as damages or costs unless provided by statute, stipulation or agreement. *Utsunomiya v. Moomulen*, 76 Haw. 396 (1994). No fees for appeal on discrimination claim to claimant where she had yet to prevail on merits. *Nelson v. University of Hawaii*, 99 Haw. 262 (2002).

### AUTOMOBILES

See Law Digest Tables.

See "NEGLIGENCE," also "NO-FAULT."

Age. Minimum age for license is 15 years and 6 months. Haw. Rev. Stat. §286-104 (5).

Contributory Negligence. Not negligence as matter of law for one riding as passenger with driver of automobile to fail to observe that driver is under influence of liquor, *Wong v. McCandless*, 31 Haw. 750 (1931) Burden of proof is on defendant to show that plaintiff was



guilty of contributory negligence. *F. Koehnen, Ltd. v. County of Hawaii*, 47 Haw. 329 (1963). Contributory negligence of mother who is driving car involved in collision with another vehicle is not imputable to 5 year old child. *Ellis by Ellis v. Mutual Telephone Co.*, 29 Haw. 604 (1927). Generally discussed, *Bright v. Quinn*, 20 Haw. 504 (1911). See also Haw. Rev. Stat. §663-31.

Alcohol. Where conduct of driver questionable, evidence of alcohol consumption is relevant and material. *Kaeko v. Davis*, 68 Haw. 447 (1986). Driving vehicle with any level of blood alcohol does not establish actionable negligence, must have causal relationship between intoxication and accident. *Methuen-Abrem v. HIG*, 73 Haw. 385 (1992).

Comparative Negligence. Contributory negligence shall not bar recovery in any action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than negligence of person against whom recovery is sought, but any damage allowed shall be diminished in proportion to amount of negligence attributable to person for whose injury damage or death recovery is made. Haw. Rev. Stat. §663-31. Comparative negligence in strict liability cases does not bar recovery by plaintiff more than 51% negligent. Rather acts as percentage reduction of recovery. *Hao v. Owens-III, Inc.*, 69 Haw. 231 (1987).

Infant. Child six years of age may be capable of contributory negligence. Child is only required to use care appropriate to his age, experience and mental capacity. *Sherry v. Asing*, 56 Haw. 135 (1975).

Family Purpose Doctrine. No Supreme Court decision.

Guest Cases. No guest statute. Driver owes duty of reasonable care. *Sherry v. Asing*, 56 Haw. 135 (1975).

Good Samaritan. Any person who, in good faith and without remuneration or expectation of remuneration, renders emergency care to victim of accident or emergency, at scene thereof is not liable for resultant damages for his acts or omissions except for gross negligence or wanton acts or omissions Haw. Rev. Stat. §663-1.5

Imputed Negligence. Negligence of owner and operator of automobile is not imputable to guest or gratuitous passenger who is not at time jointly engaged with owner in enterprise wherein each has right to direct operation of auto. *Wong v. McCandless*, 31 Haw. 750 (1931).

Joint Enterprise. Discussed *Dias v. Kamalani*, 39 Haw. 474 (1952).

Liability of Owner. No statute or case law imposing liability on owner for negligence of operator. Any negligence of minor under 18 imputed to person who signs minor's application for license, and person signing said application shall be jointly and severally liable with such minor for any damages caused by such negligence or misconduct, Haw. Rev. Stat. §286-112.

Negligent Entrustment. In order to recover under theory of Negligent Entrustment of automobile to incompetent driver, there must be showing that facts giving rise to alleged incompetency were known or should have been known to entruster at time of entrustment. *Abraham v. S.E. Onorato Garages*, 50 Haw. 628 (1968). Negligent entrustment arises out of ownership, operation and use of automobile. Therefore exclusion of such coverage in homeowners policy is applicable. *HIG v. Chief Clerk of First Circuit*, 68 Haw. 336 (1986).

Owners Liability for Acts of Servant or Agent. Negligence of employee of corporation in operating automobile owned by corporation which was furnished him for sole purpose of returning from personal enterprise is not imputable to corporation. *Angco v. Standard Oil Co. of California*, 32 Haw. 246 (1931). Detour of 400 feet by servant cannot as matter of law be said to be complete abandonment of business of master. *Carey v. Honolulu Iron Works Co.*, 30 Haw. 457 (1928), *reh'g denied*, 30 Haw. 518 (1928). Hawaii recognizes respondeat superior theory where employee was provided alcohol at company social function. *Wong-Leong v. Hawaiian Ind. Refinery*, 76 Haw. 433 (1994).

Safety Belt Defense. Use of seat belts in front seats of vehicles mandatory. Effect may be to resurrect safety belt defense. Haw. Rev. Stat. §291-11.6.

Service of Process upon Non-Resident Motorist. Operation of motor vehicle by resident or non-resident on public highways in state automatically subjects operator to jurisdiction of courts of state in any proceeding arising out of accident in connection therewith. Service may be made upon such person personally by any person authorized to serve process where person may be found, or delivered by registered mail and return receipt filed. If defendant cannot be found, court may order service by publication. Haw. Rev. Stat., 634-33.

Uninsured Motorists. Insured under multi-vehicle policy injured while in uninsured vehicle by uninsured motorist is entitled to recover statutory minimum benefits applicable to each vehicle insured under policy. *Allstate Insurance Co. v. Morgan*, 59 Haw. 44 (1978). In addition, where tortfeasor driving no-fault insured vehicle does not have coverage sufficient to compensate injured plaintiffs, injured plaintiffs may "stack" and recover from their own policies uninsured motorist cover-



age. *Yamamoto v. Premier Insurance Co.*, 4 Haw. App. 429 (1983). However, No-fault law precludes stacking of basic no-fault coverages where insured has several vehicles insured under one policy. *Rana v. Bishop Ins.*, 713 P.2d 1363 (1985). Public policy prevents stacking of benefits under group policy covering 1,000 separately owned vehicles. *Lee v. INA*, 70 Haw. 120 (1988). Insurer may have to reimburse insured if insured paid deductible, Haw. Rev. Stat. §431-10C-305.5.

Hawaii recognizes “underinsured motorist” doctrine; however, a driver is not “underinsured” if his policy provides statutory minimum bodily injury or death benefit. *Hara v. Island Ins.*, 70 Haw. 43 (1988).

Company which insured purchaser of vehicle obligated for accident coverage despite non-compliance with registration statute not seller’s insurer. *HIG v. Financial Security Ins.*, 72 Haw. 80 (1991).

Other insurance clauses in uninsured motorist provisions must be deemed invalid to extent that such terms effectively limit insured’s total recovery to less than actual damages. *Walton v. State Farm*, 55 Haw. 326 (1973).

### AVIATION

Hawaii has adopted a modified version of the Uniform Aeronautics Act.

### BAD FAITH

Hawaii recognizes tort of bad faith in first party insurance context. *Best Place v. Penn America Ins.*, 82 Haw. 120 (1996). Ruling in *Best Place* applies retroactively. *Catron v. Tokio Marine*, 90 Haw. 407 (1999).

### BROKERS

See “AGENTS AND BROKERS.” No Statutory Provision for Insurance Brokers.

### CANCELLATION

Accident and Health Policies. Among optional “standard provisions” which may be inserted in policies of accident and health insurance which provide for cancellation is provision that company may cancel only by written notice (stating when, not less than five days thereafter, such cancellation shall be effective) accompanied by return of unearned premium. Non-cancelable policies may be issued. §431:10A-106.

Failure to notify insurance company of retirement of employee leaves group policy coverage of retired employee in effect. *Elmhorst v. Prudential Ins. Co.*, 48 Haw. 121 (1964).

### CHATTEL MORTGAGE

See “FIRE INSURANCE.”

### CONSTRUCTION OF POLICY

See also, “LIABILITY INSURANCE.” Where insurance policy clearly incorporates definitions by reference, there is no ambiguity, or room for construction. *Mun Quon Kok v. Pacific Ins. Co.*, 51 Haw. 470 (1969). Court cannot create ambiguities where none exist. *Smith v. New England Mutual*, 72 Haw. 531 (1992).

Father of insured is not “insured “ under uninsured motorist provision of policy and father and insured are not residents of same household where they live in separate residences and insured takes two meals day to father. *Id.*

Insurer’s policy requirement of physical impact under “hit and run” uninsured provisions was declared invalid. *DeMello v. First Ins. Co. of Hawaii, Ltd.*, 55 Haw. 519 (1974).

Duty to defend exceeds duty to pay and rises whenever there is potential indemnification liability of insurer to insured. *Hawaii Ins. Guar. v. Chief Clerk*, 68 Haw. 336 (1986). Disclaim of duty to defend - insurer must show none of dependant facts might be resolved differently in underlying suit. *Dairy Road v. Island Ins.*, 92 Haw. 398 (2000). Duty to defend is contractual in nature, courts look at language of particular policy to determine scope of duty. *Commerce & Industry v. Bank of Hawaii*, 73 Haw. 322 (1992).

Ambiguity in exception clause is construed in favor of insured. Burden is upon insurer to provide unequivocal language to bring itself clearly within exclusion. Exclusion will be strictly construed against insurer. *Retherford v. Kama*, 52 Haw. 91 (1970). Although insurance policies are to be construed liberally in favor of person insured, ambiguity is found only when contract taken as whole is reasonably subject to differing interpretations. *Sturla v. Firemans Fund Ins. Co.*, 67 Haw. 203 (1984). *Liberty Mut. Ins. Co. v. United Nat’l Ins.*, 69 Haw. 21 (1987). Must look at language of policy to see if it is consistent with insurers and insureds intent and expectations to ascertain if coverage exists. *Methuen-Abrem v. HIG*, 72 Haw. 385 (1992).

Ambiguities in insurance policy are resolved against insurer and in favor of insured. *Masaki v. Columbia Cas.*, 48 Haw. 136 (1964). Public policy of courts is to enforce insured’s objectively reasonable expectations” with respect to policy. *Hurtig v. Terminix*, 5 Haw. App. 247 (1986).

Where material changes made to existing policy, resulting policy is not a renewal or replacement policy. *Allstate v. Kaneshiro*, 93 Haw. 210 (2000).

If insurance contract terms conflict with statutory language statute takes precedent. *Solv v. AIG*, 76 Haw. 304 (1994).

Under Haw. Rev. Stat. §431-445, Insurance policy provision cannot be paramount over statutory provision where in conflict. *National Union Fire Ins. Co. v. Olson*, 69 Haw. 559 (1988).

Readability of Insurance Contracts. Haw. Rev. Stat. §431:10-101 to 108. which prescribes readability requirements for all policies issued or delivered in state. Generally these requirements are: 1) minimum score of 40 on Flesch (or equivalent) reading ease test, 2) not less than 10 point type, 3) no undue prominence to any portion of policy and 4) table of contents or index. This statute was effective as of June 1, 1983.

Where automobile insurer's renewal packet was unintelligible as to uninsured and underinsured coverage, stacking was implied as a matter of law. *Britt v. USAA*, 86 Haw. 511 (1998).

Insurer is obligated to pay insured's reasonable defense fees and costs if it loses claim of no duty to defend. *Sentinel v. First Ins.*, 76 Haw. 277 (1994).

Literal construction of statute affecting insurance will not be applied when result is absurd. *HIG v. Financial Security Ins.*, 72 Haw. 80 (1991). Hawaii adopts reasoning in *Cumis*, 162 Cal. App. 3d 359 (1984). *Finley v. Home Ins.*, 90 Haw. 25 (1998)

Significant policy exclusion which is not contained in booklet-certificate given to insured should not be enforced. *Lecker v. General American Life Ins. Co.*, 55 Haw. 624 (1974).

## DAMAGES

Counsel may use formulas for determining damages on dollar amount per specified time unit, in arguing to jury on damages for physical pain and suffering, and mental anguish. *Barretto v. Akau*, 51 Haw. 383 (1969).

Counsel may suggest or give estimates in his argument on fragmented parts of total lump sum and on total lump sum damages which have relation to different areas of injuries shown. *Kometani v. Heath*, 50 Haw. 89 (1967).

Where defamatory language is libelous per se, general damages are such as naturally, proximately and necessarily result from publication complained of and include those which will compensate person defamed for injury to his reputation, business and feelings which de-

famatory publication caused. *Van Poole v. Nippu JiJi Co.*, 34 Haw. 354 (1937).

Exemplary or Punitive Damages. May be recovered when wrongful act is done willfully, wantonly or maliciously or characterized by some aggravating circumstances. *Howell v. Associated Hotels, Ltd.*, 40 Haw. 492 (1954). In tort action willful, malicious and oppressive character of wrongful conduct invokes doctrine of punitive damages. *Glover, Ltd., v. Fong*, 40 Haw. 503 (1954).

Where contract is breached in wanton or reckless manner, resulting in tortious injury, aggrieved person is entitled to recover in tort in addition to recovering in contract for out of pocket losses. *Dold v. Outrigger and Hawaii Hotels*, 54 Haw. 18 (1972).

Fire Fighter Rule Adopted. Professional fire fighter barred from recovery for injuries sustained putting out fire though private party's negligence caused fire. *Thomas v. Pang*, 72 Haw. 191 (1991).

Prejudgment Interest. Comprises sanction separate from punitive damage award and not applicable to punitive damage portion of judgment. *Calleon v. Miyagi*, 76 Haw. No. 16261 (1994).

Punitive damages recognized as recoverable for breach of contract (including insurance contract) but only on sufficient evidence that defendant acted "maliciously, oppressively, wantonly or fraudulently." *Goo v. Continental Cas. Co.*, 52 Haw. 235 (1970). Punitive damages available for bad faith tort, but must have clear and convincing evidence of malicious, oppressive, wanton or fraudulent acts. *Best Place v. Penn America Ins.*, 82 Haw. 120 (1996). Punitive damages award or denial within sound discretion of trier of fact. Reversed only with clear abuse of discretion. *Ditto v. McCurdy*, 86 Haw. 84 (1997).

Standard of proof for punitive damages requisite conduct must be proved by "clear and convincing" evidence not merely by "preponderance" of evidence. *Masaki v. G.M. Corp.*, 71 Haw. 1 (1989).

Probable future excess earnings of decedent are recoverable as damages in action under Hawaii Survival Statute, §663-7,8 (effective 1973).

Damages discussed. *Bernard v. Loo Ngawk*, 6 Haw. 214 (1887); *Lum v. Ah Soong*, 16 Haw. 163 (1904); *Reinhardt v. Maui County*, 23 Haw. 524 (1916); *Carter v. Notley*, 32 Haw. 183 (1931); *Choy v. Otaguro*, 32 Haw. 543 (1932); Impairment of earning capacity, *Condron v. Harl*, 46 Haw. 66 (1962). Mitigation of damages for personal injuries by submitting to treatment. If injury is of an objective nature and will be permanent or will involve future pain and suffering, expert testimony is not

essential. Where injury is subjective and lay person cannot with reasonable certainty know whether or not there will be future pain and suffering, competent expert opinion testimony is required. *Franco v. Fujimoto*, 47 Haw. 408 (1964). Standard for prejudgment interest as discretionary damages awarded by court. *Wiegand v. Colbert*, 68 Haw. 472 (1986). Recovery in negligence by parties to a contract barred where damages for purely economic loss. *City Express v. Express Partners*, 87 Haw. 466 (1998).

Recovery allowed for nervous shock and psychic injuries without physical impact, where it is witnessed accident. *Leong v. Takasaki*, 55 Haw. 398 (1974).

Apportionment Damages. Where pre-existing diseased condition is aggravated by trauma, even though portion of present and future disability is directly attributable to pre-existing condition, there shall be no apportionment, defendant whose act of negligence was cause of trauma is responsible for entire damage. *Kawamoto v. Yasutake*, 49 Haw. 42 (1966).

Where jury is unable to determine by preponderance of evidence how much of plaintiff's damages can be attributed to defendant's negligence, it should make rough apportionment, but if unable to make same, jury should divide damages equally among all accidents whether or not plaintiff is barred from recovering from one or more of alleged tortfeasors. *Loui v. Oakley*, 50 Haw. 260 (1968).

Where person has suffered injuries in prior accident and has fully recovered, and later he is injured by negligence of another person and injuries suffered in later accident bring on pain, suffering and disability, proximate cause of pain, suffering and disability is negligence of that other person. In such circumstances that other person is liable for entire damages. However, where person has not fully recovered from injuries he suffered in prior accident and was experiencing pain and suffering and was disabled from such injuries at date of second accident, total damages are not proximate result of latter accident. In such circumstances apportionment of damages is required. *Bachran v. Morishige*, 52 Haw. 61 (1970).

In State Tort Liability Act, Haw. Rev. Stat. §662-2, prohibition against payment of interest "prior to judgement" refers to compensation for delay in payment of money damages which is measured from accrual of claim for relief until final judgement and does not include interest charges, as incidental expense of loan which is incurred by claimant in good faith to mitigate damages which may be recovered as item of compensatory damages. *Rodrigues v. State*, 52 Haw. 156 (1970).

## DEATH

Action can be maintained in Hawaii by father for death of minor child. *Ferreira v. Honolulu Rapid Transit & Land Co.*, 16 Haw. 615 (1905).

Certificate. Obtained from State Board of Health, Honolulu.

Uniform Simultaneous Death Act has been adopted, Haw. Rev. Stat. §534 et. esq.

Presumption. Persons once shown to have been living at maturity are presumed to continue to live thereafter for reasonable time. *Drummond v. Makaena*, 30 Haw. 116 (1927).

Action for Death. Any dependent of one whose death was caused by wrongful act of another may maintain action for damages against person causing death, or against his employer in certain cases. Dependant defined. *Lealaimata Fao v. Woodward-Clyde*, 75 Haw. 544 (1994). Actions must be brought within two years, Haw. Rev. Stat. §663-3. No limitation of recovery, *Enos v. Motor Coach Co.*, 34 Haw. 5 (1936); *Ginoza v. Takai Elec. Co.*, 40 Haw. 691 (1955). Discussed, *Young v. Honolulu Construction & Draying Co.*, 34 Haw. 426 (1938); *Gabriel v. Margah*, 37 Haw. 571 (1947). Action barred where dependent has remedy for compensation under Workers' Compensation Act. Haw. Rev. Stat., Ch. 386; *Kamanu v. E. E. Black, Ltd.*, 41 Haw. 442 (1956). Action barred in Hawaiian district courts under Death on High Seas Act. *Higa v. Transocean Airlines*, 230 F.2d 780 (1955). Child has no cause of action for injuries to parent not resulting in death. *Halberg v. Young*, 41 Haw. 634 (1957). Damages recoverable by dependant not limited to pecuniary injuries. *Lealaimata Fao v. Woodward-Clyde*, 75 Haw. 544 (1994).

Decedents legal representative has only such cause of action as decedent had at moment of his death. Hawaii Survival Statute Haw. Rev. Stat. §663-7; *Greene v. Texeira*, 54 Haw. 231 (1973).

Abatement and Survival Actions. Cause of action, except actions for defamation and malicious prosecution, does not abate by reason of death of injured party. Such action shall survive in favor of legal representative of such person and any damage recovered shall form part of estate of deceased, Haw. Rev. Stat. §663-3. All actions arising out of physical injury to person or out of death shall survive death of wrong-doer or person liable, Haw. Rev. Stat. §663-4. *Alameda v. Spenser*, 34 Haw. 667 (1938); *City & County of Honolulu v. Sherretz*, 42 Haw. 177 (1957). Claims involving construction to improve real property. Act 164 (1994) amends Haw. Rev. Stat. §657-8 (a) to include bodily injury and wrongful death claims statute of limitation to 2 years for such con-



struction claims. Liability for surety ship manufacturing and supply of materials deleted.

### DISABILITY

See also "ACCIDENT AND HEALTH INSURANCE."

Permanent Partial. Compensation schedule set out in Haw. Rev. Stat. §386-32.

Trend to depart from exclusive application from scheduled allowances, where injury to smaller member causes injury or loss to larger member. *Respico v. Waialua Sugar*, 67 Haw. 16 (1984).

The "odd-lot" doctrine, where permanent partial disability combines with other factors (*i.e.* age, training, education, etc.) to cause that person to be unable to find employment, although applicable in workers' compensation cases, is not applicable with respect to permanent incapacitation for gainful employment under Haw. Rev. Stat. Chapter 88 governing retirement and pension for government employees. *Lewis v. Board of Trustees*, 66 Haw. 304 (1983).

Burden of Proof. Claimant must present prima facie evidence that odd-lot doctrine applies, once this is met burden shifts to employer to prove availability of steady work. *Yarnell v. City Roofing*, 72 Haw. 272 (1991).

### EXPIRATION

Hawaii law requires all terms of insurance contract to be in writing. Since insured is charged with knowledge of stated expiration date, neither insurer nor its agent has legal duty to give notice of expiration or to renew policy automatically. *Kapahua v. Hawaii Ins. & Guar. Co.*, 50 Haw. 644 (1968); *Brown v. First Ins. Co. of Hawaii*, 424 F.2d 680 (9th Cir. 1970).

### FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables.

### FIRE INSURANCE

Assigned Risk. The Hawaii Property Insurance Association has been created to provide basic property insurance to owners and occupants of property in areas of high risk to natural disasters. All insurers doing business in the state (except those writing only no-fault insurance for U-drive vehicles) participate in the Association on assigned risk basis. This applies primarily to property in areas of exposure to volcanic activity. Other areas can be designated by the commissioner. Haw. Rev. Stat. §431:21-101 *et seq.*

### HOSPITAL

Evidence-Records. Records produced pursuant to subpoena must be accompanied by affidavit. Haw. Rev. Stat. §662-53. Retention of medical records. Haw. Rev. Stat. §662-58.

Lien. Hospitals, physicians, surgeons and dentists rendering services to injured persons have lien for their charges on judgments recovered for such injuries, Haw. Rev. Stat. §507-4.

In civil tort action court shall determine validity of lien prior to judgment or stipulation to dismiss. Haw. Rev. Stat. §663-10.

### HUSBAND AND WIFE

See Law Digest Tables.

Spousal immunity does not prevent third-party from obtaining contribution from negligent spouse. *Campo v. Taboada*, 68 Haw. 505 (1986). Haw. Rev. Stat. §572-28 allows suits between spouses.

Spouse has duty to refrain from conduct that would create unreasonable risk of harm to third parties. *Touchette v. Ganal*, 82 Haw. 293 (1996). Marriage alone does not create a special relationship within meaning of Restatement (Second) Torts. See *Touchette v. Ganal*.

### INFANTS

See "AUTOMOBILES, Age" "NEGLIGENCE, Age."

### LIABILITY INSURANCE

See also "CONSTRUCTION OF POLICY."

Additional insureds. Cohabiting adult is not "relative" under auto policy. *Young v. State Farm*, 67 Haw. 544 (1985).

Unfair. It is unfair method of competition and unfair and deceptive act for insurers not to respond to communications concerning claims with "reasonable promptness" defined as no more than 15 working days. Haw. Rev. Stat. §431:13-103(a)(11).

Duty to defend is separate and distinct from duty to provide coverage and pay judgment. *First Ins. Co. of Hawaii v. Continental Casualty Co.*, 466 F.2d 807 (9th Cir. 1972), *First Ins. Co. v. State*, 66 Haw. 413 (1983). Insurer's duty to defend arises whenever there is potential for indemnification liability of insurer to insured under terms of policy. *Standard Oil Co. of Calif. v. Hawn Ins. & Guar. Co., Ltd.*, 65 Haw. 521 (1982). Where pleadings fail to allege any basis for recovery within coverage clause of policy, insurer has no duty to defend. *HIG v. Blair Ltd.*, 6 Haw. App. 447 (1986). Where in-

sured voluntarily retains its own counsel and later notifies one of its carriers, but fails to notify second carrier of claim, second carrier has no duty to contribute to defense costs incurred prior to notice. *Great American v. Aetna*, 76 Haw. 346 (1994).

Duty to defend must be determined, at least initially, as of time of insured's tender of its defense in underlying lawsuits. Insurer must look beyond effect of pleadings and must consider any facts brought to its attention or any facts which it could reasonably discover in determining whether it has a duty to defend. Possibility of coverage must be determined by good-faith analysis of all information known to insured or all information reasonably ascertainable by inquiry and investigation. *Dairy Rd. Partners v. Island Ins. Co.*, 92 Haw. 398 (2000). Insurer may initially assume unconditional defense while investigation underway, but must promptly serve insured with reservation of rights if there is possible absence of coverage. *AIG v. Smith*, 78 Haw. 174 (1995).

No duty to defend for auto accident under homeowners policy covering only accidents in and around home. *Fortune v. Wong*, 68 Haw. 1 (1985).

Attorney Fees. Without specific statutory authorization or agreement to pay, general rule is that they are not recoverable as damages. See *Olokele Sugar Co. v. McCabe, Hamilton & Renny*, 53 Haw. 69 (1971). Attorneys fees are recoverable, however, in actions in nature of assumpsit (including suit on insurance policy) based on statutory schedule Haw. Rev. Stat. §607-14. However, attorneys fees under assumpsit statute cannot be based upon punitive damages. *Hong v. Kong*, 5 Haw. App. 174 (1984).

Avoidance of Policy. When applied to fire policies, strict rules applicable to contracts of marine insurance are relaxed, and hence, in absence of unusual circumstances, insured is not bound to disclose facts not specifically inquired about. *Merricourt v. Norwalk Fire Ins. Co.*, 13 Haw. 268 (1901). No recovery could be had on policy in case of failure to disclose material fact regarding applicant's health, notwithstanding that applicant may have been ignorant of it, where applicant warranted that he concealed no material fact which insurer ought to know. *Lewis v. New York Life Ins. Co.*, 4 Haw. 305 (1880). Insurer has burden of proving its contention that statements and representations in application for policy were false. *Lewis v. New York Life Ins. Co.*, 4 Haw. 305 (1880). Avoidance and forfeiture because of fraudulent intent in submitting claim for loss on fire policy discussed. *Schmidt & Sons v. Royal Ins. Co.*, 10 Haw. 683 (1897).

Contribution Between Joint Tortfeasors. Hawaii has adopted Uniform Contribution Among Tortfeasors Act, Haw. Rev. Stat. §663-11 to -17. Legislative history of act allows joinder of those individuals whom Plaintiff himself could hold liable. *Tamashiro v. DeGama*, 51 Haw. 74 (1969). Abolition of joint and several liability for government entities, thereafter only liable for percentage of damages per Haw. Rev. Stat. §663-10.5 notwithstanding sections 663-11 to 663-13, 663-16, 663-17, and section 663-31.

Party who settles prior to suit on tort claim and is later found not negligent in action for contribution is not joint tortfeasor within meaning of Haw. Rev. Stat. §663-11 and is therefore not entitled to contribution. *Alamida v. Wilson*, 53 Haw. 398 (1972).

Impleaders. Haw. Rev. Stat. §386-5 precludes defendant in tort action from obtaining contribution from employer on theory that employer was joint tortfeasor. *Kamali v. Hawaiian Electric Co.*, 54 Haw. 153 (1972). Although a third party is entitled to sue an employer covered by Hawaii's Worker's Compensation laws for indemnity based on a breach of some independent duty, contacts of indemnity are to be strictly construed, particularly where indemnitee claims that it should be held safe from its own negligence. *Keawe v. Hawaiian Elec. Co.*, 65 Haw. 232 (1982).

Collision. Insurer is not liable under collision clause in policy indemnifying insured against direct loss or damage caused by accidental collision with any object where damages to automobile covered were caused by it becoming unmanageable, leaving road over which it was traveling and falling to bottom of adjoining gulch. *Royal Hawaiian Sales Co. v. Home Ins. Co. of Hawaii*, 27 Haw. 333 (1923). When auto leaves highway suddenly from solely accidental cause and strikes tree off highway, it is collision within meaning of collision clause which provides for indemnity against loss by reason of damage to or destruction of auto caused solely by accidental collision with another object either moving or standing. *Sutherland v. Hawaiian Ins. & Guar.*, 29 Haw. 101 (1926).

Common Carriers. Must file with treasurer of County in which it is to operate written certificate of any insurer duly authorized to do business in State of Hawaii, certifying that there is in effect \$5,000/10,000/5,000 liability insurance policy, Haw. Rev. Stat. §288-4.

Cooperation Clause. In circumstances wherein it is contended by insurer that violation of terms of cooperation clause has occurred, such lack of co-operation must be of substantial and material nature. *Yuen v. London Guar. & Acc. Co., Ltd.*, 40 Haw. 213 (1953). Term



“co-operation” as used in standard automobile indemnity policy means fair and frank disclosure of relevant and material information reasonably to be anticipated by insurer in order to enable it to determine whether valid defense to asserted claim exists. *Id.*

Coverage. Ambiguities in insurance policy are resolved against insurer and in favor of insured. *Masaki v. Columbia Cas.*, 48 Haw. 136 (1964).

Direct Action. In absence of contractual or statutory provision authorizing direct action against or joinder of liability insurer, injured person, for lack of privity between himself and insurer, has no right of action against insurer and cannot join insured and liability insurer as parties defendant. *Olokele Sugar Co. v. McCabe, Hamilton & Renny*, 53 Haw. 69 (1971).

Hawaii recognizes bad faith cause of action in first party insurance context. *Best Place v. Penn America*, 82 Haw. 120 (1996).

Limitations. Fire policy limiting time for suing thereon to six months, period shorter than that prescribed by statute of limitations is valid, and is not against public policy. *Tong Chong Chan v. New Zealand Ins. Co.*, 13 Haw. 483 (1901).

Notice. Conditions in fire insurance policies requiring notice of loss to be given and proof of amount of loss to be furnished insurers within certain prescribed period, must be strictly complied with to enable assured to recover. *Boardman v. Fireman's Fund Ins. Co.*, 14 Haw. 21 (1902). Insured waives claim against insurer's duty to defend until date insurer received notice of lawsuit. *Great American Ins. v. Aetna*, 76 Haw. 346 (1994).

Omnibus Clause. Express or implied scope of permission, not scope of employment, is determinative of coverage of employee under omnibus clause. Purpose of clause is to protect not only named insured, but also permittee and others injured by permittee. *Columbia Cas. Co. v. Hoolulie, et al.*, 50 Haw. 212 (1968); *AIG v. Vicente*, 78 Haw. 249 (1995). Considering Columbia Casualty case scope of coverage should be interpreted to include one who while not physically operating vehicle at time of accident, is alleged to be “insured” within terms of policy. *Medeiros v. First Ins. Co. of Hawaii, Ltd.*, 50 Haw. 401 (1968).

Haw. Rev. Stat. §287-24 limits omnibus clause coverage of Haw. Rev. Stat. §287-25 to policies which have been certified. Policy exclusion “while rented” not applicable where insured loaned automobile to friend for mutual convenience and \$10.00 per week. *Christensen v. State Farm Ins.*, 52 Haw. 80 (1970).

Permissive Use. Upon showing that vehicle was placed in hands of operator by consent, presumption

arises that particular use to which vehicle was being put was within scope of consent. *Columbia Casualty, supra.*

Exclusions. Intentional Acts. Sexual assault in back of pickup truck was not accidental injury neither expected or intended from standpoint of insured. *Hawaiian Ins. v. Brooks*, 67 Haw. 285 (1984).

Unfair claims settlement practices Haw. Rev. Stat. §431:3-103(11) makes following unfair: 1) Failure to offer payment within 30 days of affirmation of liability where amount is undisputed. 2) Failure to provide reasonable explanation for delay where claim remains unresolved 30 calendar days from reporting. 3) Advising insured that payment is final where other benefits may exist.

In order to constitute an unfair claims settlement practice, act must be without just cause and performed with such frequency as to indicate a general business practice. *Stratis v. Pacific Ins.*, 7 Haw. App. 1 (1987). See also Haw. Rev. Stat. §431:31-102. *Gossinger v. AOA Regency of Ala Wai*, 73 Haw. 412 (1992).

## LIFE INSURANCE

See “INSURABLE INTEREST.”

Death of insured, employee of Honolulu Fire Department, which occurred while he was on duty as such at Hickam Field during and as result of Japanese attack on Oahu on December 7, 1941 was death by external, violent and accidental means within meaning of double-indemnity provision of his life insurance policy and was not death resulting from war or any act incident thereto within meaning of policy provision excluding such death from double-indemnity coverage. *Pang v. Sun Life Assur. Co. of Canada*, 37 Haw. 208 (1945).

Where life insurance contract provided for effectiveness upon completion of medical examination by insured, contract became effective when Insured successfully completed medical examination. *Law v. Hawaiian Life Ins. Co.*, 51 Haw. 288 (1969).

Esoteric proviso in conditional receipt written by insurance company purporting to delay effectiveness of coverage beyond “effective date” does not nullify contract of life insurance. *Id.*

## LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

Actions must be brought within following periods after respective causes of action accrue:

Twenty years. To recover possession of real property, Haw. Rev. Stat. §657-31.



Ten Years. On judgment of court of record, Haw. Rev. Stat. §657-5.

Six Years. 1) For recovery of debt founded on contract, obligation or liability, except judgment of court of record; 2) on judgments of courts not of record in State or courts of record of foreign jurisdictions; 3) actions for taking or detaining goods or chattels, including replevin 4) personal actions of any nature whatever not specifically covered by laws of state. Haw. Rev. Stat. §657-1. Recovery under implied covenant. *Schimmelfennig v. Grove Farm Co., Ltd.*, 41 Haw. 124 (1955).

Four Years. Action on cause of action which arose outside of State, except suit on judgment of court of record Haw. Rev. Stat. §657-6.

Two years. Actions for damages to persons or property, for slandering character or title of any person. §657-4,7. Two years for federal or state causes or action which do not specify limitation period Haw. Rev. Stat. §657-11.

Four Years. Under Uniform Commercial Code applies to express breach of warranty claim for personal injury. *Torres v. Northwest*, 86 Haw. 383 (1997).

Foreign Causes of Action. Action barred by laws of place where cause of action arose cannot be maintained, except in favor of resident of Hawaii who has held claim since it accrued. Haw. Rev. Stat. §657-9.

Two years for actions against state. Haw. Rev. Stat. §662-4 and Haw. Rev. Stat. §661-5. No limitation of actions apply to bar institution or maintenance of any action by or on behalf of State and its agencies, unless State is specifically designated in such statute as subject to limitation period contained therein. Haw. Rev. Stat. §657-1.5.

Disabilities of Plaintiff. In case person entitled to bring action is minor, insane, or imprisoned period of limitation does not begin to run until this disability is removed. Haw. Rev. Stat. §657-13; *see also* Haw. Rev. Stat. §657-34. But sovereign immunity prevents tolling of statute in actions against state. *Whittington v. State of Hawaii*, 72 Haw. 77 (1991).

Death of Plaintiff. If person dies before limitation expires and action survives, his legal representatives may bring action within four months after expiration of usual limitation. Haw. Rev. Stat. §560:3-109.

Medical Malpractice. Statute begins to run when plaintiff knew or should have known of defendant's negligence. (Haw. Rev. Stat. §657-7.3.) Negligent diagnosis and radiation unnecessary. *See, Yoshizaki v. Hilo Hospital*, 50 Haw. 150 (1967).

Absence of Defendant. If person against whom cause of action accrues is at such time absent from State or absents himself after its accrual, statute begins to run upon his return. Haw. Rev. Stat. §657-18.

Recoveries Authorized by Federal Statute. If Federal statute does not specify period and suit must be filed in State court, limitation is two years from date cause of action arises. Haw. Rev. Stat. §657-11.

Setting limitations of actions for damages based on professional services or licensed construction to improve real property found to be arbitrary and capricious thereby violates equal protection guaranty. *Fujioka v. Kam*, 55 Haw. 7 (1973).

## MALPRACTICE

### Medical - Hospital.

Statutory Requirements and Limitation. Medical malpractice action to be brought within two years of date of discovery or should have discovered. Haw. Rev. Stat. §657-7.3 - sets an outer limit of six years from date of alleged negligent act or omission after which suits can not be instituted. *Yamaguchi v. Queen's Med. Ctr.*, 65 Haw. 84 (1982).

Prior to initiation of lawsuit claimant's claim must be reviewed by Medical Claim Conciliation Panel. Haw. Rev. Stat. §§671-1 to 671-19.

Expert Testimony. Plaintiff is not required to prove standard of disclosure required for informed consent with medical expert evidence, but is required to prove by expert medical evidence materiality of risk of harm to which plaintiff was subjected. *Carr v. Strode*, 79 Haw. 475 (1995).

Informed Consent. Standards for informed consent established by board of medical examiners. Haw. Rev. Stat. §671-3. Psychiatrist who failed to advise patient of side effects of medication did not establish therapeutic privilege exception. *Barcai v. Betwee*, 98 Haw. 470 (2002).

Doctor has duty to reasonably inform patient as to proposed treatment or surgical procedure in order to obtain informed consent from patient. *Keomaka v. Zakaib*, 8 Haw. App. 518 (1991). Counselors do not have duty to prevent suicide of noncustodial clients, regardless if suicide foreseeable. *Lee v. Corregdore*, 83 Haw. 154 (1996). Breach of duty where doctor should have known he or she made erroneous choice. *Hirahara v. Tanaka*, 87 Haw. 460 (1998).

Accountant. Owes duty of reasonable care and competence. *Kohala Agr. v. Deloitte*, 86 Haw. 301 (1997).



Standard of Care. Learned Intermediary rule recognized in this jurisdiction. *Craft v. Peebles*, 78 Haw. 287 (1995).

Common knowledge rule recognized in this jurisdiction. *Medina v. Figuered*, 3 Haw. App. 186 (1982). See also Expert Testimony.

Legal. See "ATTORNEYS."

Other professionals. See "NEGLIGENCE."

## NEGLIGENCE

See Law Digest Tables.

See "AUTOMOBILES."

There are no statutes covering liability of owner for negligence of others or restricting liability for injury to guests.

Age. Negligence and contributory negligence of infants discussed, *Bonilla v. Mutual Telephone Co.*, 40 Haw. 417 (1953). Degree of care required of infant is different from that required of adult. Child is only required to use care appropriate to his age, experience and mental capacity, *Grace v. Kumalaa*, 47 Haw. 281 (1963).

Blasting. Actor assumes risk of any damage resulting from vibrations or concussions, irrespective of negligence. *Beckstrom v. Hawaiian Dredging Co., Ltd.*, 42 Haw. 353 (1958).

Comparative Negligence. Doctrine of comparative negligence enacted into statute, Haw. Rev. Stat. Ch. 663, effective July 14, 1969. It applies only to claims accruing after effective date. *Silva v. Oishi*, 52 Haw. 129 (1970). Applied to products liability action. *Armstrong v. Cione*, 69 Haw. 176 (1987).

Contributory Negligence. One who, while walking along public sidewalk fails to see and avoid obvious obstruction is contributorily negligent as matter of law. *Young v. Price*, 47 Haw. 309 (1963). Failure to read printed consent form before signing is not contributory negligence. *Keomaka v. Zakaib*, 8 Haw. App. 518 (1991).

Contributions among tortfeasors. Hawaii has adopted Uniform Contribution Among Tortfeasors Act. All claims against and among joint tortfeasors are governed by this act Haw. Rev. Stat., Ch. 663.

Consortium. Derivative of spouses claim. If injured spouse barred from making claim, no claim for loss of consortium. *Doi v. HIG*, 6 Haw. App. 456 (1986). *Bertelmann v. Taas Assoc.*, 69 Haw. 95 (1987).

Duty. Husband and Wife. Marriage alone does not create a special relationship within meaning of Restatement (2nd) Torts; no duty to control spouse. *Touchette v. Ganal*, 82 Haw. 293 (1996). However, spouse has duty to refrain from conduct that would create an unreasonable risk of harm. *Id.*

Emotional Distress. Negligent infliction of emotional distress (NIED) requires physical injury to person. 76 Haw. No. 16261 (1994). NIED claims by family members are derivative and will be barred if defendant is found not liable to injured person. *Torres v. Northwest*, 86 Haw. 383 (1997). If negligent behavior subjects person to potential life threat from exposure to HIV, exception to rule applies that recovery for NIED only where injury to person. *Roes v. FHP*, 91 Haw. 470 (1999).

Gross Negligence. Is aggravated form of negligence which differs from ordinary negligence only in degree and not in kind. *State v. Bunn*, 50 Haw. 351 (1968).

Haw. Rev. Stat. §572-28 amended tort suits between spouses now allowed.

Informed Consent. Sounds in negligence, as raising question of neglect of duty required to be observed by physician in his relationship with his patient and imposes duty to disclose to his patient all relevant information concerning proposed treatment, including collateral hazards attendant thereto, so that patient's consent to treatment would be intelligent one based on complete information. *Nishi v. Hartwell*, 52 Haw. 188 (1970).

Independent Contractors. Contractor generally not liable for torts of an independent contractor. *Taira v. Oahu Sugar Co. Ltd.*, 1 Haw. App. 208 (1980). Owner of premises liable for harm caused by independent contractor when owner knew or should have known of risk likely to be created by work. *Makaneole v. Gampon*, 70 Haw. 501 (1989).

Intentional Act. Firing gun to scare someone is an intentional act, not an occurrence within policy. *HIG v. Blanco*, 72 Haw. 9 (1990).

Jury. Permissible voir dire relating to insurance discussed. *Carr v. Kinney*, 41 Haw. 166 (1955). Plaintiff may examine jurors on voir dire as to whether they have any financial interest in insurance company. *Id.* Last clear chance doctrine is inapplicable with adoption of comparative negligence Haw. Rev. Stat. §663-31 applicable to all claims accruing after July 14, 1969. *Silva v. Oishi*, 52 Haw. 129 (1970).

Medical Tort. Haw. Rev. Stat. Ch. 671 requires that a plaintiff submit a claim to a medical claim conciliation panel before filing suit in court. *Tobasa v. Owens*, 69 Haw. 305 (1987).



Liquor Liability/Dram Shop Act. Haw. Rev. Stat. §281-78 (b) (1) (B) prohibits liquor licensee to furnish liquor to anyone under the influence. Case law allows cause of action based upon statute. *Ono v. Applegate*, 62 Haw. 131 (1980). Non liquor licensee social host has no non-statutory duty to protect third persons from injury. *Johnston v. KFC*, 71 Haw. 229 (1990). See also *Faulk v. Suzuke*, 9 Haw. App. 490 (1993). Intoxicated and disorderly bar patron who engages and is injured in a fight with another patron not protected under Haw. Rev. Stat. §281-78 (b) (1) and (2). *Myers v. South Seas*, 10 Haw. App. 331 (1992).

Joint and Several Liability. Act 300 requires court approval of settlement where one party settles, leaving remaining claims against others.

Occupiers Liability. Occupiers liability not based on common law distinctions as to status of injured party. Occupier of land has duty to use reasonable care for safety of all persons reasonably anticipated to be upon premises. *Pickard v. City & County of Honolulu*, 51 Haw. 134 (1969). Possessor of land who knows/should have known of unreasonable risk of harm to users of land must warn of or eliminate risk. *Corbett v. AOAO Wailua Bay View Apts.*, 70 Haw. 415 (1989).

Parent and Child. Parent may sue his child. *Tama-shiro v. De Gama*, 51 Haw. 74 (1969); when minor child is liable in tort to his parent, he is subject to contribution to his joint tortfeasor under Uniform Contribution Among Tortfeasors Act, *Id.* Father and mother of unmarried minor children shall jointly and severally be liable in damages for tortious acts committed by their children. *Day v. Day*, 8 Haw. 715 (1891); *Victoria v. Palama*, 15 Haw. 127 (1903); *Rathburn v. Kaio*, 23 Haw. 541 (1916). Minor child has no cause of action for damages arising out of disability of his mother caused by negligence of third party with attendant loss of acts of kindness, care, attention and other incidents of parent and child relationship, *Halberg v. Young*, 41 Haw. 634 (1957).

Child may sue his parent. *Peterson v. C & C. Honolulu*, 53 Haw. 440 (1970). Parents vicariously responsible for torts of their unmarried minor children. *Fortune v. Wong (9838, et al.)*, 68 Haw. 1 (1985).

Premises Liability. Hawaii Recreational Use Statute (HRUS), Haw. Rev. Stat. ch. 520 (1993) enters immunity on landowners from negligence when person is not charged or is houseguest, not to non-recreational purpose. Subjective intent is the key issue. *Crichfield v. Grand Wailea*, 93 Haw. 477 (2000). In slip and fall cases, notice is not required if defendant's mode of operation lends itself to foreseeable dangerous condition. *Gump v. Wal-Mart*, 93 Haw. 417 (2000).

Proximate Cause. Discussed, *Hughes v. McGregor*, 23 Haw. 156 (1916); *Ferrage v. Honolulu Rapid Transit & Land Co.*, 24 Haw. 87 (1917). Defendant is liable although concurrent negligence of another is also substantial factor in causing injuries, if defendant's negligence was proximate cause. *Struzik v. City & County of Honolulu*, 50 Haw. 241 (1968). Concurring negligence of third party is not defense in negligence action unless such concurring negligence is sole proximate cause of plaintiff's injuries. *Radford v. Morris*, 52 Haw. 180 (1970).

Res Ipsa Loquitur. Followed in Hawaii. *Mortan v. Yamada*, 26 Haw. 17 (1921); *Ciacchi v. Woolley*, 33 Haw. 247 (1934); *Lyu v. Shinn*, 40 Haw. 198 (1953); *Ho v. Ing*, 43 Haw. 289 (1959); *Agee v. Kahului*, 67 Haw. 365 (1984). Applied where passenger for hire seeks recovery from common carrier for equipment failure. *Cozine v. Hawaiian Catamaran Ltd.*, 49 Haw. 77. (1966).

Respondeat Superior. Common law tort requires plaintiff to prove this element to hold employer liable. There is no presumption as in Workers' Compensation Law. *Kang v. Charles Pankow*, 5 Haw. App. 1 (1984).

Strict Liability in tort adopted in regard to defective products which are dangerous to user or consumer or to his property. *Stewart v. Budget Rent-A-Car*, 52 Haw. 71 (1970). It is not always necessary to identify and produce specific defective instrumentality causing injury in order to prove products liability case. *Beerman v. Toro*, 1 Haw. App. 111 (1980). Cause of injury must be a product, a publication is not a product. *Birmingham v. Fodor's Travel*, 73 Haw. 359 (1992).

Sudden emergency doctrine does not invoke different standard of care. Standard is that of reasonable person under circumstances. *Dicenzo v. Izawa*, 68 Haw. 528 (1986).

Requirement of physical impact and resulting physical injury should not stand as artificial bar to recovery for negligent infliction of serious mental distress. *Leong v. Takasaki*, 55 Haw. 398 (1974).

Sovereign Immunity of Municipality Waived. Where municipality owns and controls public parks there is imposed upon it legal duty to use ordinary care to keep such parks in reasonably safe condition for public rightfully using same. *Wax v. City & County of Honolulu*, 34 Haw. 256 (1937). Municipality is required to exercise reasonable, *i.e.*, ordinary, care to discover and repair defects in its streets and sidewalks. *Kellett v. City & County of Honolulu*, 35 Haw. 447 (1940). City and County is liable to private individual for damages by fire caused by negligence of its officers, agents or employees in permitting electric current to escape from its street-lighting system and thereby flow into and upon private

property, *Mark v. City & County of Honolulu*, 40 Haw. 338 (1953); municipal corporation operating hospital is liable for negligence of its servants and employees in care and treatment of patients of such hospitals. *Kamau v. County of Hawaii*, 41 Haw. 527 (1957). Proper county authorities have duty under Haw. Rev. Stat. §265-1 to exercise ordinary care to keep safe not only part of road or highway customarily used by travelling public, but also shoulders of such roads and highways. *Terranella v. City & County*, 52 Haw. 490 (1970).

When municipality's negligence contributes substantially and proximately to produce injury, fact that third party's negligence concurred in producing injury will not relieve municipality from liability for damages resulting to injured party. *Koehnen Ltd. v. County of Hawaii*, 47 Haw. 329 (1963).

Sovereign Immunity of State Waived. Sovereign immunity waived by State. State waives its immunity for liability for torts of its employees and shall be liable in same manner and to same extent as private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. However, in any case wherein death was caused, State shall be liable only for actual or compensatory damages measured by pecuniary injuries resulting from such death to persons respectively for whose benefit action was brought. Basic principles of policy considerations of State Tort Liability Act and its application by courts discussed. *Cootey v. Sun Investment*, 68 Haw. 480 (1986). Haw. Rev. Stat. §662-2. Circuit Courts of State have original jurisdiction of all tort actions on claims against State for money damages, accruing on or after July 1, 1957. Statute of limitation is two years. Action shall be tried by court without jury. Haw. Rev. Stat. §662-3 to 5.

Discretionary function exception in State Tort Liability Act does not apply to operational level decisions which involve routine everyday matters not requiring evaluation of broad policy factors. *Rodrigues v. State*, 52 Haw. 156 (1970). Where state violates own published policy with respect to roadway upgrades, act is not protected by discretionary function. *Taylor-Rice v. State*, 91 Haw. 60 (1999).

### NO-FAULT

Abolition of Tort Liability. As with most no-fault statutes, Hawaii Act abolishes tort liability for motor vehicle accidents, except in cases falling within certain specific exceptions, as follows: 1) Death; 2) Significant permanent loss of use or function of body; 3) Permanent and serious disfigurement; 4) Exceeding medical/rehabilitative limit (see below); 5) Exhausting total no-fault benefits (often referred to in statute as "personal injury protection benefits" PIP) of \$20,000 (allowable

between medical-rehabilitative and wage loss at insured's option. See Haw. Rev. Stat. §431:10C-103, effective June 3, 1992); 6) Injuries which are intentionally caused, caused by criminal act, or by conduct resulting in punitive or exemplary damages; 7) Property damage (Haw. Rev. Stat. §431:10C-306) Does not supersede claims under Wrongful Death Statute, Haw. Rev. Stat. §663-3, *Crawford v. Crawford*, 69 Haw. 410 (1987).

Medical/Rehabilitative Expense Threshold. Haw. Rev. Stat. §431-10c-306(b)(2) was amended by 1997 legislature. Effective 1/1/98: medical rehabilitative limit is deleted. Allows lawsuits if PIP equals or exceeds \$5,000. Requires reduction of award of \$5,000 or actual PIP incurred, whichever is greater. 50% reimbursement to PIP insurer of any recovery by suit or settlement.

Haw. Rev. Stat. §431:10c-306 (2) creates rebuttable presumption that expenses paid under no-fault were reasonable and necessary in meeting medical rehabilitative limit. *Ho v. Leftwich*, 88 Haw. 251 (1998).

Medical/Rehabilitation expenses limited by workers' compensation fee and frequency guidelines. Haw. Rev. Stat. §431-10C-308.5. Effective January 31, 1993, excess charges pre-approved or submitted to peer review for coverage. Insurer must pay provider directly.

Burden of proving plaintiff sustained permanent injury threshold requirement is on plaintiff. *Parker v. Nakaoka*, 68 Haw. 557 (1986).

No-fault insurance wage loss benefits payable only to extent that, when combined with workers compensation payments (for injuries in a job related auto accident), total does not exceed worker's net take home pay. Act 149, 1991 Legislature. Benefits are secondary only to workers compensation benefits pursuant to Haw. Rev. Stat. §294-5 (b). *Chun v. Liberty Mut.*, 5 Haw. App. 290 (1984).

Exclusionary clause within no fault policy valid if consistent with Haw. Rev. Stat. §431:10C-305 (d) and legislative intent. *State Farm v. Fermahin*, 73 Haw. 552 (1992).

Damages under Haw. Rev. Stat. §431:10C-117 includes loss of consortium damages. *Doi v. Hawaiian Ins. & Guar.*, 6 Haw. App. 456 (1986).

Motorcycle insurers are not required to offer underinsured coverages. *National Union Fire Ins. v. Ragil*, 72 Haw. 205 (1991), Haw. Rev. Stat. §431:10C-501.

No-fault wage loss benefits may not be withdrawn even though insured suffers heart attack which was independent of accident and alone would disable him. *Lorenzo v. State Farm*, 69 Haw. 104 (1987).



Consent to sue clause of uninsured motorist coverage upheld where insured has to get permission of company to sue and company policy provided for mandatory binding arbitration to reserve dispute. Company waived rights by not asserting promptly. *Moorcraft v. First Ins.*, 68 Haw. 501 (1986).

**Requirement for Insurance.** No person may register or operate motor vehicle in State of Hawaii unless it is insured under no-fault policy, or owner of vehicle provides adequate bond, security, or qualifies as self-insurer. (Haw. Rev. Stat. §287-5). Fine for violators: \$500 for first offense, minimum of \$1,500 for each subsequent offense. In addition drivers licenses of owner and operator of an uninsured vehicle may be suspended for 3 months for first violation and shall be suspended for 1 year, provided that these penalties shall not apply to an operator who reasonably believes that subject vehicle is insured. Haw. Rev. Stat. §431:10C-117.

**Required Limits.** Although owners may purchase additional insurance, required minimum limits are \$20,000 per person and \$10,000 for property damage. Haw. Rev. Stat. §431:10C-301.

**Required Optional Additional Insurance.** In addition to no-fault benefits, each insurer must make available to insured, certain optional additional benefits and clauses. §431:10C-302.

**Priority of Payment.** No-fault insurance on vehicle occupied by injured person is primary. If injured person is pedestrian, insurance on vehicle which caused injury is primary. If vehicle causing injury is not insured, any other no-fault insurance shall apply. §431:10C-305.

**Stacking.** Insurer must offer this option to policyholders. Haw. Rev. Stat. §431:10c-30 (b) (d). No stacking of no-fault benefits where insured has several vehicles under one policy. *Rana v. Bishop*, 713 P.2d 1363 (1985). Stacking of lost wage benefits under no-fault and workers compensation permitted to make up short fall in actual salary. *Maldonado v. Transport Indem.*, 67 Haw. 347 (1985).

**Right of Reimbursement.** §431:10C-307 No-fault insurer has a right of reimbursement for 50 per cent of no-fault benefits paid and may recover same from injured party to extent that judgment or settlement duplicates no-fault benefits paid.

Uninsured motorist liability of insurer is limited to stated policy limits unless limit are in contravention of statute or public policy. *Moorcraft v. First Ins. Co.*, 68 Haw. 501 (1986).

No-fault survivors benefits subject to either \$15,000 or aggregate limit where insured has contracted for it under additional coverage. Haw. Rev. Stat.

§431:10C-103 (10) (B). *Estate of Cabral v. AIG*, 88 Haw. 345 (App. 1998).

No-fault insurance applies to insured occupant injured by gunshot from another vehicle. *Ganiron v. Hawaiian Ins. Guar. Assn.*, 69 Haw. 432 (1987). Must have nexus between injury and operational use of vehicle, injury foreseeable if a result of insureds' intentional acts or omissions. *AIG v. Caraang*, 74 Haw. 620 (1993).

In proceeding to recover from settlement made by insured from tortfeasor pursuant to Haw. Rev. Stat. §431:10C-307, insurance company has affirmative burden of showing that recovery duplicates no-fault benefits paid, but insured must act in good faith in settling and releasing claim so that insurer's rights are not cut off without legitimate reason. *First Ins. Co. of Hawaii v. Jackson*, 67 Haw. 165 (1984).

**Insured's Right of Reimbursement of Deductible Paid.** Insured has right of reimbursement of deductible paid in accident with uninsured motorist. Haw. Rev. Stat. §431-10C:305.5.

**Prohibition of collusion between health care providers and attorneys,** cannot have pattern of client referral. Haw. Rev. Stat. §431:10C-308.7. Violations reported to regulated Industries Complaint Office. Haw. Rev. Stat. §431:10C-308.7(e).

**Standing to Contest Denial of Benefits.** Provider of treatment has standing to contest denial. *GEICO v. Hyman*, 90 Haw. 1 (1999). Insurer has standing to contest substantive merits of claim after 30-day bar date. *TIG Ins. Co. v. Kauhane*, 101 Haw. 311 (App. 2003).

## PENALTY AND ATTORNEY FEES

Generally awarded only when provided by statute, stipulation or agreement. *Pancakes of Hawaii v. Pomare*, 85 Haw. 286 (1997).

Circuit Court has wide authority to impose sanctions for spoliation evidence and fashions remedies to cure prejudice. *Stender v. Vincent*, 92 Haw. 355 (2000).

## PRIVILEGED COMMUNICATIONS

**Attorney/Client.** Codified in Haw. Rev. Stat. §626-1:Rule 503. General rule - communication must be made for purpose of facilitating rendering of professional legal services to client; 1) between client or client's representative and lawyer or lawyer's representative, or 2) between lawyer and lawyer's representative, or 3) client or client's representative or lawyer or a representative of lawyer representing another party in a pending action and concerning a matter of common interest, or 4) representatives or client or between client and representative of client, or 5) among lawyers and their representatives



representing same client. May be claimed by client, client's guardian or conservator, personal representative of a deceased client, or successor trustee, or similar representative of a corporation, association, or other organization, whether in existence or not. Lawyer must have express release from client to waive privilege. Exceptions - furtherance of crime or fraud, prevention of crime or fraud, claimants through same deceased client, breach of duty by lawyer or client, document attested by lawyer, joint clients and lawyer's professional responsibility.

Insurer/Insured. No statutory definition. Statement given by insured to insurer during initial investigation by insurer before litigation commenced, not requested by or taken under guidance of counsel not within attorney-client privilege and is discoverable. *DiCenzo v. Izawa*, 68 Haw. 528 (1986).

Clergy/Penitent. Codified in Haw. Rev. Stat. §626-1:Rule 506. General rule - person may refuse to disclose and to prevent another from disclosing communication by person to member of clergy during course of latter's profession. Made by communicant, communicant's guardian, conservator, or personal representative, member clergy may claim privilege on behalf of communicant.

Doctor/Patient. Codified in Haw. Rev. Stat. §626-1:Rule 504. General rule - Privilege extends to communications made in diagnosis or treatment. Made by patient, guardian or conservator or personal representative of deceased patient. Physician presumed to have privilege but only on behalf of patient. Exceptions - proceedings for hospitalization, examination by court, condition an element of claim or defense and proceedings against physician.

Psychologist/Client. Codified in Haw. Rev. Stat. §626-1:Rule 504.1. General rule - Client may refuse to disclose and to prevent any other person from disclosing communications made for purpose of counseling or psychotherapy. Made by client, guardian or conservator, or personal representative of deceased client. Psychologist presumed to have privilege but only on behalf of client. Exceptions - same as physician-patient privilege (see above).

Spousal. See also "HUSBAND AND WIFE." Codified in Haw. Rev. Stat. §626-1:Rule 505. Criminal proceeding - available only to spouse called to testify. Marital communication - all proceedings, either spouse has privilege. Exceptions: 1) where one spouse charged with crime against person or property of (a) the other, (b) child of either, (c) third person residing in household of either, or (d) third person committed in course of committing a crime against any of the above; or 2) matters prior to marriage.

Waiver. Haw. Rev. Stat. §626-1:Rule 511. Person or predecessor waives privilege if person voluntarily discloses or consents to disclose any significant part of privileged matter. Rule does not apply if disclosure itself is a privileged communication.

## PRODUCTS LIABILITY

Strict Liability. Adopted in Hawaii. *Stewart v. Budget*, 52 Haw. 71 (1970). Party may proceed under negligence or strict liability. *Ontai v. Straub Clinic*, 66 Haw. 237 (1983). Strict liability does not require showing that defendant was negligent. *In re Asbestos Cases*, 829 F.2d 907 (9th Cir. 1987).

Warranty. Breach of Seller's warranty express or implied extends to person who reasonably is expected to use, consume or be affected by goods and who is injured by breach. Haw. Rev. Stat. §490:2-318.

Implied. Warranty of merchantability implied into every sale of goods. Haw. Rev. Stat. §490:2-314. *Ontai, supra*. Merchantability means that goods are fit for ordinary purpose for which such goods are used. *Ontai, supra*. Warranty of fitness for a particular purpose - essential elements are seller has reason to know of particular purpose for which goods are required and buyer relies on seller's expertise in supplying suitable product. *Ontai, supra*.

Duty to Warn. Consist of two duties 1) to give adequate instructions for safe use and 2) warn of inherent dangers in improper use. *Ontai, supra*. Manufacturer must give appropriate warning of any known dangers which user would not ordinarily discover. *Ontai, supra*. Manufacturer's duty of ordinary care is to warn consumers of dangers involved in use of product, as well as duty to use ordinary care in design and manufacture of products. *In re Hawaii Federal Asbestos Cases*, 854 F. Supp. 702 (D. Hawaii, 1994). Dangers that are by matter of law open and obvious - no duty to warn. *Fosue v. Isuzu*, 87 Haw. 413 (1998).

Damages. Compensatory. Except where governed by statute, compensatory damages should be given in an amount to put injured party in a position that he would have been without the wrong. *Nobriga v. Raybestos-Manhattan*, 67 Haw. 157 (1984).

Indemnification. Right to tort indemnification invoked where indemnitee has been held absolutely liable for wrongful acts of another. *In re All Asbestos Cases*, 603 F. Supp. 599 (D. Hawaii, 1984).

Punitive. May be awarded against a corporation only if party can prove that corporation expressly or impliedly authorized or ratified alleged tortious act. *Beerman v. Toro*, 1 Haw. App. 111 (1980). Punitive damages



recoverable in negligence actions if party can prove that act was wanton, oppressive or with malice implying a spirit of mischief or criminal indifference to civil obligation. *Kang v. Harrington*, 59 Haw. 652 (1978).

Defenses. State of art. In strict liability actions, state of art evidence not admissible to establish whether seller knew or reasonably should have known of dangerous product. *Johnson v. Raybestos-Manhattan*, 69 Haw. 287 (1987). Question open as to admissibility of such evidence in failure to warn causes of action. *Johnson, supra*.

Assumption of risk. Express assumption risk as complete bar survives merger of products liability and comparative negligence. *Larsen v. Pacesetter*, 74 Haw. 1 (1992). Implied assumption of risk is defense in tort and warranty strict product liability only when assumption of risk is a form of contributory negligence. *Larsen, supra*. Primary implied assumption of risk in implied warranty and strict product liability is abolished. *Larsen, supra*.

Comparative/Contributory negligence. Pure comparative negligence applies to strict products liability. *Hao v. Owens-Illinois*, 69 Haw. 231 (1987). Pure comparative negligence applies to implied warranty action in personal injury. *Larsen, supra*.

Privity of contract. Not necessary in order to recover for injuries as a result of breach of implied warranty. Haw. Rev. Stat. §490:2-318. *Ontai, supra*.

## RELEASE

Release from all damages for personal injuries sustained in accident may be cancelled by court of equity upon ground of mutual mistake of material fact. *Silva v. Robert Hind, Ltd.*, 32 Haw. 936 (1934). General words of release are to be construed most strongly against releasor. *Aluna v. Selig*, 6 Haw. 661 (1887). Release of one joint tortfeasor does not release others unless release so provides, Haw. Rev. Stat. §663-14. *Savanillo v. Silva*, 78 Haw. 1 (1995). Requirements of effective joint tortfeasor's release contained in Haw. Rev. Stat. §663-15.

## REPRESENTATIONS AND WARRANTIES

Warranties. misrepresentations in applications. All statements or descriptions in any application for insurance policy or in negotiations therefor, by or in behalf of insured, shall be deemed to be representations and not warranties. Misrepresentation, unless it was made with actual intent to deceive or unless it materially affected either acceptance of risk or hazard assumed shall not prevent recovery on policy, Haw. Rev. Stat. §431:10-209.

## SERVICE OF PROCESS

Upon Non-Resident Motorists. See "AUTOMOBILES."

Acts Creating Jurisdiction. Any person submits himself to jurisdiction of State Courts as to any cause of action arising from doing any of following within state: (a) Transacts business, (b) commits tortuous act, (c) ownership, use, possession of real property, (d) contracts to insure any person, property or risk located within state at time of insuring. Haw. Rev. Stat. §634-35. Minimum contact only is required for "transacting business" in state (*i.e.* contracting through mail with Hawaii plaintiff). *Cowan v. First. Ins. Co.*, 61 Haw. 644 (1979).

Process may be served on corporations by delivering summons to any officer or director thereof or on any superintendent or manager in charge of corporation's business. Haw. Rev. Stat. §414-64.

## SUBROGATION

Discussed, *Kapena v. Kaleleonalani*, 6 Haw. 579 (1885); Fire insurance being contract of indemnity, insurer upon paying insurance would in absence of express assignment, be subrogated in corresponding amount, to insured's right, if any, against wrongdoer responsible for loss. *Liverpool & London & Globe Ins. Co. v. MacFarlane*, 14 Haw. 481 (1902).

One who settles under threat of civil suit is not classified as volunteer and is entitled to recover from actual tortfeasor under general rule of subrogation. *Alamida v. Wilson*, 53 Haw. 398 (1972). Indemnity agreements given to surety are generally enforceable according to their terms. *Hawaiian Ins. & Guar. Co. v. Higashi*, 67 Haw. 12 (1984). TDI carrier not entitled to full reimbursement under Haw. Rev. Stat. §392-46 when employee sets "general damages only" settlement. *Pacific Ins. Co. v. Esperanza*, 73 Haw. 403 (1992). Right of indemnity is expressly preserved under Uniform Contribution Among Tortfeasors Act. Haw. Rev. Stat. §663-16. *Saranillio v. Silva*, 78 Haw. 1 (1995).

## TORT REFORM

Passed by special session of 1986 legislature.

Cause of action for serious emotional distress arising from property damage (not physical injury) abolished. Haw. Rev. Stat. §663-8.9.

Joint and several liability abolished with four exceptions as follows: (a) Suits seeking economic damages involving injury or death; (b) Damage suits related to aircraft accidents, asbestos, products liability and environmental pollution; (c) Some automobile accident suits seeking non-economic damages; (d) Suits seeking non-economic damages against parties found to be at least

25% responsible. Haw. Rev. Stat. §663-10.9 (repeal effective October 1, 1995, repealed by 1995 Haw. Secs. Laws, Act 130).

Collateral source rule modified to allow reimbursement to non-parties. Haw. Rev. Stat. §663-10.

Awards against state or its municipalities greater than \$1,000,000.00 may be paid over 5 years.

Attorney's fees of both plaintiff and defendant in tort actions subject to review and approval by Court as to reasonableness. Haw. Rev. Stat. §663-1.7

Court may award attorney's fees for frivolous claims or defenses. Haw. Rev. Stat. §663-1.7

Court annexed arbitration program extended state-wide, applies to all cases with estimated jury award of \$150,000.00 or less. Haw. Rev. Stat. §601-20.

### WAIVER AND ESTOPPEL

Failure to notify insured that there was not strict compliance with fire policy where loss occurs, is waiver of strict compliance requirements. *Merricourt v. Norwalk Fire Ins. Co.*, 13 Haw. 218 (1901). Where assurer is aware of alleged breach of policy condition by insured and insured refuses to consent that insurer's defense of suit will not constitute waiver by insurer of any defenses under policy, insurer is thereby required to elect. It may rely upon such defense and refuse to proceed, but is considered to have waived such defense if it undertakes defense of insured. *Yuen v. London Guar. & Acc. Co.*, 40 Haw. 213 (1953). Where party induced to forego legal rights by reliance upon representations and promises of insurance company, said company is estopped from requiring compliance with provisions of policy. *Silverhorn v. Pacific Mut. Life Ins. Co. of California*, 24 Haw. 366 (1918).

### WORKERS' COMPENSATION

See Law Digest Tables.

Workers' Compensation Laws made major reform during 1995 Legislative Session, effectively Haw. Rev. Stat. §386 and §431. Act 234 Reform set limits to medical fee payments, established new utilization limits, set criminal penalties for fraud, and initiated a "managed care" concept. Workers' Compensation Laws allow for recovery by employee or dependents when injury arises out of scope of and in course of employment. *Pacheco v. Orchids of Hawaii*, 54 Haw. 66 (1972).

Employers' Premises. Employer's contribution to landlord for maintenance of common area does not per se make area premises of employer. *Ono v. Hawn. Tel.*, 68 Haw. 479 (1986).

Indemnity by Employer. Third party may be entitled to indemnification from employer if employer has made clear and unequivocal assumption of liability. *Espaniola v. Cawdry Mars Joint Venture*, 68 Haw. 171 (1985).

Offset. Third party tortfeasor is not entitled to have judgment reduced against it for benefits received by plaintiff under workers' compensation. *Hanagami v. China Airlines Ltd.*, 67 Haw. 357 (1984).

Stress Claim. Stress caused by employer's disciplinary actions is compensable under Haw. Rev. Stat. §386-3. *Mitchell v. State*, Slip Opinion No. 19868 (1997). Stress claim out of non-disciplinary action arising out of and in course of employment compensable. *Davenport v. City and County*, 100 Haw 297 (App. 2001).

Attorneys Fees. Non-appealing employer may recover attorneys fees from losing employer pursuant to Haw. Rev. Stat. §386-93 (b); *Yamada v. Royal Hawaiian Macadamia Nut Co.*, 5 Haw. App. 521 (1986).

Asbestos. Statute of limitations does not run when condition causes no loss of function and has not been treated. *Miyake v. Welders, Inc.*, 71 Haw. 269 (1990).

Hawaii adopts direct and natural result standard in determining whether subsequent injury was result of original injury. *Diaz v. Oatau Sugar*, 77 Haw. 152 (1994).

Dual capacity doctrine is inapplicable in Hawaii. *Estate of Coates v. Pacific Eng'r*, 71 Haw. 358 (1990). Exclusivity does not bar child from making claim for in utero injuries suffered at work. *Omori v. Juwa*, 91 Haw. 146 (1999).

Death Benefit. Payable to decedent's parents if decedent has no dependents, and if no parents, then to the Special Compensation Fund. Haw. Rev. Stat. §386-41 (d) Act 98, 1991 Legislature.

Pre-existing Injury. To apportion liability, employer must prove 1) claimant suffered pre-existing permanent partial disability; 2) pre-existing injury capable of supporting award of 32 weeks of compensation and 3) pre-existing injury and subsequent injury combine to a greater present disability. *Bumanglag v. Oahu Sugar*, 78 Haw. 275 (1995). Haw. Rev. Stat. §386-85 creates presumption that subsequent injury is causally related to primary injury. *Korsak v. Hawaii*, 94 Haw. 297 (2000).

Employee Leasing. Company contracting for temporary worker through an agency entitled to immunity where fee includes workers' compensation premiums. *Frank v. Hawaii Planning Mill*, 88 Haw. 140 (1998).

