

# DIGEST OF INSURANCE LAW

## IDAHO

Courtesy of

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Boise, Idaho

### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

District Courts. I.C. §§ 1-701-705, 711. District Courts are courts of general jurisdiction and have original jurisdiction in all cases both at law and in equity. They have jurisdiction to review on appeal proceedings before magistrates and administrative agencies, including Boards of County Commissioners. Idaho is divided into seven judicial districts. District Courts in various counties have assumed all powers and functions of prior probate, justice and city courts. District judges have power to handle all traffic cases, adoptions, probate matters, juvenile proceedings and other cases previously within scope of authority of inferior courts or courts of limited jurisdiction.

Magistrate Division. I.C. §§ 1-2201-2224. Each District Court has Magistrate's Division, staffed by at least one magistrate in each county, appointed by "district magistrate's commission" subject to approval by district judges in each district. These magistrates are lawyers and non-lawyers alike who attend institute organized by Supreme Court. Magistrates may be assigned in civil cases in which claim, counterclaim or value of property involved does not exceed \$5,000, criminal cases involving misdemeanors, preliminary hearings in criminal cases, certain juvenile proceedings, certain proceedings associated with involuntary commitments, proceedings under Idaho Traffic Infractions Act, and probate of wills and administration of estates of decedents, minors and incompetents. I.C. § 1-2208. Additional jurisdiction, when approved by the administrative district judge, may be granted attorney magistrates, including custody and divorce proceedings. I.C. § 1-2210; I.R.C.P. 82(c)(1), (2).

Written objections to propriety of assignment of case to magistrate on grounds that it must be tried by district judge must be made before commencement of trial or hearing. Appeal may be taken to District Court from judgment or orders of Magistrate's Division. Generally, these appeals are limited to questions of fact or law on record made before magistrate, but district judge

may try case de novo or send it back for retrial. Verbatim record of proceedings in Magistrate's Division must be recorded by electronic or stenographic means. Idaho Rules of Criminal and Civil Procedure govern proceedings in Magistrate Division, as in District Courts. Statutory procedure relating to special proceedings govern same cases in District Court and Magistrate's Division. I.C. § 1-2212; I.R.C.P. 82(c)(3).

#### Appellate Courts

Supreme Court of Idaho. I.C. §§ 1-201-215. This is the court of last resort. It has jurisdiction to review on appeal any decision of District Courts, Industrial Commission of State, orders made by Department of Insurance and certain decisions by Public Utilities Commission. It has original jurisdiction to issue writs of mandamus, certiorari, prohibition, habeas corpus and all writs necessary to exercise its appellate jurisdiction. It is composed of five justices.

Idaho Court of Appeals. I.C. §§ 1-2401-2411. This court is subordinate to Idaho Supreme Court and subject to its administration and supervision. It has jurisdiction to hear and decide all cases assigned to it by Supreme Court; provided, Supreme Court shall not assign cases invoking Supreme Court's original jurisdiction, appeals from imposition of sentences of capital punishment in criminal cases, or appeals from Industrial Commission or Public Utilities Commission. In assigning cases, Supreme Court shall consider workload of each court, error review and correction function of Court of Appeals, and desirability of retaining for decision by Supreme Court those cases in which there is substantial public interest or in which there are significant issues involving clarification or development of law. It is composed of four judges.

### LAW

#### Abbreviations

Ct. App. – Idaho Court of Appeals.  
F. – Federal Reporter.  
F. Supp. – Federal Supplement.  
F.2d – Federal Reporter, Second Series.



F.3d – Federal Reporter, Third Series.  
 I.B.C.R. – Idaho Bar Commission Rules.  
 I.C. – Idaho Code.  
 I.R.C.P. – Idaho Rules of Civil Procedure.  
 I.R.E. – Idaho Rules of Evidence.  
 I.R.P.C. – Idaho Rules of Professional Conduct.  
 L.R.A. – Lawyer’s Reports Annotated.  
 P. – Pacific Reporter.  
 P.2d – Pacific Reporter, Second Series.  
 P.3d – Pacific Reporter, Third Series.  
 S.L. – Session Laws.

## ACCIDENT AND HEALTH INSURANCE

See “ACCIDENTAL MEANS” and “DISABILITY.”

**Restricted Liability.** Provisions in life or accident policy, or fraternal benefit certificate, releasing insurer from or restricting its liability, because of connection of insured with military or naval forces, or because of his entry into military service, are valid. *Rosenau v. Idaho Mut. Benefit Ass’n*, 65 Idaho 408, 412, 145 P.2d 227, 229 (1944). Where accident policy excepted all bodily injuries, fatal or otherwise, which were caused wholly or partly, or results of which were contributed to by bodily or mental infirmity, hernia or any medical or surgical treatments therefor, clause was not ambiguous and beneficiary of insured, whose accidental death resulted from administration of opiates after hernia operation, could not recover. *Wilson v. Bus. Men’s Assurance Co.*, 181 F.2d 88, 90 (9th Cir. 1950). Where insurer seeks to avoid liability on grounds that accident or injury is within exceptions of policy, burden rests upon it to prove facts bringing case within exception. *O’Neil v. N.Y. Life Ins. Co.*, 65 Idaho 722, 732, 152 P.2d 707, 711 (1944).

Insurer had right to limit its coverage of risk and liability, and in so doing may impose conditions and restrictions upon its contractual obligations which are not inconsistent with public policy. *Hill v. Am. Family Mut. Ins. Co.*, 150 Idaho 619, 623 249 P.3d 812, 816 (2011). Where policy contains two limit of liability clauses which limit same type of coverage in different manners, ambiguity exists which must be construed against insurer. *Farmers Ins. Co. v. Talbot*, 133 Idaho 428, 432, 987 P.2d 1043, 1047 (1999), distinguished by *Armstrong v. Farmers Ins. Co. of Idaho*, 143 Idaho 135, 138, 139 P.3d 737, 740 (2006) (distinguishing on grounds that conflicting limitations had a superseding clause).

**Proof of Loss.** “Proof of loss” requirements for insured’s death cannot be greater than requirements for establishing prima facie cause of death. *In re Death of Cole*, 113 Idaho 98, 101, 741 P.2d 734, 737 (Ct. App. 1987). Brochure sent to insurer by insured describing

insured’s injuries and resulting medical expenses constituted “proof of loss” for purposes of statute awarding attorney fees against insurers who failed to pay amount justly due within specified time after loss where brochure provided enough information for insurer to investigate and determine its liabilities. *Brinkman v. Aid Ins. Co.*, 115 Idaho 346, 350, 766 P.2d 1227, 1231 (1988), overruled on other grounds by *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho 589, 593, 130 P.3d 1127, 1131 (2006) (finding that “a submitted proof of loss is sufficient when the insured provides the insurer with enough information to allow the insurer a reasonable opportunity to investigate and determine its liability.”)

**Burden upon plaintiff in action under policy providing insurance coverage for injuries or death resulting from accident,** is to show by preponderance of evidence that its theory of causation is more probable than not, and proof of medical certainty is not required. *Erikson v. Nationwide Mut. Ins. Co.*, 97 Idaho 288, 293, 543 P.2d 841, 846 (1975). Insured may not recover where his own evidence only shows that it is equally as probable that damage was caused by one factor as by another. *Id.* at 295, 543 P.2d at 848.

**Proof of Claim.** Proof that source of infection causing insured’s death was external has been held sufficient to warrant recovery on accident policy designating no specific type of external source. *Jensma v. Sun Life Assurance Co.*, 64 F.2d 457, 459 (9th Cir. 1933). Failure to show just how infection occurred, causing insured’s death after hay fever injection, did not preclude recovery on accident policy. *Id.* at 463.

**Double Indemnity.** Evidence justified judgment against insurer for double indemnity under life policy providing for payment of double indemnity in event of death by accident on ground that insured who disappeared after having last been seen alive while fishing from rowboat on large lake at night was dead and that death resulted from drowning, notwithstanding that seven years had not elapsed since disappearance. *Occidental Life Ins. Co. v. Thomas*, 107 F.2d 876, 879 (9th Cir. 1939).

## ACCIDENTAL MEANS

**No Special Statutory Provisions.** Any degree of force satisfies provision of accident policy the means through which insured suffered bodily injury must be “violent.” Effect which cannot be reasonably anticipated from use of means producing it by one not intending to produce such effect is produced by “accidental means” within accident policy. *Jensma*, 64 F.2d at 461. There is no distinction between “accidental death” and “death by accidental means,” as used in accident policy provision

insuring against death by accidental means, and such policy must be construed to protect against loss by bodily injury, neither expected nor designed, suffered while insured was doing what he intended to do. *O'Neil v. N.Y. Life Ins. Co.*, 65 Idaho 722, 729, 152 P.2d 707, 709 (1944).

Insured shot after quarrel, death held accidental event. *Mabee v. Cont'l Cas. Co.*, 37 Idaho 667, 219 P. 598 (1923). Death from infection following hay fever injection held caused by accidental means. *Jensma*, 64 F.2d at 464. Loss of eyesight caused by flying object from wreckage of wagon held injury by accidental means. *Watkins v. Fed. Life Ins. Co.*, 54 Idaho 174, 29 P.2d 1007 (1934). Hernia sustained while loading barrel on truck, when entire weight of barrel suddenly shifted, being neither expected nor designed, held injury by "accidental means." *Rauert v. Loyal Prot. Ins. Co.*, 61 Idaho 677, 106 P.2d 1015 (1940).

Disease. Where city electrician, after contracting influenza, worked for ten days, left sick bed to attend meeting, and died three days later of rheumatic heart disease complicated by influenza, held there was no compensable "accident." *Walters v. City of Weiser Inc.*, 66 Idaho 615, 164 P.2d 593 (1945), *distinguished by Teater v. Dairymen's Co-op. Creamery of Boise Valley*, 68 Idaho 152, 190 P.2d 687 (1948). Truck driver claimant contracted severe cold repairing truck resulting in bronchial pneumonia. Held not occupational disease or caused by "accident." *Moulton v. Gregor Mines*, 70 Idaho 329, 217 P.2d 860 (1950). Tuberculosis not compensable disease. *Davis v. Sunshine Mining Co.*, 73 Idaho 94, 245 P.2d 822 (1952). Fact that latent disease or bodily infirmity exists prior to accident, upon which accident acts to precipitate loss, will not defeat insurance coverage under accident policy so long as disease or infirmity appears as passive ally and accidental cause predominates. *Erikson v. Nationwide Mut. Ins. Co.*, 97 Idaho 288, 292, 543 P.2d 841, 845 (1975).

## ADJUSTERS

Definition. Adjuster is person who, on behalf of insurer, as independent contractor or employee of such independent contractor, or for fee or commission, investigates and negotiates settlement of claims arising under insurance contract. I.C. § 41-1102(1).

Must Have License. No person shall in this state be, act as, or advertise or hold himself out to be adjuster unless then licensed as adjuster under this chapter. I.C. § 41-1103; *see* I.C. § 41-1104 (providing qualifications for adjuster's license). Licensed attorneys, employees of authorized insurer adjusting losses for such insurer, and authorized agents of insurer who at insurer's request adjusts losses arising under policies issued by insurer, are

not "adjusters" for purposes of this chapter. I.C. § 41-1102(2).

Emergency Adjusters. No adjuster's license is required as to any adjuster who is sent into Idaho on behalf of authorized insurer for purpose of investigating or adjusting particular loss under insurance policy, or for purpose of temporarily assisting or substituting for licensed adjuster who is incapacitated due to illness, injury, unforeseeable or uncontrollable incident, or for adjustment of series of losses resulting from catastrophe common to all such losses. I.C. § 41-1107.

## AGE

*See* "AUTOMOBILES"; "LIABILITY INSURANCE, Infants"; "NEGLIGENCE."

Minor defined. I.C. § 32-101. Persons under 18 years of age. Any person who is married is competent to enter a contract, mortgage, deed of trust, bill of sale and conveyance, and to sue or be sued.

## AGENTS AND BROKERS (PRODUCERS)

Definition. Producer means a person required to be licensed under Idaho law to sell, solicit or negotiate insurance. I.C. § 41-1003(8). A producer shall not act as agent of insurer unless insurance producer becomes an appointed agent of that insurer. I.C. § 41-1018(1). To appoint a producer as its agent, appointing insurer shall file, in a format approved by the Director of Insurance, notice of appointment within fifteen (15) days from the date agency contract is executed or first insurance application is submitted. I.C. § 41-1018(2).

Authority. Insurer is bound by contracts of agent, special or general, which are within scope of real or apparent authority, notwithstanding violation of private limitations upon authority of which insured had no knowledge. *Hahn v. Nat'l Cas. Co.*, 64 Idaho 684, 689, 136 P.2d 739, 741 (1943). Where applicant correctly states facts to agent, and agent inserts wrong version thereof, insurer is estopped from relying on misrepresentations in absence of bad faith on part of insured, and company is bound by policy issued. *Phx. Ins. Co. v. Warttemberg*, 79 F. 245, 249 (9th Cir. 1897); *Allen v. Phx. Assur. Co.*, 14 Idaho 728, 95 P. 829 (1908).

For Whom. Agent who prepares and executes policy acts as agent for insurer. *Bales v. Gen. Ins. Co.*, 53 Idaho 327, 332, 24 P.2d 57, 58 (1933), *distinguished by Martin v. Argonaut Ins. Co.*, 91 Idaho 885, 434 P.2d 103. While general rule is that agent of insurer is not agent of insured, statutory or contractual provisions may alter that relationship. *Sysco Intermountain Food Serv. v. City of Twin Falls*, 109 Idaho 88, 91, 705 P.2d 548, 551 (Ct. App. 1985). Agent whose function is to bring about

contractual relations between his principals is ordinarily an independent contractor. *Anderson v. Farm Bureau Mut. Ins. Co.*, 112 Idaho 461, 465, 732 P.2d 699, 703 (Ct. App. 1987), *abrogated on other grounds, Metcalf v. Intermountain Gas Co.*, 116 Idaho 622, 778 P.2d 744 (1989). Special relationship exists between insurer and insured which requires that parties deal with each other fairly, honestly, and in good faith. *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 99, 730 P.2d 1014, 1019 (1986).

There was no legal barrier to agent of insurer acting on behalf of insured in procuring provisional form policy and in transmitting monthly payments to insurer, thereby acting in limited manner as agent for insured, where no conflicts of interest or inconsistency of duties were present. *E.S. Harper Co. v. Gen. Ins. Co.*, 91 Idaho 767, 771, 430 P.2d 658, 662 (1967).

Liability of. Agent and company held liable for negligent failure to write policy. *Wallace v. Hartford Fire Ins. Co.*, 31 Idaho 481, 174 P. 1009 (1918). Oral agreement of agent to renew fire policy held to be within agents apparent authority and company held liable on failure to renew. *Bales v. Gen. Ins. Co.*, 53 Idaho 327, 24 P.2d 57 (1933).

Insurance agency that was requested to provide complete insurance to cover total value of insured's business inventory, which knew or should have known amount of insurance necessary to effect complete coverage, and which underinsured its insured could be held liable in tort for its negligence in failing to procure insurance, despite contention that agent's only duties to insured were contractual. *McAlvain v. Gen. Ins. Co.*, 97 Idaho 777, 780, 554 P.2d 955, 958 (1976). Where insurance agent's extension of coverage to insured was not within scope of his authority from insurer, and insurer did not waive or ratify breach of agency agreement, agent was liable to indemnify insurer for loss sustained by insured under agent's unauthorized extension of coverage. *Benner v. Farm Bureau Mut. Ins. Co.*, 96 Idaho 311, 313, 528 P.2d 193, 195 (1974). Where insurance agent, who had authority to bind several insurance companies, orally agreed to bind insurance coverage of owner's warehouse, and warehouse owner, although it knew that insurance agent was acting as agent for some principal but did not necessarily know for which principal he was acting, agent of partially disclosed contract to provide insurance was party to and liable under contract. *Keller Lorenz Co. v. Ins. Assocs. Corp.*, 98 Idaho 678, 681, 570 P.2d 1366, 1369 (1977).

License and Regulation. Agents of any insurer authorized to transact business in Idaho must apply to director of department of insurance for license and conform to requirements of I.C. §§ 41-1001 through 41-1045. Agents, brokers, solicitors, and consultants are

likewise subject to licensing procedures. I.C. § 41-1004. Application must be filed with director on form prescribed by him, with applicable fees. Director shall issue license to applicant upon finding that applicant is at least eighteen years old, has submitted fingerprints as may be required, complied with Idaho Code Title 41, and has passed examination(s). I.C. § 41-1007.

## ARBITRATION

The Uniform Arbitration Act is contained in Idaho Code §§ 7-901-922.

Arbitration agreements are valid. I.C. § 7-901.

Awards. Arbitration awards are not self-enforcing. They require imprimatur of court. *Bingham Cnty. Comm'n v. Interstate Elec. Co.*, 108 Idaho 181, 183, 697 P.2d 1195, 1197 (Ct. App. 1985). Written findings of facts and conclusions of law are not required. *Cady v. Allstate Ins. Co.*, 113 Idaho 667, 671, 747 P.2d 76, 80 (Ct. App. 1987).

District court's review of arbitrator's award limited to examination of award to determine whether any grounds for relief provided by Uniform Arbitration Act are present. *Am. Foreign Ins. Co., v. Reichert*, 140 Idaho 394, 401, 94 P.3d 699, 706 (2004). Absent agreement to the contrary, arbitrator has authority and jurisdiction to award prejudgment interest. *Id.* at 400, 94 P.3d at 705.

Enforcement. Automobile insurer's motion to compel arbitration pursuant to policy was untimely filed, where suit filed in district court proceeded until settlement negotiations broke off, insurer waived its right to compel arbitration. *Hansen v. State Farm Mut. Auto Ins. Co.*, 112 Idaho 663, 670, 735 P.2d 974, 981 (1987).

Insured may not proceed with lawsuit for proceeds under policy in face of valid clause requiring arbitration without first complying with arbitration provision. *Inland Group of Cos., Inc. v. Providence Washington Ins. Co.*, 133 Idaho 249, 255, 985 P.2d 674, 680 (1999).

Where language of arbitration clause in policy is sufficiently broad, claim for bad faith falls within mandatory arbitration clause. *Lovey v. Regence BlueShield of Idaho*, 139 Idaho 37, 47, 72 P.3d 877, 887 (2003), *distinguished by Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 246 P.3d 961 (2010).

Failure to choose/identify arbitration forum in agreement does not preclude enforcement unless it is integral part of the agreement, and failure to identify arbitrator does not preclude enforcement because I.C. § 7-903 allows court to appoint arbitrator. *Deeds v. Regence BlueShield of Idaho*, 143 Idaho 210, 213, 141 P.3d 1079, 1082 (2006).

## ATTORNEYS

**Appointment and Authority.** The Idaho State Bar Board of Commissioners has power to determine by rules subject to approval by the Idaho Supreme Court, requirements for admission, to conduct investigations and examinations, and to certify to the Supreme Court names of qualified applicants. I.C. § 3-408.

All members who have been duly admitted to practice law before the Supreme Court of Idaho and have not been disbarred or suspended therefrom, and who have paid license fee are members of the Idaho State Bar. I.C. § 3-405.

Every person practicing or holding himself out as practicing law within Idaho shall, no later than February 1 of each year, pay license fee for the calendar year. I.C. § 3-409.

**Conflict of Interest.** Lawyer shall not represent client if representation of client will be directly adverse to another client unless: 1) lawyer reasonably believes representation will not adversely affect relationship with other client; and 2) each client consents after consultation. Lawyer shall not represent client if representation of client may be materially limited by lawyers responsibility to another client or to third person, or by lawyer's own interest unless: 1) lawyer reasonably believes representation will not be adversely affected; and 2) client consents after consultation. When representation of multiple clients in single matter is undertaken, consultation shall include explanation of implications of common representation and advantages and risks involved. I.R.P.C. Rule 1.7.

**Legal Malpractice.** Statute of limitations is two years. I.C. § 5-219(4). Clear legislative intent is not to create "discovery" exception for legal malpractice action. *Martin v. Clements*, 98 Idaho 906, 909, 575 P.2d 885, 888 (1978). Plaintiff suffered "some damage" when limitation period for bringing action against debtor expired, and the two-year statute of limitations for legal malpractice began to run at that time. *Figueroa v. Merrick*, 128 Idaho 840, 843-44, 919 P.2d 1041, 1044-45 (Ct. App. 1996). Statute of limitations does not begin when negligent act is performed, but rather when effects of that negligence are felt. "Potential for harm" does not begin tolling of statute of limitations, rather actual harm. *Parsons Packaging, Inc. v. Masingill*, 140 Idaho 480, 482, 95 P.3d 631, 633 (2004).

**Liabilities.** Grounds governing attorney's removal, suspension, or reprimanding are provided for under Idaho Code § 3-301.

**Unlawful Practice of Law.** Practicing without a license is contempt and punishable. I.C. §§ 3-104, 3-420.

**Appearance by Non-Resident Attorneys.** Non-resident attorneys are permitted to appear if they are associated with attorney practicing law in Idaho and who is personally present at all stages of any proceeding. I.B.C.R. 222(e). All attorneys engaged in active practice of law must complete minimum of 30 credit hours of legal education accredited by Board of Commissioners every three years. Included in this requirement is at least 2 credit hours of instruction on Ethics. I.B.C.R. 402 (a)(1), (2).

**Fees.** In Idaho, lawyer's fees shall be reasonable under specific circumstances. I.R.P.C. Rule 1.5(a). If lawyer has not regularly represented client, basis or rate of fee shall be communicated to client preferably in writing before or within reasonable time after commencing representation. I.R.P.C. Rule 1.5(b). Contingent fee shall be in writing and shall state method by which fee is to determine, including percentage that shall accrue to lawyer in event of settlement, trial or appeal, litigation and other expenses to be deducted from recovery and whether such expenses are to be deducted before or after contingent fee is calculated. I.R.P.C. Rule 1.5(c). Contingent fees are not allowed in domestic relations matters (other than proceedings to enforce or satisfy judgment for property distribution or past due alimony or child support) when payment of which is contingent upon securing of divorce or upon amount of alimony or support or property settlement in lieu thereof. Contingent fees are also not allowed if attorney represents defendant in criminal case. I.R.P.C. Rule 1.5(d).

Division of fee between lawyers who are not in same firm may be made only if 1) division is in proportion to service performed by each lawyer or, by written agreement with client, each lawyer assumes joint responsibility for representation, 2) client is advised and does not object to lawyers involved, and 3) total fee is reasonable. I.R.P.C. Rule 1.5(e).

**Liens on Commencement of Action.** Attorney who appears for party has lien upon client's cause of action or counterclaim which attaches to verdict, report, decision or judgment in his client's favor, and proceeds thereof in whosoever hands they may come. They are not affected by any settlement between parties before or after judgment. I.C. § 3-205.

**Attorney's Fees.** Where insurer fails to pay amount "justly due" within third (30) days upon receipt of proof of loss, insured is entitled to attorney's fees. I.C. § 41-1839. Application seeking confirmation of arbitration award does not invoke this section. *Wolfe v. Farm Bureau Ins. Co.*, 128 Idaho 398, 405, 913 P.2d 1168, 1175 (1996). Attorney's fees in civil actions are provided for in I.C. §§ 12-120 and 12-121.



Where agent attempted to perpetrate fraud upon insured by cancellation of policy and insurer ratified act of agent, insured was entitled to award of attorneys fees for prosecution of action in district court and for defending judgment upon appeal. *Lewis v. Snake River Mut. Fire Ins. Co.*, 82 Idaho 329, 336, 353 P.2d 648, 652 (1960).

## AUTOMOBILES

See Law Digest Tables.

See "NEGLIGENCE" and "NO-FAULT INSURANCE."

Age. No person shall drive any motor vehicle without valid license. No person shall operate a motorcycle upon highway unless he has motorcycle endorsement on a valid driver's license. I.C. § 49-301. A person does not need license, if their driving privileges are not otherwise suspended or revoked, to drive farm tractor or implement of husbandry when incidentally on highway. I.C. § 49-302. Non-resident at least 15 years of age possessing valid driver's license from home state may operate motor vehicle in Idaho during daylight hours only. I.C. § 49-302. No person under age of 18 shall be issued license unless that person meets school attendance requirements as set forth in I.C. § 49-303A. Minimum driving age is 15 years old. I.C. § 49-303, 49-305.

Agency. To hold an owner liable for the negligence of an agent, there must be evidence that 1) there was principle/agent or master/servant relationship and 2) agent or servant was acting within scope of employment or in furtherance of owner's business. *Manion v. Waybright*, 59 Idaho 643, 658, 86 P.2d 181, 187 (1938); *Van Vranken v. Fence-Craft*, 91 Idaho 742, 745-46, 430 P.2d 488, 491-92 (1967).

Employee may be acting as agent within the scope of employment if employer has "right to control" activities of employee. *Van Vranken*, at 746, 430 P.2d 492. Employee's right to exercise discretion is not determinative of this status. *Id.* Employees shall be within the scope of employment during automobile trips when employment is at least concurrent purpose of such trip. *Buf-fat v. Schnuckle*, 79 Idaho 314, 322, 316 P.2d 887, 892 (1957).

Motorist, who did not seek punitive damages, could not proceed against employer under independent negligence theories of negligent entrustment and negligent hiring and training once employer admitted liability under doctrine of respondeat superior for employee's negligence. *Wise v. Fiberglass Sys., Inc.*, 110 Idaho 740, 743, 718 P.2d 1178, 1181 (1986). See "DAMAGES."

Compulsory Insurance Coverage. No owner's or operator's policy of motor vehicle liability insurance that is subject to requirements for such policies set out in I.C.

§ 49-1212(1) and (2), shall be delivered or issued for delivery in this state unless coverage is provided in limits for bodily injury or death in amount of \$25,000 because of bodily injury or to death of one person in any one accident and subject to limit for one person in amount of \$50,000 because of bodily injury to or death of two or more persons in any one accident and in amount of \$15,000 because of injury to or destruction of property of others in any one accident. I.C. §§ 41-2502, 49-117(18).

Alcohol/DUI. Legal limit of alcohol concentration is .08. I.C. § 18-8004. It is unlawful for any person under age 21 who has alcohol concentration of .02 to .08, to be in actual physical control of motor vehicle, and it is unlawful for any person (regardless of age) to be in actual physical control of a motor vehicle with an alcohol concentration over .08. I.C. § 18-8004. Any person in actual physical control of motor vehicle shall be deemed to have given consent to evidentiary test of alcohol, drugs or other intoxicating substances. If person refuses to take test, license may be seized and temporary permit issued. Person has right to request hearing within 7 days, or if he does not request hearing or does not prevail at hearing, license will be suspended for one year if this was first refusal and license will be suspended for two years if this was second refusal within 10 years. I.C. § 18-8002. Anyone guilty of violating I.C. § 18-8004 shall be guilty of misdemeanor and may be sentenced to jail not to exceed six months, fined, forced to surrender license, or required to undergo alcohol evaluation. I.C. § 18-8005(3). Anyone found guilty of violating I.C. § 18-8004 for a second time within 10 years shall be sentenced to jail for mandatory period of not less than ten days, and may be fined, must surrender his license or permit, and have driving privileges suspended for one year. I.C. § 18-8005(4). Choice as to what evidentiary test to be given driver rests with police officer, not defendant. *In re Griffiths*, 113 Idaho 364, 370, 744 P.2d 92, 98 (1987).

Contributory Negligence. See "NEGLIGENCE."

Damages. Compensatory. Compensatory damages for lost profits and future earnings must be shown with reasonable certainty. *Inland Grp. of Cos., Inc. v. Providence Wash. Ins. Co.*, 133 Idaho 249, 257, 985 P.2d 674, 682 (1999).

Family Purpose Doctrine Not Recognized. Parents generally are not responsible for negligence of their children except where children are shown to be agents of parents. Application of any person under eighteen years for permit, restricted license, or operator's license must be signed by either father or mother of applicant, or person or guardian having custody, or by employer or other responsible person. Negligence or willful conduct of



minor imputed to person who signed application for permit or license, such person being jointly and severally liable with minor. I.C. § 49-310(2). If proof of financial responsibility is maintained by or on behalf of minor, then parent/guardian not subject to liability. I.C. § 49-310(3).

**Guest Cases.** Guest statute, Idaho Code § 49-2415, limits the liability of owner to guest. Declared unconstitutional by *Thompson v. Hagan*, 96 Idaho 19, 24, 523 P.2d 1365, 1370 (1974), but that decision has been held to apply only to negligence actions brought by passengers against host-drivers and is not applicable to action for contribution based on I.C. § 6-803. *Brockman Mobile Home Sales v. Lee*, 98 Idaho 530, 567 P.2d 1281 (1977). Thus, the constitutionality of § 49-2415 has yet to be fully determined but is questionable.

**Imputed Negligence/Joint Enterprise.** There is a joint enterprise for the purpose of contributory negligence if there is joint or community interest in purpose of the undertaking, and equal right, express or implied, to exercise control over conduct of each other. *Fawcett v. Irby*, 92 Idaho 48, 52, 436 P.2d 714, 718 (1968). Conflicting evidence as to whether passenger who was agency supervisor had any supervisory authority over plaintiff driver who was insurance agent required submission to jury of issue of joint enterprise between them for purpose of ultimately determining whether contributory negligence of driver was imputable to passenger. *Id.*

**Intrafamily Action.** Intrafamily actions in automobile negligence may be maintained only up to limits of automobile liability insurance policy. *Farmers Ins. Grp. v. Reed*, 109 Idaho 849, 854, 712 P.2d 550, 555 (1985).

**Motorcycles.** Motorcycle endorsement on driver's license necessary for operation of motorcycle. I.C. § 49-304.

**Owner Liability.** Every owner of vehicle and any person who furnishes vehicle, who causes or knowingly permits minor under age sixteen years to drive such vehicle upon highway is jointly and severally liable with such minor for damage caused by negligence. I.C. § 49-2416. Where action against owner is based on imputed negligence of driver, such driver must be made co-defendant if service may be had upon him within state. I.C. § 49-2417(3).

**Owner's Liability for Negligence of Another.** Owner of motor vehicle is liable and responsible for death or injury to person or property resulting from negligent operation of that vehicle, in business of owner or otherwise, by person using same with owner's permission, express or implied. I.C. § 49-2417(1). However, owners who are in business of renting or leasing motor vehicles cannot be held liable for damage or harm arising

from use or possession of vehicles rented or leased if owner is not negligent or guilty of criminal wrongdoing. I.C. § 49-2417(7).

If operator is not agent of owner, owner's liability is limited to greater of either \$25,000/\$50,000/\$15,000 or limits of owner's liability insurance. I.C. §§ 49-2417(2) & 49-117(18). In case of recovery, owner is subrogated to rights of person injured. I.C. § 49-2417(4).

**Bicyclists.** Every person operating bicycle has same rights and duties of driver of any other vehicle on roadways, but must use due care. I.C. § 49-714. Operator must ride as close as practicable to right hand edge or curb except when passing or turning left, when necessary to avoid objects, or riding upon one-way roadway with two or more traffic lanes. I.C. § 49-717. Operators may yield at stop signs, but must stop at red traffic control light, although may then proceed with caution. I.C. § 49-720.

**Pedestrians.** Pedestrians have right of way in cross walk and vehicles must yield. No pedestrian shall suddenly leave curb and step into path of vehicle so close as to constitute immediate hazard. I.C. § 49-702.

**Seat Belts.** All occupants of motor vehicles (with certain exceptions) must wear seat belts. I.C. § 49-673(1)-(3). Failure to use safety belt shall not be considered under any circumstances as evidence of contributory or comparative negligence nor shall such be admissible as evidence in any civil action with regard to negligence. I.C. § 49-673(8). Child under age of 6 must be restrained in a child safety restraint, unless child is held by attendant for purposes of nursing or other physiological needs. Failure to use child safety seat shall not be admissible as evidence with regard to negligence. I.C. § 49-672.

**Service of Process Upon Non-resident Motorists.** See I.C. § 49-2421.

**Speed Limit.** Basic rule and maximum speed limits provided in Idaho Code § 49-654.

**Trailers/Weight Limits.** Any vehicle with maximum gross weight of 26,001 lbs. or more must stop at ports of entry or checking stations. I.C. § 40-511(1). Any vehicle transporting livestock or placardable hazardous materials with maximum gross weight of 10,000 lbs. or more must stop at all ports or checking stations. I.C. § 40-511(2)

**Uninsured/Underinsured Motorist Coverage.** Uninsured/Underinsured motorist coverage is not required, but must be offered. *Martinez v. Idaho Cnty. Reciprocal Mgmt. Program*, 134 Idaho 247, 252, 999 P.2d 902, 907 (2000). Automobile liability policy must be initially is-

sued with coverage for protection of insured from operators or owners of uninsured motor vehicles, but insured may reject coverage in writing or in an electronic record as authorized by the UETA. I.C. § 41-2502. There is nothing in Idaho Code § 41-2502 that requires carrier who offers uninsured motorist coverage, that it must do so in language which covers all circumstances, or that policy language which attempts to limit coverage is void as against legislative public policy. *Miller v. Farmers Ins. Co.*, 108 Idaho 896, 900, 702 P.2d 1356, 1360 (1985). However, where all-encompassing exclusions are used in such way to prevent coverage, policy will fail. *Martinez*, 134 Idaho at 252, 999 P.2d at 907.

Physical contact requirement may be inserted into uninsured motorist endorsement. *Miller v. US Fid. & Guar. Ins. Co.*, 112 Idaho 955, 957, 738 P.2d 425, 427 (Ct. App. 1987).

Underinsured motorist coverage at issue was clear and unambiguous and entitled insurer to set-off from maximum liability limit amount insured received from tortfeasor's insurance company. *Sublimity Ins. Co. v. Shaw*, 127 Idaho 707, 905 P.2d 640 (1995).

Insured under automobile policy covering several vehicles was precluded from stacking coverages for purpose of determining whether third party's automobile involved in accident was underinsured despite fact that it had same policy limits as limits on any one of insured's vehicles, where policy language plainly and unambiguously provided that in no event would insured be entitled to more than highest limit applicable to any one motor vehicle under policy. *Nationwide Mut. Ins. Co. v. Scarlett*, 116 Idaho 820, 821-22, 780 P.2d 142, 143-44 (1989).

## AVIATION

Damages by or to Aircraft. I.C. §§ 21-201-211; I.C. §§ 21-701-703. Owner or operator of every aircraft shall be liable for injuries or damages to persons or property in accordance to rules of law applicable to torts in Idaho. I.C. § 21-205.

## BROKERS

*See* "AGENTS AND BROKERS."

## BURGLARY INSURANCE

Insurance against loss or damage by burglary, theft, larceny, robbery, forgery, fraud, or otherwise, including supplemental coverage for medical, hospital, and funeral expense incurred by named insured as result of such act and householder's personal property floater defined as "Casualty Insurance." I.C. § 41-506(1)(e) and (f).

## CANCELLATION

*See* "ACCIDENT AND HEALTH INSURANCE, Contracts"; "LIABILITY INSURANCE"; "FIRE INSURANCE, Contracts."

Agent. Agent authorized specifically to procure insurance, has no authority to accept notice of or consent to its cancellation so as to bind insured by such action. *McDonald v. N. River Ins. Co.*, 36 Idaho 638, 213 P. 349, 350 (1923).

Authority. Authority of owner to procure and maintain insurance for mortgagee's benefit as mortgagee's agent did not extend to cancelling policy thus procured. *Gen. Ins. Co. of Am. v. Allen*, 40 F.2d 384 (9th Cir. 1930).

Mode of Cancellation. Generally, provisions for notice of cancellation of insurance policies are intended to prevent cancellation of policy without allowing insured ample opportunity to obtain other insurance. *Crowley v. Lafayette Life Ins. Co.*, 106 Idaho 818, 822, 683 P.2d 854, 858 (1984). Strict compliance with policy's cancellation requirements are necessary. *Hauter v. Coeur d'Alene Antimony Mining Co.*, 39 Idaho 621, 631, 228 P. 259, 262 (1923). Strict compliance with workmen's compensation statute in terms of policy issued thereunder is mandatory in order to effectually cancel policy. *Passmore v. Austin*, 73 Idaho 484, 491, 253 P.2d 800, 804 (1953). Insurer of personal property against fire and theft, absent contrary agreement with insured, cannot cancel insurance policy except as provided by its terms; where policy provides for 10 days' notice of cancellation to insured, such notice must be given. *McDonald*, 36 Idaho at 646, 213 P. at 351. Request to cancel insurance policy must be unequivocal and absolute, and if there is doubt whether instrument cancels insurance, instrument is to be construed most strongly against party seeking forfeiture thereon. *Magruder v. United States*, 32 F.2d 807, 810 (D. Idaho 1929).

Block cancellation of insurance policies must provide written notice to director 120 days prior to such action. I.C. § 41-1841.

Insurer's filing of notice of termination of agency with state insurance department did not result in constructive notice to insured of such termination. *Martin v. Argonaut Ins. Co.*, 91 Idaho 885, 889, 434 P.2d 103, 107 (1967).

## CHATTEL MORTGAGE

*See* "FIRE INSURANCE."

## CONSTRUCTION OF POLICY

Construction and Interpretation of Policy. Every insurance contract shall be construed according to entirety of its terms and conditions as set forth in policy and is amplified, extended, or modified, by any rider, endorsement, or application lawfully made part of policy. I.C. § 41-1822.

Construction. Insurance policies are contracts of adhesion, not subject to negotiations between parties, and hence must be construed most strongly against insurer. *Moss v. Mid-American Fire and Marine Ins. Co.*, 103 Idaho 298, 300, 647 P.2d 754, 756 (1982). Court construes accident insurance policies in spirit of liberal construction of insurance contracts. *Jones v. Mountain States Tel. & Tel. Co.*, 105 Idaho 520, 530, 670 P.2d 1305, 1315 (Ct. App. 1983).

Ambiguity of Terms. Contracts of insurance construed in view of general objects, and strict interpretation is to be avoided. Terms and limits of contract, in absence of plain unequivocal exceptions and provisions to contrary, held to intend what insured party is likely to understand by terms. Where language may be given two meanings, one permitting recovery, policy is to be given construction most favorable to insured. *Shields v. Hiram C. Gardner, Inc.*, 92 Idaho 423, 427-28, 444 P.2d 38, 42-43 (1968).

Ambiguity exists in insurance policy only if policy term is reasonably subject to conflicting interpretation. *Monarch Greenback, LLC v. Monticello Ins. Co.*, 118 F. Supp. 2d 1068, 1073 (D. Idaho 1999) (quoting *Nedrow v. Unigard Sec. Ins. Co.*, 132 Idaho 421, 974 P.2d 67 (1998)).

In construing insurance policy, court would not adopt doctrine of reasonable expectations but instead used intent. Intent is to be determined from language of contract itself, and in absence of ambiguity, contracts for insurance are to be construed as any other and understood in their plain, ordinary and proper sense, according to meaning derived from plain wording of contract. *Casey v. Highlands Ins. Co.*, 100 Idaho 505, 509, 600 P.2d 1387, 1391 (1979). Application of mutuality of assent doctrine to only one provision of insurance contract is error. *Hansen v. State Farm Mut. Auto. Ins. Co.*, 112 Idaho 663, 669, 735 P.2d 974, 980 (1987).

In certain instances, insurer may be held liable based on representations of its agent, despite presence of contrary language in actual policy. *Wright v. Johnson*, 101 Idaho 208, 212, 610 P.2d 567, 571 (1980).

Change of Beneficiary. Insured's letter to insurer requesting change held sufficient where insurer had no forms for requesting change and policy reserved right of

insured to change without notice. *In Re Idaho Mut. Benefit. Ass'n*, 56 Idaho 272, 53 P.2d 1171 (1936). Absent statutory regulation, method of changing beneficiaries of life policy may be prescribed by insurance policy, charter or bylaws of insurance company. *Noyes v. Noyes*, 106 Idaho 352, 355-56, 679 P.2d 152, 155-56 (Ct. App. 1984). Where life policy, as matter of contract, specifies method of changing beneficiaries, ordinarily change of beneficiaries can be accomplished only in manner set forth in policy, with result that attempt to make such change in any other manner is ineffectual. *Id.* Substantial compliance with requirements for change in beneficiary shown by doing everything to best of ability to effectuate change. *IDS Life Ins. Co. v. Estate of Groshong*, 112 Idaho 847, 849, 736 P.2d 1301, 1303 (1987).

Enforcement. Insurance policies are enforceable to the extent they are valid and legal. *Brinkman v. Aid Ins. Co.*, 115 Idaho 346, 352, 766 P.2d 1227, 1233 (1988), *overruled on other grounds by Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho 589, 130 P.3d 1127 (2006). Because insurance policy is a contract, rights and remedies of parties to insurance contract are determined by terms contained therein. *Intermountain Gas Co. v. Indus. Indem. Co. of Idaho*, 125 Idaho 182, 185, 868 P.2d 510, 513 (Ct. App. 1994).

## DAMAGES

See "NEGLIGENCE."

Amounts sought for general damages shall not be disclosed to jury. To do so is grounds for mistrial. I.C. § 10-111.

Types of Damages. Definitions of different types of damages found in I.C. § 6-1601.

Economic Damages. Plaintiffs cannot recover for pure economic loss in negligence actions. *Clark v. Int'l Harvester Co.*, 99 Idaho 326, 333, 581 P.2d 784, 791 (1978). Recovery may be had for economic damages if in addition to personal injury or property damages. *Id.* "Special relationship" exception allows recovery for economic loss if plaintiff has relationship with professional or with entity holding itself out as having expertise. *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 301, 108 P.3d 996, 1001 (2005). Professionals include those who perform personal services, such as physicians, attorneys, architects, engineers, and insurance agents but not bankers. *Eliopoulos v. Knox*, 123 Idaho 400, 408, 848 P.2d 984, 992 (Ct. App. 1992).

Emotional Distress. Action for intentional infliction of emotional distress will lie only where there is extreme and outrageous conduct coupled with severe emotional distress. *Davis v. Gage*, 106 Idaho 735, 741, 682 P.2d 1282, 1288 (Ct. App. 1984). In action for negligent in-

fliction of emotional distress, conduct must have caused some physical injury to plaintiff which accompanies emotional distress. *Gill v. Brown*, 107 Idaho 1137, 1138, 695 P.2d 1276, 1277 (Ct. App. 1985); *see also Johnson v. McPhee*, 147 Idaho 455, 210 P.3d 563 (Ct. App. 2009).

**Arbitration Awards.** *See* "ARBITRATION." Provisions regarding arbitration awards, modification and enforcement thereof can be found at I.C. §§ 7-908 to 7-922. In any case where sole relief sought is money damages and amount claimed is less than \$25,000, either party can move for non-binding mediation or evaluation. I.C. §§ 7-1501 to 7-1512. If party rejects findings of evaluator, proceeds to trial, and does not improve his position by fifteen percent (15%) at trial, that party will be assessed costs, attorney fees and evaluator's fee, including all other expert witness fees and expenses in excess of those permitted by statute or rule. I.C. § 7-1509(5).

**Limitation on Damages. Limitation on Non-Economic Damages.** In actions for personal injury or death accruing after July 1, 2004, judgment for non-economic damages shall not be entered for claimant exceeding maximum amount of \$250,000. Cap on non-economic damages established in this section shall increase or decrease annually in accordance with percentage of amount of increase or decrease by which Idaho Industrial Commission adjusts average annual wage. I.C. § 6-1603. Out of court settlement with other parties shall not affect the calculation of damages. *Horner v. Sanitop, Inc.*, 143 Idaho 230, 236, 141 P.3d 1099, 1104 (2006).

**Limitation on Punitive Damages.** In any action seeking recovery of punitive damages, claimant must prove by clear and convincing evidence, oppressive, fraudulent, malicious, or outrageous conduct by party against whom claim for punitive damages is asserted. No claim for damages shall be filed containing prayer for relief seeking punitive damages. However, party may, pursuant to pretrial motion and after hearing by court, amend pleadings to include prayer for relief seeking punitive damages. Court shall allow Motion to Amend pleadings if party established at hearing reasonable likelihood of proving facts at trial sufficient to support award of punitive damages. I.C. § 6-1604. Punitive damages are limited to greater of \$250,000 or three times amount of actual damages. I.C. § 6-1604(3).

Calculating 5% of insurance company's annual profit in arriving at amount of punitive damages resulted in an appropriate amount for deterrent purposes. *Walston v. Monumental Life Ins. Co.*, 129 Idaho 211, 222, 923 P.2d 456, 467 (1996).

**Reduction Due to Contributory & Comparative Negligence.** Common law doctrine of joint and several liability is limited to following causes of action: where parties are acting in concert or when person was acting as agent or servant of another party. Acting in concert means pursuing common plan or design which results in commission of intentional or reckless tortious act. I.C. § 6-803(5).

Idaho has adopted joint tortfeasors contribution statute wherein right of contribution exists among joint tortfeasors, but joint tortfeasor is not entitled to money judgment for contribution until he has by payment discharged common liability or has paid more than his pro rata share thereof. Joint tortfeasors remain individually liable to injured person for whole injury. I.C. § 6-804. Recovery of judgment by injured person against one joint tortfeasor does not discharge other joint tortfeasors. I.C. § 6-804(1).

In any action which trier of fact attributes percentage of negligence or comparative responsibility to persons listed on special verdict, court shall enter separate judgment against each party whose negligence or comparative responsibility exceeds negligence or comparative responsibility attributed to person recovering. Negligence or comparative responsibility of each such party is to be compared individually to negligence or comparative responsibility of person recovering. Judgment against each such party shall be entered in amount equal to each party's proportionate share of total damages awarded. I.C. § 6-803(3).

Idaho has adopted comparative negligence rule, which states that there is no recovery if plaintiff's comparative negligence was as great as person against whom recovery is sought. I.C. §§ 6-801 through 806. *See also* "NEGLIGENCE."

Joint tortfeasor who enters into settlement with injured person is not entitled to recover contribution from another joint tortfeasor whose liability to injured person is not extinguished by settlement. I.C. § 6-803(2).

**Prohibition of Double Recoveries from Collateral Sources.** In any event for personal injury or property damage, judgment may be entered for claimant only for damages which exceed amounts received by claimant from collateral sources as compensation for personal injury or property damage. Collateral sources do not include payments by federal programs which must seek subrogation, life insurance contracts, or other contract where subrogation rights exist. I.C. § 6-1606.

**Governmental Immunity.** Except as otherwise provided in Idaho Torts Claim Act, every governmental entity is subject to liability for money damages arising out of its negligence or otherwise wrongful acts or omissions



and those of its employees acting within course and scope of their employment or duties, whether arising out of governmental or proprietary function, where governmental entity or private person or entity would be liable for money damages under laws of Idaho, provided governmental entity is subject to liability only for pro rata share of total damages awarded to claimant which is attributable to negligence of otherwise wrongful acts or omissions of governmental entity or its employees. I.C. § 6-903(a).

Exceptions to governmental liability are provided in I.C. §§ 6-904, 6-904A, 6-904B.

Periodic Payment of Damages Act. In any civil action seeking damages for personal injury or property damages in which verdict, award or finding for future damages exceeds \$100,000, the court may, in its sound discretion, and at request of either party, enter judgment providing for periodic payment of that portion of verdict, award or finding that represents future damages. I.C. § 6-1602(1).

## DEATH

See Law Digest Tables.

Generally. Death of Applicant. Where policy signed and premium paid to soliciting agent with understanding that policy is to be immediately effective, where insured dies from injuries contemplated in policy and premium not returned, retention of premium is indicative of insurer's acceptance of application. *Hahn v. Nat'l Cas. Co.*, 64 Idaho 684, 689, 136 P.2d 739, 741 (1943).

Life Insurance. No policy of life insurance may exclude or restrict liability for death caused in specified manner occurring while insured has specified status, except for death as result of war or action by military forces, or as result of aviation or air travel or flight, or as result of specified hazardous occupation, or death while insured is resident outside United States or Canada, or death within two years of issuance of policy as result of suicide. I.C. § 41-1925(1).

Unexplained Absence. Under common law, fact of death may be proven by unexplained absence of person for 7 years without having been heard from by his relatives or close personal friends. Such absence does not give rise to any presumption as to particular time during 7 years when death occurs. *Gaffney v. Royal Neighbors of Am.*, 31 Idaho 549, 552, 174 P. 1014, 1015 (1918). Idaho Code. § 15-1-107(c), enacted as part of Uniform Probate Code, provides presumption of death for person absent for continuous period of five years if such person has not been heard from and his absence is not satisfactorily explained after diligent search and inquiry.

Wrongful Death Actions. When death of person is caused by wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain action for damages against person causing death, or in case of death of such wrongdoer, against personal representative of such wrongdoer whether wrongdoer dies before or after death of person injured. I.C. § 5-311.

When negligence of another causes person's death, decedent's heirs or personal representative may maintain action for damages against wrongdoer. *Turpen v. Granieri*, 133 Idaho 244, 247, 985 P.2d 669, 672 (1999). Heir may only recover for wrongful death if decedent would have been able to recover. *Id.*

Action to recover damages for death of one caused by wrongful act or neglect of another must be filed within two years. I.C. § 5-219(4).

Idaho also recognizes cause of action for injury or death of viable unborn fetus. *Volk v. Baldazo*, 103 Idaho 570, 573, 651 P.2d 11, 14 (1982).

Since pain and suffering are personal to deceased and are not damages suffered by survivors, action for pain and suffering under Idaho Wrongful Death Statute does not survive death. *Vulk v. Haley*, 112 Idaho 855, 859, 736 P.2d 1309, 1313 (1987). Survivors of deceased cannot recover for their own grief and anguish, however, they may recover for loss of society, companionship, comfort, protection, guidance, advice, intellectual training, etc. *Hepp v. Ader*, 64 Idaho 240, 245, 130 P.2d 859, 862 (1942).

Survival of Actions. Cause of action arising out of injury or death to person caused by wrongful act or negligence of another, except actions for slander or libel, do not abate upon death of wrongdoer, and each injured person or personal representative of each one meeting death shall have cause of action against personal representative of wrongdoer, provided, however, punitive damages shall not be awarded in any such action. I.C. § 5-327.

Damages. In every action under this section, such damages may be given as under circumstances of case may be just. I.C. § 5-311(1). May only recover for wrongful death of person if decedent could have recovered. *Bevan v. Vassar Farms, Inc.*, 117 Idaho 1038, 1039-40, 793 P.2d 711, 712-13 (1990).

Idaho has adopted Uniform Simultaneous Death Act. Any person who fails to survive decedent by 120 hours is deemed to have predeceased decedent for purposes of homestead allowance, exempt property and intestate succession and decedent's heirs are determined accordingly. I.C. § 15-2-104.

Brain Death Act. Idaho has not adopted Uniform Brain Death Act.

Determination of Death. Individual who has sustained either 1) irreversible cessation of circulatory or respiratory functions, or 2) irreversible cessation of all functions of entire brain, including brain stem, is dead. Determination of death must be made in accordance with accepted medical standards, which mean usual and customary procedures of community in which determination of death is made I.C. § 54-1819.

### DISABILITY

Disability insurance includes insurance of persons against bodily injury, disablement, death by accident or accidental means, or expense thereof, or against disablement or expense resulting from sickness, and every insurance pertaining thereto, and managed care plans for which certificate of authority is required, but does not include workers' compensation coverage. I.C. § 41-503(a). All policies issued against disability must comply with Uniform Disability Policy Provision Law. I.C. §§ 41-2101-46.

Total Disability. Claimant who sought benefits for medical expenses associated with bilateral carpal tunnel syndrome was not required to show total disability prior to surgery to recover medical benefits for such surgery. *Mulder v. Liberty Nw. Ins. Co.*, 135 Idaho 52, 57, 14 P.3d 372, 377 (2000).

Defenses. After two years from date of issue, no defense regarding misstatements except fraudulent misstatements may be used to void policy or deny claim. I.C. § 41-2106(1)(a). Group and Blanket disability insurance discussed in I.C. §§ 41-2201-46.

### FINANCIAL RESPONSIBILITY LAW

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

### FIRE INSURANCE

Generally. Standard fire policy must be on form known as New York Standard as revised in 1943 with certain statutory defined exceptions. I.C. § 41-2401.

Assignment. Assignment of fire policy of face value of \$2,000 to creditor as collateral security on debt of \$300 does not constitute assignment of policy in violation of stipulation contained therein to effect that policy shall be void "if assigned before loss." *Allen v. Phx. Assur. Co.*, 12 Idaho 653, 665, 88 P. 245, 248 (1906).

Chattel Mortgage. Mortgagee under loss payable clause in insurance policy may recover for itself to extent of its mortgage debt and hold surplus for benefit of

insured. Under loss payable clause in insurance policy mortgagee is appointee of insured with right to recover measured by that of insured. *Farmers & Merchs.' Bank v. Hartford Fire Ins. Co.*, 43 Idaho 222, 231, 253 P. 379, 382-83 (1926). Provision for forfeiture of fire insurance policy covering furniture, fixtures and stock of merchandise, if subject of insurance were encumbered by chattel mortgage, does not prevent recovery on policy because of insured giving mortgage on furniture and fixtures only. *Creem v. Nw. Mut. Fire Ass'n*, 56 Idaho 529, 532, 56 P.2d 762, 763 (1936).

Damages. Insurance company liable for loss of property by fire through negligence of railroad company, having paid loss, is subrogated to all rights of insured against railroad company on account of such loss to full amount paid to insured. *Allen-Wright Furniture Co. v. Hines*, 34 Idaho 90, 101, 200 P. 889, 891 (1921).

Friendly Fires. Where package containing antique jewelry was inadvertently deposited in incinerator and destroyed by fire intentionally set therein to destroy waste, etc., said fire was "friendly fire" and not "hostile fire," and loss or damage sustained was not "direct loss or damage by fire," within meaning of fire insurance policies covering destroyed merchandise. *Mode, Ltd. v. Fireman's Fund Ins. Co.*, 62 Idaho 270, 110 P.2d 840 (1941). "Loss by fire" as used in fire policy means "hostile fire," and not "friendly fire." "Friendly fire" subject to control in furnace or stove is not covered by policy, but "hostile fire" produced from fire escaping from furnace is included under coverage. *Pac. Fire Ins. Co. v. C. C. Anderson Co.*, 47 F. Supp. 90 (D. Idaho 1942).

Proof of Loss. Misstatement in proof respecting ownership is not defense to action on policy unless intent to defraud is shown. *Carroll v. Hartford Fire Ins. Co.*, 28 Idaho 466, 154 P. 985 (1916). Failure to submit proof within 60 days (the time provided in the policy) held not to preclude recovery on policy. *S. Idaho Conference Ass'n of Seventh Day Adventists v. Hartford Fire Ins. Co.*, 31 Idaho 130, 169 P. 616 (1917). False statements in proof of loss may be so gross as to furnish inference of wilfulness and knowledge of falsity. *Boise Ass'n of Credit Men, Ltd. v. U.S. Fire Ins. Co.*, 44 Idaho 249, 256 P. 523 (1927). Fire policy provision whereby insured required to give immediate notice of loss and within certain period supply insurer with proof of loss are for benefit of insurer and may be waived by words or conduct inconsistent with intention to demand strict compliance. *March v. Snake River Mut. Fire Ins. Co.*, 89 Idaho 275, 404 P.2d 614 (1965).

Exclusion. Idaho Code § 41-2401(2) allows insurance companies to exclude from payment, losses caused by nuclear or radioactive radiation or contamination.

**GUEST CASES**

See "AUTOMOBILES, Guests."

**HOSPITALS**

Hospital liens addressed at I.C. §§ 45-701-05. Such lien must be filed within 90 days after person is discharged. I.C. § 45-702.

Statute of limitations against hospitals for malpractice resulting in personal injury is two years. I.C. § 5-219(4). However, claims against the state (or government) must be presented and filed within 180 days. I.C. § 6-905.

**HUSBAND AND WIFE**

See Law Digest Tables.

Community Property. Idaho has adopted community property statutes. See I.C. §§ 32-901-29.

Where policy is payable to member of marital community, and is upon life or disability of either, either may receive payment and such payment fully discharges insurer from all claims under contract. I.C. § 41-1828(2).

Interspousal immunity. Wife is entitled to pursue her remedy for damages arising out of alleged accident, notwithstanding that tortfeasor was her husband and was named as party defendant. *Rogers v. Yellowstone Park Co.*, 97 Idaho 14, 19, 539 P.2d 566, 571 (1975).

Common Law Marriages. Idaho does not recognize any common-law marriage after January 1<sup>st</sup>, 1996. I.C. § 32-201.

Loss of Consortium. Claim for loss of consortium is wholly derivative claim contingent on third party's tortious injury to spouse. *Runcorn v. Shearer Lumber Prod., Inc.*, 107 Idaho 389, 394, 690 P.2d 324, 329 (1984).

**INFANTS**

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

**INLAND MARINE**

Inland Marine. Wet marine and transportation insurance is defined by I.C. § 41-505.

**LIABILITY INSURANCE**

Accident. With respect to liability insurance policy period limitation clauses, time of occurrence of "accident" within meaning of liability indemnity policy, is not

time wrongful act was committed, but time complaining party was actually damaged. *Nat'l Aviation Underwriters, Inc. v. Idaho Aviation Ctr., Inc.*, 93 Idaho 668, 670, 471 P.2d 55, 57 (1970).

Exclusions. Intentional Acts. For "intentional tort" exclusion of insurance coverage to operate, insurance company required to show insured acted for purpose of causing injury in person or property in which it resulted so long as injury was intended, willed or maliciously sought, it was immaterial that injury of different nature than injury contemplated actually resulted. *Farmers Ins. Group v. Sessions*, 100 Idaho 914, 918, 607 P.2d 422, 426 (1980).

Compromise of Claims. Insurer is under duty to exercise good faith in considering offers to compromise injured party's claim against insured for an amount within insured's policy limits. *Openshaw v. Allstate Ins. Co.*, 94 Idaho 192, 194, 484 P.2d 1032, 1034 (1971). Insurer also has duty to act in good faith in first party actions where insured is personally filing direct claim for benefits with insurer. *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 96, 730 P.2d 1014, 1016 (1986).

Independent action in tort arises based on insurers breach of duty of good faith, only where insured can show insurer intentionally and unreasonably denied or withheld payment and as result of insured's conduct, plaintiff was harmed in way not fully compensable by contract damages. *Selkirk Seed Co. v. State Ins. Fund*, 135 Idaho 649, 652, 22 P.3d 1028, 1031 (2000). Plaintiff has burden to prove all elements of bad faith claim in suit against insurer. *Robinson v. State Farm Mut. Auto. Ins. Co.*, 137 Idaho 173, 45 P.3d 829 (2002). Prima facie case of first-party bad faith required insured to establish that: 1) coverage of the claim was not fairly debatable; 2) based on evidence before insurer, it intentionally and unreasonably withheld benefits; 3) delay in payment was not the result of a good faith mistake; and 4) resulting harm was not fully compensable by contract damages. *Id.*

Contribution among Joint Tortfeasors. In "Pier-ringer type release" plaintiff credits and satisfies total amount of damages of settling defendant and agrees to discharge pro rata share of defendant's damages from actual claims against any nonsettling parties; with such release, there can be no possibility of claim by nonsettling tortfeasor for contribution from settling tortfeasor since nonsettling party will only pay its pro rata share of damages. *Truck Ins. Exch. v. Bishara*, 128 Idaho 550, 555-56, 916 P.2d 1275, 1280-81 (1996).

Duty to Defend. As general rule, insurer must defend suit against insured where complaint alleges facts which, if true, would bring case within policy coverage.



Insurer is obligated to defend even though complaint fails to state claim covered by policy, where facts of case, if established, present potential liability of insured. Doubt as to obligation of insured to defend should be resolved in favor of insured. *Black v. Fireman's Fund Am. Ins. Co.*, 115 Idaho 449, 455–56, 767 P.2d 824, 830–31 (Ct. App. 1989). General liability insurer did not breach its duty to insured by failing to defend him in personal injury action, even though one of two counts was sufficient to invoke potential liability, where insurer had sought and obtained declaratory judgment against principal insured, insured's father, holding that injury in issue was not within scope of policy. *Maxson v. Farmers Ins. of Idaho*, 107 Idaho 1043, 695 P.2d 428 (Ct. App. 1985). Insurance company must seek declaratory judgment of no duty to defend where application of exclusion involves fairly debatable question of law. *Monarch Greenback LLC v. Monticello Ins. Co.*, 118 F. Supp. 2d 1068, 1078–79 (D. Idaho 1999). Duty to defend exists so long as there is genuine dispute over facts bearing on coverage under policy or over application of policy's language to facts. *Const. Mgmt. Sys., Inc. v. Assurance Co. of Am.*, 135 Idaho 680, 682–83, 23 P.3d 142, 144–45 (2001).

**Cooperation.** Provision for notice and cooperation on liability policy are valid, reasonable requirements, designed to afford insurer opportunity to defend; substantial breach of such requirement resulting in prejudice to insurer, can relieve insurer's responsibility to insured and third parties. *Leach v. Farmer's Auto. Interinsurance Exch.*, 70 Idaho 156, 160, 213 P.2d 920, 923 (1950). Insurers had no duty to indemnify insured in state's action alleging release of hazardous waste for property damage occurring after policy's expiration date, where plain language of policy suggested that intent of parties was to provide insurance only against damages occurring during that period, but insurer had duty to defend until declaration of non coverage because claims were arguable and there was potential coverage. *Idaho v. Bunker Hill Co.*, 647 F. Supp. 1064, 1070 (D. Idaho 1986).

**Standard Provisions.** Provision in insurance code relating to standard provisions of policy was not intended to deny insurer right to add other provision not inconsistent with or violative of statute. *Gem State Mut. Life Ins. Ass'n v. O'Connell*, 79 Idaho 427, 432, 320 P.2d 329, 332 (1958).

**Jurisdiction.** State Courts of Idaho have jurisdiction of and can obtain personal service outside state upon any person, firm, company, association or corporation contracting to insure any person, property or risk located within State of Idaho at time contract of insurance is issued. I.C. § 5–514(d).

**Right of Injured Party Against Insurer.** Parties to automobile liability insurance policy may legally contract that no action shall lie against insurer on any claim until amount is fixed and rendered certain by judgment against insured or by agreement between parties to action thereon with insurer's written consent. *Stearns v. Graves*, 61 Idaho 232, 242, 99 P.2d 955, 958–59 (1940).

## LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Generally. Civil actions must be commenced within time provided by statute. Statutes of limitation begin running after cause of action accrues. I.C. § 5–201. Actions for relief not otherwise provided for by statute must be brought within four years of accrual. I.C. § 5–224.

The only non-statutory bar to statute of limitation defense in Idaho is doctrine of equitable estoppel. *J.R. Simplot Co. v. Chemetics Int'l, Inc.*, 126 Idaho 532, 534, 887 P.2d 1039, 1041 (1994). Estoppel does not "extend" statute of limitation; rather, it prevents a party from pleading and utilizing statute of limitation as a bar, although time limit of statute may have already run. *Twin Falls Clinic & Hosp. Bldg. v. Hamill*, 103 Idaho 19, 22, 644 P.2d 341, 344 (1982).

**Contract.** Action upon written contract must be brought within five years. I.C. § 5–216. Action upon contract, obligation or liability not founded upon instrument in writing must occur within four years. I.C. § 5–217. Action for relief, not specifically provided for under statutes must be brought within four years. I.C. § 5–224. Action for breach of any contract for sale must be commenced within four years after cause of action has accrued. I.C. § 28–2–725(1).

Provisions in Contract of Life Insurance for period shorter than provided by statute is void. I.C. § 41–1925(a). Every stipulation or condition in contract, by which any party thereto is restricted from enforcing his rights under contract by usual proceedings in ordinary tribunals, or which limits time within which he may thus enforce his rights, is void. I.C. § 29–110(1).

After two years from date of issue of policy of insurance, no misstatement, except fraud, shall be used to deny such claim. I.C. § 41–2106(a).

**Fire Insurance Contracts.** Fire insurance contracts are to be issued only on New York Standard form as revised in 1943, such that five year statute of limitations for bringing contract action as set out in Idaho Code. § 5–216 is not amended. See *Sunshine Mining Co. v.*

*Allendale Mut. Ins. Co.*, 107 Idaho 25, 684 P.2d 1002 (1984).

Statutory Liabilities, Trespass, Trover, Replevin and Fraud. Statute of limitation for these actions is three-years. I.C. § 5-218. Cause of action for fraud or mistake not deemed to have accrued until discovery of facts constituting fraud or mistake. I.C. § 5-218(4).

Statute of limitations does not begin to run against action based upon fraud until Plaintiff in exercising proper diligence discovers facts constituting fraud. *Ryan v. Old Veteran Mining Co.*, 37 Idaho 625, 635-36, 218 P. 381, 384 (1923).

Torts. Statute of limitation is two years for the following actions. Actions against sheriff, coroner or constable upon liability incurred by acts committed in official capacity. Actions against sheriff, coroner or constable upon liability incurred by acts committed in official capacity. Action upon statute for penalty or forfeiture. Action upon statute or upon undertaking in criminal action for forfeiture or penalty to county or to state. Action for libel, slander, assault, battery, false imprisonment or seduction. Action against sheriff or other office for escape of prisoner arrested or imprisoned on civil process. I.C. § 5-219.

Tort actions arising out of the design, construction, or improvement to real property accrue six years after completion of construction or improvement if not previously accrued. I.C. § 5-241(a).

Malpractice. Action to recover damages for professional malpractice must be commenced within two years. I.C. § 5-219(4). Cause of action accrues, for purposes of applying statutory period for limitations in professional malpractice actions, as of time of occurrence, act or omission complained of. Statute of limitations for professional malpractice does not begin to run until "some damage" occurs. *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991). "Some damage" does not equate to potential for damage. A negligent act can occur without damages, therefore "some damage" arises at time injury occurs. *Parsons Packaging, Inc. v. Masingill*, 140 Idaho 480, 483, 95 P.3d 631, 634 (2004). Under I.C. § 5-219(4), discovery exception limited to cases involving foreign objects and fraudulent concealment.

In malpractice actions, cause of action shall be deemed to have accrued as of time of occurrence, act or omission complained of and limitation period shall not be extended by reason of any continuing consequences or damages resulting therefrom or any continuing professional or commercial relationship between injured party and alleged wrongdoer. When action for damages arising out of placement or inadvertent, accidental or

unintentional leaving of foreign object in body of any person by reason of professional malpractice of any person or institution practicing any healing arts, or when fact of damage has, for purposes of escaping responsibility therefor, been fraudulently and knowingly concealed from injured party, such shall be deemed to have accrued when injured party knows or by exercise of reasonable care, should have been put on inquiry regarding condition or matter complained of. Provided further, action within foregoing foreign object or fraudulent concealment exceptions must be commenced within one year following date of accrual or two years following occurrence, act or omission complained of, whichever is later. I.C. § 5-219. *See also Elliott v. Parsons*, 128 Idaho 723, 918 P.2d 592 (1996).

Wrongful Death. Action to recover damages for wrongful death must be commenced within two years. I.C. § 5-219(4). Running of statute of limitations on wrongful death cause of action begins from date of death. *Chapman v. Cardiac Pacemakers, Inc.*, 105 Idaho 785, 787, 673 P.2d 385, 387 (1983).

Actions Against Government. All claims against state or all claims against employee of state for any act or omission of employee within course or scope of his employment shall be presented to and filed with secretary of state within 180 days from date claim arose or reasonably should have been discovered, whichever is later. I.C. § 6-905. All claims against political subdivision or any employee of political subdivision shall be filed within 180 days. I.C. § 6-906. No minor shall be required to present and file claim against governmental entity or its employee under Idaho Torts Claim Act until 180 days after he reaches age of majority or six (6) years from date claim arose or should reasonably have been discovered, whichever is earlier. I.C. § 6-906A.

Tolling for Disabilities. If person entitled to bring action, other than recovery of real property, is at time of cause of action accrued, either under age of majority, or insane, time of such disability is not part of time limited for commencement of action provided. However, time limited for commencement of action shall not be tolled for period more than six (6) years on account of minority, incompetency, defendant's absence from jurisdiction, and legal disability or other cause or reason, except as provided in I.C. § 5-213. I.C. § 5-230. No person can avail himself of disability unless it existed when his right of action accrued. I.C. § 5-235. In all cases other than contract of minors for necessities and contracts of minors authorized by statute, contract of minor, if made while he is unmarried minor may be disaffirmed by minor himself either before his majority or within reasonable time afterwards, or in case of his death within that



period by his heirs or personal representatives. *See* I.C. §§ 32–103–05.

### MALPRACTICE

Generally. Medical malpractice actions are governed by Title 6, Chapter 10, Idaho Code. Compulsory as condition precedent to litigation in medical malpractice actions is Idaho State Board of Medicine's providing hearing panel in nature of special civil grand jury and procedure for pre-litigation consideration of personal injury and wrongful death claims for damages arising out of provision or alleged failure to provide hospital or medical care in State of Idaho. I.C. § 6–1001. *See also Moss v. Bjornson*, 115 Idaho 165, 765 P.2d 676 (1988). Case must be brought within two years. I.C. § 5–219(4). In medical malpractice action against physician or other health care provider, plaintiff must prove by direct expert testimony that defendant negligently failed to meet applicable standard of care in community, as such standard existed at time and place of alleged negligence of such physician, etc. with respect to class of health care that defendant belonged to and in which capacity he or she was functioning. I.C. §§ 6–1012 and 6–1013. However, expert testimony is not required every time provider of medical care is sued for negligence; there are circumstances when alleged act of negligence is so far removed or unrelated to provision of medical care that this section would not apply. *Hough v. Fry*, 131 Idaho 230, 233, 953 P.2d 980, 983 (1998).

Standard of Care. Testimony of expert witness on community standard is established in Idaho Code § 6–1013.

Informed Consent. Requires objective, medical community standard for determining whether patient has been adequately informed prior to giving consent for medical treatment. I.C. § 39–4506; *Sherwood v. Carter*, 119 Idaho 246, 251, 805 P.2d 452, 457 (1991) (citing I.C. § 39–4304, which was repealed along with I.C. §§ 39–4301–03, 39–4305–06, but reincorporated within I.C. Chapter 45, The Medical Consent and Natural Death Act, without any fundamental changes).

### NEGLIGENCE

*See* Law Digest Tables.

*See* "AUTOMOBILES."

Duty. Every person, in conduct of their business, has duty to exercise ordinary care to prevent unreasonable, foreseeable risks of harm to others. *Turpen v. Granieri*, 133 Idaho 244, 247, 985 P.2d 669, 672 (1999).

Age. Negligence and contributory negligence of infants discussed. *Frazier v. N. Pac. Ry. Co.*, 28 F. Supp.

20, 24 (D. Idaho 1939). Contributory or comparative negligence of parent, *i.e.* negligent supervision, can be raised as affirmative defense in wrongful death action. *Nelson v. N. Leasing Co.*, 104 Idaho 185, 188, 657 P.2d 482, 485 (1983). As general rule, child is held to standard of care which could be expected from child of same age, experience, knowledge, and discretion; exception exists in case of child operating motor vehicle on public highway, in such instance, child held to adult standard of care. *Goodfellow v. Coggburn*, 98 Idaho 202, 203–04, 560 P.2d 873, 874–75 (1977).

Attractive Nuisance. Under "attractive nuisance" doctrine, structure or condition maintained or permitted by owner on his property must be peculiarly or unusually attractive to children, injured child must have been attracted by such condition or structure, owner must know, or facts be such as to charge him with knowledge of condition, and that children are likely to trespass and be injured, and structure or condition must be dangerous and of such character that danger is not apparent to immature minds. *Bass v. Quinn-Robbins Co.*, 70 Idaho 308, 312, 216 P.2d 944, 945 (1950); *Jacobsen v. City of Rathdrum*, 115 Idaho 266, 272, 766 P.2d 736, 742 (1988). Artificial character of water hazard will not support attractive nuisance doctrine and has no bearing on liability or nonliability for personal injuries. *Anneker v. Quinn-Robbins Co.*, 80 Idaho 1, 6, 323 P.2d 1073, 1075 (1958). Idaho's recreational use statute does not preclude liability under doctrine of attractive nuisance. *Nelson v. City of Rupert*, 128 Idaho 199, 202, 911 P.2d 1111, 1114 (1996).

Comparative/Contributory Negligence. Contributory negligence standard was abolished in favor of comparative negligence standard in 1971. I.C. § 6–801. Contributory negligence or comparative responsibility shall not bar recovery in any action by any person or his legal representative to recover damages for negligence, or gross negligence or comparative responsibility resulting in death or in injury to person or property, if such negligence or comparative responsibility was not as great as negligence, or gross negligence or comparative responsibility of person against whom recovery is sought, but any damages allowed shall be diminished in proportion to amount of negligence or comparative responsibility attributable to person recovering. Nothing herein shall create any new legal theory, cause of action or legal defense. *Id.*

Negligence of plaintiff is not defense available to defendant who has committed intentional tort. *Fitzgerald v. Young*, 105 Idaho 539, 541, 670 P.2d 1324, 1326 (Ct. App. 1983). Contributory negligence in sense of failure to discover defect or guard against its existence is no defense to strict liability in tort; contributory negligence



in sense of misuse of product, or in sense of voluntarily and unreasonably proceeding in face of known danger, is good defense to strict liability. *Shields v. Morton Chem. Co.*, 95 Idaho 674, 677, 518 P.2d 857, 860 (1974); see also *Duff v. Bonner Bldg. Supply, Inc.*, 105 Idaho 123, 125–26, 666 P.2d 650, 652–53 (1983). Negligence of plaintiff is compared against negligence of each individual defendant. *Odenwalt v. Zaring*, 102 Idaho 1, 5, 624 P.2d 383, 387 (1980).

Evidence of plaintiff's non-use of seat belts was not admissible to show comparative fault or contributory negligence, nor was it admissible to show alleged failure to mitigate damages. *Quick v. Crane*, 111 Idaho 759, 780–81, 727 P.2d 1187, 1208–09 (1986). Failure to use seat belt shall not be admissible as evidence of contributory or comparative negligence. I.C. § 49–673(8).

Last Clear Chance. Doctrine of last clear chance of necessity admits avenue of escape from consequences of contributory negligence of proponent of doctrine. *Kuhn v. Dell*, 89 Idaho 250, 256, 404 P.2d 357, 360 (1965). Adoption of comparative negligence creates considerable doubt about future use of this doctrine.

Governmental Immunity. Tort Claims Act waives all governmental immunity for tort liability, save for various exceptions and conditions, specifically set forth by Act. I.C. §§ 6–901 to 6–929.

Waiver of Immunity. State of Idaho, or any agency, department, or other political subdivision thereof, exercising sovereign powers, has waived immunity against damages to extent of liability insurance carried, for torts of its officers, agents or employees, acting in their governmental capacity. See *Ford v. City of Caldwell*, 79 Idaho 499, 509, 321 P.2d 589, 594 (1958); doctrine of immunity no longer valid defense in actions based upon tortious acts of State or any of its departments, political subdivisions, counties or cities, where governmental unit has acted in proprietary as distinguished from governmental function. *Id.*

Dram Shop Act. Legislature finds it is not furnishing of alcoholic beverages that is proximate and legal cause of injuries inflicted by intoxicated person and it is legislature's intent to limit dram shop and social host liability. I.C. § 23–808. However, person may bring cause of action against person who sold or furnished alcoholic beverage if intoxicated person was under legal age or was obviously intoxicated at time alcoholic beverage was sold or furnished. I.C. § 23–808(3). Dram Shop Act barred sorority member injured when she fell from fire escape of sorority house while intoxicated, from recovering against other fraternities and sororities who had provided alcohol to member on evening when

fall occurred. *Coghlan v. Beta Theta Pi*, 133 Idaho 388, 394, 987 P.2d 300, 306 (1999).

Proximate Cause. Proximate Cause is defined as cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces result complained of and without which result would not have occurred. *Smith v. Sharp*, 82 Idaho 420, 426, 354 P.2d 172, 175 (1960). Proximate cause, in sense of cause in fact, embraces two closely related elements; first, event is cause in fact of succeeding event only if succeeding event would not have occurred “but for” prior event, and thus act or omission is not cause of ensuing damage if damage would have occurred anyway; second element is requirement that first event be “substantial factor” in producing succeeding event, and thus defendant's conduct is cause in fact of event only if it was material element and substantial factor in bringing it about. *Challis Irr. Co. v. State*, 107 Idaho 338, 343, 689 P.2d 230, 235 (Ct. App. 1984). “But for” as explanation of proximate cause only appropriate if case involves only single force or cause. If two or more causes contributed to damage, “substantial factor” is appropriate test for determining proximate cause. Proximate cause under “substantial factor” test is a cause which, in natural or probable sequence, produced damage complained of. It need not be only cause. It is sufficient if it is substantial factor concurring with some other cause acting at same time, which in combination with it, causes damage. *Fussell v. St. Clair*, 120 Idaho 591, 595, 818 P.2d 295, 299 (1991).

Before intervening, superseding cause of accident can become sole proximate cause of injury, and thus relieve first negligent wrongdoer of liability, subsequent cause must have been unforeseen, unanticipated and not probable consequence of original negligence. *Dewey v. Keller*, 86 Idaho 506, 515, 388 P.2d 988, 993 (1964); see also *Stephens v. Stearns*, 106 Idaho 249, 256, 678 P.2d 41, 48 (1984). There can be more than one proximate cause of injury. *Formont v. Kircher*, 91 Idaho 290, 299, 420 P.2d 661, 670 (1965). Intervening, superseding cause may be unforeseeable as matter of law. *Obray v. Glick*, 104 Idaho 432, 434, 660 P.2d 44, 46 (1982).

Res Ipsa Loquitur. For doctrine to apply, must prove that agency or instrumentality causing injury is under control and management of defendant and circumstances must be such that common knowledge and experience would justify inference that accident is of kind which normally does not occur unless someone is negligent. *Flowerdew v. Warner*, 90 Idaho 164, 170, 409 P.2d 110, 113 (1965).

Assumption of Risk. Assumption of risk is no longer available as absolute bar to recovery in any action instituted in state, unless plaintiff, either in writing or orally, expressly assumes risk involved. *Salinas v. Vier-*

*stra*, 107 Idaho 984, 989, 695 P.2d 369, 374 (1985). Contractual assumption of risk expressed either in writing or orally operates as total bar to recovery unless contract violates public policy. *Id.* at 375, 695 P.2d at 990.

**Sudden Emergency.** Instruction on sudden emergency should ordinarily not be given if it is adequately covered by general negligence instruction which takes into account circumstances confronting actor. *Bills v. Busco*, 97 Idaho 182, 185, 541 P.2d 606, 609 (1975).

**Rescuers.** No action shall lie for civil damages against any person or persons, who in good faith, stop at scene of accident and offer or administer first aid or medical attention to any person or persons injured, unless it can be shown that person or persons offering first aid is guilty of gross negligence in care and treatment. I.C. § 5-330.

### NO-FAULT INSURANCE

Not applicable in Idaho.

### NOTICE AND PROOF OF LOSS

See "FIRE INSURANCE, Proof of Loss"; "ACCIDENT AND HEALTH INSURANCE, Proof of loss."

**Person Giving Notice.** Insured, under contract permitting him to insure property of others, may make proof of loss in his own name. *Boise Ass'n. of Credit Men Ltd. v. U.S. Fire Ins. Co.*, 44 Idaho 249, 268, 256 P. 523, 529 (1927).

**Waiver.** Proof of disability and proof of loss provisions in life policies may be waived by insurer. *Lewis v. Cont'l Life & Accident Co.*, 93 Idaho 348, 354, 461 P.2d 243, 249 (1969). Where insurer proceeds with investigation and makes determination as to liability and denies coverage as result thereof, it is deemed to have waived right to demand further proof of loss. *Tippets v. Gem State Mut. Life Ass'n, Inc.*, 91 Idaho 91, 94, 416 P.2d 38, 41 (1966).

**When Given.** Requirement that notice of injury to insured be given immediately means within reasonable time, in view of beneficiary's situation and surrounding circumstances. *Jensma v. Benefit Ass'n of Ry. Emp.*, 1 F. Supp. 951, 953 (D. Idaho 1932), *rev'd other grounds*, 64 F.2d 457 (9th Cir. 1933). Insured must exercise ordinary care in acquiring knowledge of claim in order to promptly notify insurer as required by policy. *Berg v. Associated Emp'rs Reciprocal*, 47 Idaho 386, 389, 279 P. 627, 628 (1929).

Policy provision which stated that when accident occurs written notice should be given by insured to insurer as soon as practicable, that such notice should contain particulars sufficient to identify insured and also

reasonably obtainable information respecting time, place and circumstances of accident, names and addresses of injured and of available witnesses, and that if suit is brought against insured, insured should immediately forward to insurer every demand, notice, summons or other process received by him, were valid, reasonable requirements. *Viani v. Aetna Ins.*, 95 Idaho 22, 28, 501 P.2d 706, 712 (1972), *overruled on other grounds*, *Sloviaczek v. Estate of Puckett*, 98 Idaho 371, 565 P.2d 564 (1977).

**To Whom Given.** Notice of claim given to local underwriting agency which had apparent authority to accept notice on behalf of insurer is sufficient. *Kootenai County v. W. Cas. & Sur. Co.*, 113 Idaho 908, 913, 750 P.2d 87, 92 (1988).

**Attorney Fees.** Insureds failure to give proof of loss prior to action against insurer precluded recovery of attorney fees against insurer. *Hansen v. State Farm Mut. Auto. Ins. Co.*, 112 Idaho 663, 671, 735 P.2d 974, 982 (1987).

### PENALTY AND ATTORNEYS FEES

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

Penalty provisions for failure of insurance companies to pay policy benefits, judgments, etc. provide for attorney fees in such cases found in Idaho Code §§ 41-1209 and 41-1839.

**Unreasonable Failure to Pay.** Any insurer which fails after proof of loss has been furnished to pay person entitled thereto amount justly due under policy shall pay such further amount as Court shall adjudge reasonable as attorneys fees in subsequent action for recovery under policy. I.C. § 41-1839; *see also Assocs. Disc. Corp. v. Yosemite Ins. Co.*, 96 Idaho 249, 257, 526 P.2d 854, 862 (1974). Amount of attorney fees to be awarded is sum which trial court in its discretion determines to be reasonable; there is no requirement that amount of attorney's fees awarded bear reasonable relationship to amount of judgment. *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 281, 561 P.2d 1299, 1314 (1977).

### PRIVILEGED COMMUNICATIONS

Except as otherwise provided by Constitution or by Statute, or Rules of Evidence, no person has privilege to refuse to be witness, refuse to disclose any matter, refuse to produce any object or writing, or prevent another from being witness or disclosing any matter or producing any object or writing. I.R.E. 501. Specific privileges include lawyer/client privilege, I.R.E. 502; physician and psychotherapist/patient privilege, I.R.E. 503; husband and wife privilege, I.R.E. 504; religious privilege, I.R.E.



505; mediator privilege, I.R.E. 507; governmental privileges, I.R.E. 508; identity of informer, I.R.E. 509; parent/child, guardian or legal custodian/ward privilege, I.R.E. 514; accountant/client privilege, I.R.E. 515; school counselor/student privilege, I.R.E. 516; licensed counselor/client privilege, I.R.E. 517; licensed social worker/client privilege, I.R.E. 518; hospital, in-hospital medical staff committee and medical society privilege, I.R.E. 519; medical malpractice screening panel privilege, I.R.E. 520.

As a general rule, every person has privilege to refuse to disclose tenor of his vote at political election conducted by secret ballot. Exception does not apply if court finds vote was cast illegally or determines disclosure should be compelled pursuant to election laws. I.R.E. 506.

Waiver. Above privileges may be waived if holder of privilege voluntarily discloses or consents to disclosure of any significant part of matter or communication. I.R.E. 510.

## PRODUCTS LIABILITY

Idaho Product Liability Reform Act, I.C. §§ 6-1401-10. Product seller not subject to liability for harm caused after product's "useful safe life." I.C. § 6-1403(1)(a).

Comparative responsibility shall not bar recovery so long as such responsibility is not as great as responsibility of person against whom recovery is sought, but damages shall be diminished in proportion to amount of responsibility attributable to persons recovering. I.C. § 6-1404. Statute must be interpreted as requiring all negligent actors contributing to causation of any accident or injuries to be listed on jury verdict form regardless of whether they are parties to action. *Vannoy v. Uniroyal Tire Co.*, 111 Idaho 536, 542, 726 P.2d 648, 654 (1985).

Conduct affecting comparative responsibility. I.C. § 6-1405. Changes in product design, warnings or instructions, technological feasibility, "state of art," or industry custom occurring after manufacture and delivery of product are not admissible to prove defect. I.C. § 6-1406.

Liability of product sellers other than manufacturers is limited. I.C. § 6-1407. Distributor does not have absolute duty to test for, discover and warn of all possible dangers associated with product. *Fish Breeders of Idaho, Inc. v. Rangen, Inc.*, 108 Idaho 379, 384, 700 P.2d 1, 6 (1985).

Strict Liability. Doctrine of strict liability in tort, as it appeared in Restatement of Law, Torts Second, is

adopted as law of Idaho. *Shields v. Morton Chem. Co.*, 95 Idaho 674, 676, 518 P.2d 857, 859 (1974).

Plaintiff carries burden of showing he has suffered injury, product was defective or unsafe when it left control of manufacturer, and plaintiff's injury was proximately caused by product. *Earl v. Cryovac*, 115 Idaho 1087, 1088, 772 P.2d 725, 726 (Ct. App. 1989).

Unreasonably dangerous requirement of Restatement affirmed. *McBride v. Ford Motor Co.*, 105 Idaho 753, 762, 673 P.2d 55, 64 (1983).

In order to recover under strict liability claim, plaintiff must prove existence of defect, but need not prove specific product defect, and prima facie case may be proved through direct or circumstantial evidence. *Curtis v. DeAtley*, 104 Idaho 787, 790, 663 P.2d 1089, 1092 (1983). Fact that product was excepted from strict liability under doctrine of unavoidably unsafe product does not preclude negligence claim. *Toner v. Lederle Labs.*, 112 Idaho 328, 342, 732 P.2d 297, 311 (1987).

In order to establish claim under crashworthiness doctrine, evidence must show that defect in vehicle enhanced or intensified injuries received, rather than establishing that defect caused accident. *Jensen v. Am. Suzuki Motor Corp.*, 136 Idaho 460, 463, 35 P.3d 776, 779 (2001). There is no recovery in negligence for purely economic losses from manufacturer of defective product. *Adkison Corp. v. Am. Bldg. Co.*, 107 Idaho 406, 411, 690 P.2d 341, 346 (1984).

Laws of negligence and strict liability impose no liability on manufacturer of product for defects which cause purely economic losses. *Myers v. A.O. Smith Harvestore Prods. Inc.*, 114 Idaho 432, 435, 757 P.2d 695, 698 (Ct. App. 1988).

Duty to Warn. Failure to warn may be basis for recovery under strict liability in situations where danger is not obvious; however, if danger is obvious or if danger is known to person injured, duty to warn does not attach. *Mico Mobile Sales & Leasing, Inc. v. Skyline Corp.*, 97 Idaho 408, 414, 546 P.2d 54, 60 (1975).

Warranty. Express warranties by affirmation, promise, description, sample. I.C. § 28-2-313. Implied warranty-merchantability-usage of trade. I.C. § 28-2-314. Implied warranty-fitness for particular purpose. I.C. § 28-2-315. Exclusion or modification of warranties. I.C. § 28-2-316. Cumulation and conflict of warranties express or implied. I.C. § 28-2-317. Third party beneficiaries of warranties, express or implied. I.C. § 28-2-318.

One element of proof necessary to sustain implied warranty of fitness is plaintiff's reliance as buyer upon skill or judgment of seller to select suitable goods. Prima



facie case of products liability may be by direct or circumstantial evidence and inferences arising therefrom based on expert opinion testimony and condition of product after accident. However, plaintiff will not carry burden of proof by merely proving facts of accident. This case involved alleged defective steering and design of drivers seat in truck-tractor, two years old with 116,000 miles. Verdict for plaintiff affirmed. *Farmer v. Int'l Harvester Co.*, 97 Idaho 742, 553 P.2d 1306 (1976).

**Defenses.** While plaintiffs' contributory negligence is not bar to recovery in products liability action, misuse of product in manner unforeseeable to manufacturer is a defense; such misuse defense embodies policy that manufacturer should not absorb consequences of plaintiff's misuse of product in way in which manufacturer could not reasonably anticipate. *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*, 411 F. Supp. 598, 602 (D. Idaho 1976). Misuse of product is affirmative defense to strict liability action against manufacturer, and thus plaintiff not entitled to instruction that manufacturer must foresee some degree of misuse of its products, either by user or by third parties, and must take reasonable precaution to minimize harm that may result from misuse or abuse. *McBride v. Ford Motor Co.*, 105 Idaho 753, 762, 673 P.2d 55, 64 (1983).

### RELEASE

See Law Digest Tables.

Release taken within 15 days after personal injury may be disavowed within one (1) year. I.C. § 29-113.

**Accord and Satisfaction.** Defense of "accord and satisfaction" is, in effect, substitution of new contract for previous contract or tort, and burden of proof is on one who relies on new contract in settlement of old obligation or controversy. *Clay v. Rossi*, 62 Idaho 140, 105-51, 108 P.2d 506, 511 (1940).

**Joint Tortfeasors.** Release by injured person of one or more tortfeasors who are not jointly and severally liable to injured person, whether before or after judgment, does not discharge another tortfeasor or reduce claim against another tortfeasor unless release so provides and negligence or comparative responsibility of tortfeasor receiving release is presented to and considered by finder of fact, whether or not finder of fact apportions responsibility to tortfeasor receiving release. I.C. § 6-805. Amount plaintiff receives in settlement from party should be deducted from plaintiff's judgment even though settling party was never judicially determined technically to be joint tortfeasor. *Quick v. Crane*, 111 Idaho 759, 783, 727 P.2d 1187, 1211 (1986). Trial court's determination whether settling party is joint tortfeasor must be based on pleadings and not on jury's ap-

portionment of liability. *Id.* If issue of proportionate fault is litigated between joint tortfeasors in same action, release by injured person of one joint tortfeasor will not relieve him from liability to make contribution to another joint tortfeasor unless release given before right of other joint tortfeasor to secure money judgment or contribution has accrued, and provides for reduction, to extent of pro rata share of released tortfeasor, of injured person's damages recoverable against all other tortfeasors. I.C. § 6-806.

### REPRESENTATIONS AND WARRANTIES

Insurer has right to choose persons with whom he will contract and he should not be retroactively made to accept relationship for which he did not knowingly bargain. *Occidental Fire & Cas. Co. v. Cook*, 92 Idaho 7, 9, 435 P.2d 364, 366 (1967).

**Avoidance.** Contract of insurance and liability of insurer may be avoided by reason of fraud at inception of contract, concealment, or misstatement of matters material to risk. *Matthews v. N.Y. Life Ins. Co.*, 92 Idaho 372, 376, 443 P.2d 456, 460 (1968). Material misrepresentations of fact by insured which induces insurer to assume risk which otherwise it would not have taken, is legal grounds for avoidance. *Charlton v. Wakimoto*, 70 Idaho 276, 281, 216 P.2d 370, 372 (1950). False answers in application for life insurance, made in good faith, will not void policy unless they have misled insurer to its injury. Statements in application for life insurance that are not material to risk cannot be made material by agreement of parties. *Russell v. N.Y. Life Ins. Co.*, 35 Idaho 774, 778-79, 209 P. 273, 276 (1922).

**Applications for Insurance.** Misrepresentations, omissions, concealment of facts, or incorrect statements in applications for insurance do not prevent recovery under policy unless they are fraudulent or material either to acceptance of risk or to hazard resulting in loss, or insurer, in good faith, would not have issued policy if true facts had been made known as required by application for policy or contract or otherwise. I.C. § 41-1811; see also *Wardle v. Int'l Health & Life Ins. Co.*, 97 Idaho 668, 673, 551 P.2d 623, 628 (1976).

**False Applications, Claims.** Any person with intent to defraud or deceive who knowingly makes any false, incomplete or misleading statement in connection with, or in support of any claim for payment or other benefit pursuant to insurance policy, may be found guilty of felony. I.C. § 41-293.

### SERVICE OF PROCESS

State Courts of Idaho have jurisdiction of and can obtain personal service upon non-resident person, asso-

ciation, or corporation, as result of commission of any tortious action within State of Idaho, transaction of any business within State for pecuniary benefit, or ownership, use or possession of any real property situated within State. I.C. § 5-514.

### SUBROGATION

Generally. Through subrogation, insurer entitled to recoup loss inflicted on its insured which it has paid pursuant to its policy. *Int'l Equip. Serv., Inc. v. Pocatello Indus. Park Co.*, 107 Idaho 1116, 1119, 695 P.2d 1255, 1258 (1985); see *Stonewall Surplus Lines Ins. Co. v. Farmers Ins. Co.*, 132 Idaho 318, 322, 971 P.2d 1142, 1146 (1998). Insurer not entitled to recover by subrogation against alleged wrongdoer protected by policy. *Pendlebury v. W. Cas. & Sur. Co.*, 89 Idaho 456, 468, 406 P.2d 129, 136 (1965)

Fidelity Insurance. Where employer liable for his employee's negligence entitled to recoup from employee, employer's liability insurer may subrogate and collect from employee or employee's insurer. *Travelers Ins. Co. v. Gen. Cas. Co.*, 187 F. Supp. 234, 236 (D. Idaho 1960).

Franchisee's liability insurers did not have direct action for equitable subrogation against driver's and owner's personal automobile insurer, based on primary coverage allegedly due driver and owner under automobile policy, for liability insurers' settlement of personal injury suit. *Stonewall*, 132 Idaho at 321-22, 971 P.2d at 1145-46.

Mortgagee's Rights. Insurer not entitled to subrogation to insured mortgagee's security, without first paying remainder of mortgage debt. *Carroll v. Hartford Fire Ins. Co.*, 28 Idaho 466, 482, 154 P. 985, 989 (1916).

Workers' Compensation. Employer may exercise its statutory right of subrogation when it has voluntarily paid workers' compensation benefits or become liable therefor. I.C. § 72-223(3); see also *Struhs v. Prot. Techs., Inc.*, 133 Idaho 715, 719, 992 P.2d 164, 168 (1999).

Settlement. Where husband and wife, who had been paid by insurer for damage caused in collision, negotiated settlement with motorist for personal injury and damage to automobile as result of accident, insurer's recovery under right of subrogation for amount paid husband and wife was subject to reduction by amount husband and wife expended in obtaining settlement. *Cedarholm v. State Farm Mut. Ins. Cos.*, 81 Idaho 136, 141-42, 338 P.2d 93, 95-96 (1959).

### WAIVER AND ESTOPPEL

Purpose of doctrine of estoppel in insurance cases is to enforce contract as originally agreed upon by parties, and not write new contract. *Foremost Ins. Co. v. Putzier*, 100 Idaho 883, 887-88, 606 P.2d 987, 991-92 (1980). Insurers acknowledgment at receipt of notice of loss or claim under policy; furnishing of forms for reporting loss or claim; giving information relative to making claim; making proof of loss; receiving or acknowledging receipt of any forms or proofs completed or uncompleted; investigating any loss or claim under any policy; negotiating towards possible settlement, are not acts amounting to waiver. I.C. § 41-1832.

Non-waiver Agreements. In action by injured parties against insurer to recover on judgments obtained against insured for damages arising out of negligent operation of insured's automobile, evidence sustained trial court's finding that insurer was not prejudiced but accepted insured's oral notice of claim and acted on it over period of more than three months before demanding nonwaiver agreement. *Leach v. Farmer's Auto. Interinsurance Exch.*, 70 Idaho 156, 161, 213 P.2d 920, 923 (1950).

Proof of Loss. Where agent authorized to adjust loss, acceptance of proof other than required by policy, held waiver thereof. *Therault v. Cal. Ins. Co.*, 27 Idaho 476, 483, 149 P. 719, 721 (1915). Furnishing proof of loss within period stipulated in policy is condition precedent to recovery; but requirement may be waived, or insurers estopped, by lulling insured into belief that formal proofs will not be required. *Alliance Ins. Co. v. Enders*, 293 F. 485, 488 (9th Cir. 1923). Where insurer, with knowledge of accident, demanded additional proof, it waived right to object that notice of accident had not been given, as required by policy. *Douville v. Pac. Coast Cas. Co.*, 25 Idaho 396, 138 P. 506, 507 (1914).

Agents Authority. Agent of foreign company with power to solicit and take applications, collect premiums, countersign and deliver policies may waive policy provision with reference to change in ownership. *Collard v. Universal Auto. Ins. Co.*, 55 Idaho 560, 572, 45 P.2d 288, 293 (1935). Company held estopped to deny agent's authority to write policy. *Burdick v. Cal. Ins. Co.*, 50 Idaho 327, 295 P. 1005, 1007 (1931).

### WORKERS' COMPENSATION

I.C. §§ 72-101 to 72-1717.

Definitions. I.C. § 72-102. Employee means any person who has entered into employment of, or who works under contract of service or apprenticeship with employer. I.C. § 72-102 (12). Does not include excepted employment such as household domestic service, casual

employment, outworkers, members of employer's own family household and others unless employer elects coverage. I.C. § 72-212. Employer's family members not dwelling in employer's household may elect to be exempt from coverage. *Id.* Employer means any person who has expressly or impliedly hired or contracted services of another. I.C. § 72-102 (13).

State Insurance Fund is independent agency having status of private insurance company. *Selkirk Seed Co. v. State Ins. Fund*, 135 Idaho 434, 437, 18 P.3d 956, 959 (2000).

Attorney's Fees. See I.C. § 72-804.

Question of whether grounds exist for awarding claimant's attorney's fees is question of fact for Industrial Commission. Attorney's fees are not granted to claimant as matter of right under workers' compensation law, but may only be affirmatively awarded under circumstances set forth by statute. *Wutherich v. Terteling Co., Inc.*, 135 Idaho 593, 595, 21 P.3d 915, 917 (2001).

Exclusions. This chapter does not apply to any domestic reciprocal insurer transacting workers' compensation insurance only and insuring solely hazards or perils of its subscribers exclusively associated with single industry. I.C. § 41-1601(2).

Workers' Compensation. No claims or compensation under workers' compensation law shall be assignable and all compensation and claims shall be exempt from all claims of creditors, except restrictions of this law shall not apply to enforcement of order of any court for support of any person by execution, garnishment, or wage withholding under Chapter 12, Title 7, Idaho Code. I.C. § 72-802.

Burden of proof in industrial accident case is on the claimant. *Vernon v. Omark Indus.*, 115 Idaho 486, 488, 767 P.2d 1261, 1263 (1989).

Injured employee cannot have full recovery against both employer and third-party defendant. Judgment must be reduced by amount of workers' compensation benefits received. *Schneider v. Farmers Merch., Inc.*, 106 Idaho 241, 244, 678 P.2d 33, 36 (1983).

Claimant's psychological disorder could be considered personal circumstance for purposes of determining if claimant is totally and permanently disabled. *Mapusaga v. Red Lion Riverside Inn*, 113 Idaho 842, 849-50, 748 P.2d 1372, 1379-80 (1987), *overruled on other grounds*, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

Idaho Supreme Court declined to adopt doctrine of dual capacity. *Rhodes v. Sunshine Mining Co.*, 113 Idaho 162, 168, 742 P.2d 417, 423 (1987).

Arising out of and in course of. Claimant receives injury in course of employment if worker is doing duty that claimant is employed to perform. *Gage v. Express Pers.*, 135 Idaho 250, 253, 16 P.3d 926, 929 (2000). Claimant's employment need not be only cause of disability nor precipitate it in order for disability to be compensable; rather employment need only contribute to disability. *O'Loughlin v. Circle A Const.*, 112 Idaho 1048, 1051, 739 P.2d 347, 350 (1987).

Occupational Disease. Employee can be disabled more than once by given occupational disease for workers' compensation purposes, even when further disabilities involve same parts of body as first disability; proper inquiry is not whether employee has experienced prior symptoms, but whether employee is totally incapacitated from work tasks that brought about incapacity, and although prior symptoms are relevant in determining whether employee's occupational disease was incurred during course of employment, they are not relevant to determination of total incapacity. *Blang v. Liberty Nw. Ins. Corp.*, 125 Idaho 275, 277-78, 869 P.2d 1370, 1372-73 (1994). Aggravation of underlying disease is compensable under workers' compensation case law only if such aggravation results from industrial accident. *Nycum v. Triangle Dairy Co.*, 109 Idaho 858, 862 712 P.2d 559, 563 (1985).

Benefits-Death. Claimant was not entitled to annual adjustment in average state wage paid for work-related death of spouse under workers' compensation death benefits statute that existed at time of spouse's death; statute intended to be fixed and quantifiable. *Vincent v. Dynatec Mining Corp.*, 132 Idaho 200, 202, 969 P.2d 249, 251 (1998).

Benefits-Wages. Industrial Commission's findings specifying workers' compensation claimant's hourly wage and number of hours worked per week constituted determination of claimant's average weekly wage for purposes of benefits calculation. *Phinney v. Shoshone Med. Ctr.*, 131 Idaho 529, 531-32, 960 P.2d 1258, 1260-61 (1998).

Benefits-Medical. Claimant who sought benefits for medical expenses associated with bilateral carpal tunnel syndrome was not required to show total disability prior to surgery to recover medical benefits for such surgery. *Mulder v. Liberty Nw. Ins. Co.*, 135 Idaho 52, 58, 14 P.3d 372, 378 (2000); see I.C. § 72-432(1).

Benefits-Disability. Medical stability sets time at which temporary impairment or disability ends and determination of permanent disability occurs. *McGee v. J.D. Lumber*, 135 Idaho 328, 332, 17 P.3d 272, 276 (2000).