

DIGEST OF INSURANCE LAW

IOWA

Courtesy of
Lane & Waterman LLP
Davenport, Iowa

CIVIL JUDICIAL SYSTEM

Courts of Original Jurisdiction

District Courts are courts of record which have general, and original jurisdiction, of all actions.

It is unified trial court having district and associate judges and judicial magistrates. I.C.A. §§602.6101, 602.6104.

Appellate Courts

Supreme Court has appellate jurisdiction in cases in chancery and constitutes court for correction of errors at law. I.C.A. §602.4102.

Consists of seven justices and is state court of last resort. I.C.A. §602.4101.

Court of Appeals consists of nine judges and has same grant of appellate jurisdiction as Supreme Court. I.C.A. §§602.5102, 602.5103.

All appeals are to Supreme Court, which may transfer appeal to Court of Appeals. I.C.A. §602.4102.

Further appeal from decision by Court of Appeals by application to Supreme Court for discretionary review. I.C.A. §602.4102.

LAW

Abbreviations

I.C.A. – Iowa Code Annotated.
Ia. R. Civ. P. – Iowa Rules of Civil Procedure.
Iowa – Iowa Reports.
N.W. – North Western Reporter.
N.W.2d – North Western Reporter, Second Series.
References are to Code of Iowa, 2009.

ACCIDENT AND HEALTH INSURANCE

Disability. See “DISABILITY.”

Disease induced by Accident. No statutory rule on this subject but has been held that malady or disorder

resulting from accident is not disease within exceptions of accident policy. Malady or disorder designated by physicians as disease may be result of accidental injury in such sense as to be covered by accident policy even though such policy excluded liability for injury due to disease. *Kenny v. Bankers’*, 136 Iowa 140, 113 N.W. 566, 569 (1907). Where one is injured in accident and disease follows as result and dies of disease, accident is still proximate cause of death. *Dewey v. Abraham Lincoln Life*, 218 Iowa 1220, 257 N.W. 308, 311 (1934).

Medical policy covering only specified diseases does not cover unspecified disease caused by specified disease. *Dolan v. Hoosier Cas.*, 252 Iowa 1188, 110 N.W.2d 334, 335-36 (1961).

Double Indemnity. In case of *Mochel v. I.S.T.M.A.*, 203 Iowa 623, 213 N.W. 259, 260 (1927) - held valid - generally included in carrier accident policies.

“Medical and surgical treatment” within exclusionary clause of accidental death policy included medical and surgical procedures performed for purpose of aiding in diagnosis of particular disease. *McKay v Bankers Life Co.*, 187 N.W.2d 736, 738 (Iowa 1971).

Terms “illness,” “sickness,” and “disease” in health insurance policies are synonymous. *Witcraft v. Sundstrand*, 420 N.W.2d 785, 788 (Iowa 1988). “Disease” is a “morbid condition of the body, a deviation from the healthy or normal condition of any of the functions or tissues of the body.” *Id.*

Infertility is “illness” for purposes of health insurance policy, and artificial insemination is covered treatment for such illness. *Id.* at 789.

“Treatment” covers “all steps taken to effect a cure of an injury or disease, including examination and diagnosis as well as the application of remedies.” *Id.* at 790.

“Sickness” in accident and health policy includes alcoholism. *Kitchen v. Time Ins. Co.*, 232 N.W.2d 863, 865 (Iowa 1975).

Where insurance policy excluded coverage for dental injury treatment rendered more than 72 hours after initial accident, insured was not entitled to coverage for



treatments rendered after 72 hours even though dentist could not have treated injuries earlier due to misalignment of teeth. *Hickman v. IASD*, 572 N.W.2d 165, 167 (Iowa Ct. App. 1997).

ACCIDENTAL MEANS

Iowa courts do not distinguish between accidental results and accidental means. *Dawson v. Bankers Life*, 216 Iowa 586, 247 N.W. 279, 282 (1933). When injuries or death follow or result from voluntary act of insured and act is one which is manifestly dangerous but which is ordinarily done without serious consequences to doer, such result is by accidental means. *Lickleider v. Iowa*, 184 Iowa 423, 166 N.W. 363, 367 (1918). Accidental result and accidental means by which it is caused are somewhat identical and proof of former may be considered as proof of latter. *Miser v. Iowa*, 223 Iowa 662, 273 N.W. 155, 160 (1937).

Presumption against suicide. *Brown v. Metropolitan*, 233 Iowa 5, 7 N.W.2d 21, 24 (1942).

Under “wrecked and disabled” clause, vehicle must be “wrecked and disabled” at time insured was thrown therefrom—not subsequently. *Slaughter v. Company*, 214 Iowa 451, 240 N.W. 229, 231 (1932). Death caused by drinking intoxicating liquor is not effected by accidental means, under policy providing for injury from external violent and accidental means. *Naggy v. Provident*, 218 Iowa 694, 255 N.W. 526, 527-28 (1934). Cause of death, proofs and weight of evidence. See *Aldine v. National*, 222 Iowa 20, 268 N.W. 507 (1936).

Iowa follows general rule that determination of whether injury is accidental must be made from point of view of insured and what he intended or should have reasonably expected. *Wade’s Estate v Continental Ins. Co.*, 514 F.2d 304, 306-07 (8th Cir. 1975).

Cause of death need not be proved to absolute certainty; evidence as to reasonable medical certainty is sufficient. *Poweshiek Co. Nat’l Bank v. Nationwide*, 261 Iowa 844, 156 N.W.2d 671, 678 (1968).

In accidental death cases, where evidence is such that reasonable minds differ, question of whether injuries were accidental was for the jury. *Johnson v. Mutual Life*, 253 Iowa 1218, 115 N.W.2d 825, 829 (1962).

Insured’s death during surgical procedure to repair defective aorta, which itself was not a covered accident, was not accidental death for insurance policy purposes. *Austin v. Cuna Mut.*, 603 N.W.2d 577, 580 (Iowa 1999).

“Accidental death” does not include death resulting from artificial heart valve defect since valve had become a functional part of claimant’s body. *Century Companies*

of America v. Kraehling, 484 N.W.2d 197, 198-99 (Iowa 1992).

Where personal accident insurance policy provided benefits for death due to an accident, but excluded benefits if death was directly or indirectly caused by physical or mental illness, plan administrator did not abuse discretion in finding that death was caused by physical illness when beneficiary was found dead in bathtub and had a history of epilepsy and seizures, and police report, autopsy and death certificate listed epilepsy as contributing factor in beneficiary’s death. *Jones v. ING North America Ins. Group*, No.07-1099, 2008 WL 508672, *2 (Iowa Ct. App., Feb. 27, 2008).

ADJUSTERS

Definition – Adjusting agent with authority to ascertain and settle losses has of necessity power to determine what proofs are satisfactory. *Brock v. D. M. Ins.*, 106 Iowa 30, 75 N.W. 683, 683-85 (1898).

Licensing – Statutory regulation of public adjusters, see I.C.A. Ch. 522C.

Scope of Authority – An adjuster can bind an insurance company if he or she acts within the scope of either actual or apparent authority conferred by the insurer. *Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 493-94 (Iowa 2000). Iowa law recognizes that an adjuster is cloaked with the authority to adjust a loss with an insured and his or her powers and authority are co-extensive with the business entrusted to his or her care. *Id.*

AGE

See “AUTOMOBILES”; “LIABILITY INSURANCE, Violation of Law”; “NEGLIGENCE..”

AGENTS AND BROKERS

Definition. The Iowa Code formerly provided a general definition of agent, a specific definition of agent, and a separate definition for soliciting agent. See I.C.A. §515.123-124 (repealed 2001). The Iowa Code also formerly provided an exception for activities that fell outside the agency relationship. I.C.A. §515.126 (repealed 2001). Currently, however, the Code provides that any officer, insurance producer, or representative of an insurance company who solicits insurance, procures applications, issues policies, adjusts losses, or transacts the business generally of an insurance company shall be held to be its agent with authority to transact all business within the scope of the agency relationship, anything in the application, policy, contract, by-laws, or articles of incorporation of such insurance company to the contrary notwithstanding. I.C.A. §515.105.

Statutory licensing and residency provisions are for protection of insured and are not to be used by insurer to avoid its obligations on insurance contract. *State v. Sellers*, 258 N.W.2d 292, 299-300 (Iowa 1977).

For Whom – As general rule, same person cannot act as agent for both insurance company and insured unless he or she does so with consent of both parties. *Cole v. Hartford Acc. & Indem. Co.*, 242 Iowa 416, 46 N.W.2d 811, 817-18 (1951); *Schmidt v. Fortis*, 349 F. Supp. 2d 1171, 1199 (N.D. Iowa 2005). In *Sioux City Inv. Co. v. Hartford Fire Ins. Co.*, 190 Iowa 1135, 181 N.W. 446, 447-48 (1921), court held when agent who was not insurer's duly authorized agent took application, forwarded it to insurer's authorized agent, and delivered policy issued on application to insured after receiving it from authorized agent, and when such agent had previously placed insurance on insured's buildings with other companies, he was agent of insured and not insurer.

Fraud by Agent. It is unlawful for any agent of any insurance company, with knowledge that its certificate of authority has been suspended or revoked, or is insolvent or is doing unlawful business, to solicit insurance, or do any act or thing toward procuring new business for said company. I.C.A. §507.16. Insurance Trade Practices Act, I.C.A. §507B, establishes prohibitions against unfair competition and deceptive acts or practices.

Knowledge of Agent. No statutory rule on imputed knowledge, but generally held that while insurance company may be bound by knowledge of soliciting agent regarding past or present conditions, such agent has no power to waive future conditions, nor is company estopped by his knowledge of future intentions of insured. *Sowers v. Mutual Fire*, 113 Iowa 551, 85 N.W. 763, 764-65 (1901); *Stoner v. First Am. Fire Ins. Co.*, 215 Iowa 665, 246 N.W. 615, 617 (1933). Insurance company is chargeable with knowledge of facts made known to its agent at time of taking application. *Key v. Des Moines Ins. Co.*, 77 Iowa 174, 41 N.W. 614, 615 (1889). Acts and declarations of soliciting agent while writing application for insurance are those of insurer itself even when agent is mistaken mistakes of soliciting agent are mistakes of insurer. *Johnson v. United Investors*, 263 N.W.2d 770, 773 (Iowa 1978). Knowledge of agent of imperfect ownership or change in ownership and company's continuing to treat policy as of binding force and inducing insured to act in that belief will constitute waiver of forfeiture on above grounds. *Thompson v. Patron's*, 231 Iowa 168, 300 N.W. 642, 645 (1941). Agent's knowledge of intention of applicant for insurance to violate, at some future time, one or more conditions of policy as written is not binding upon insurer. *House v. Security Fire*, 145 Iowa 462, 121 N.W. 509, 512 (1909).

Liability of Agent for Negligence. Insurance agent obligated to exercise reasonable care, diligence and judgment in the performance of tasks undertaken on behalf of principal. *Humiston v. Rowley*, 512 N.W.2d 573, 574-75 (Iowa 1994). Standard of care for insurance agent is skill and knowledge normally possessed by agents in good standing in similar community. *Id.* at 575.

In claim against agent for breach of duty, if claim is more than failure to procure coverage requested and paid for, expert testimony is necessary to establish standard of care. *Id.* at 576.

Liability of Agent for Failure to Procure Policy. Equity will reform policy, so as to make it express intention of parties when policy fails to represent such intention because of fault or negligence of agent. *Morgensen v. Hawkeye Cas.*, 234 Iowa 430, 12 N.W.2d 823, 825 (1943). Party seeking reformation need not prove the insurer would actually have insured the particular risk if agent had not made mistake as reformation maybe had to afford coverage of any lawful risk. *Johnson v. United Investors*, 263 N.W.2d 770, 773 (Iowa 1978).

Insurance agent owes duty to principal to exercise reasonable skill, care and diligence in obtaining requested insurance coverage, and agent is liable to principal for loss or damage occasioned by this negligence. *Smith v. State Farm*, 248 N.W.2d 903, 905 (Iowa 1976).

Liability of Agent for Insolvent Company. Agent who places policy with insolvent insurer is personally liable to insured in case of loss regardless of whether agent knew of insolvency or not. *Hartman & Daniels v. Hollowell*, 126 Iowa 643, 102 N.W. 524 (1905). Insured may also recover premium, liquidated damages and attorney fees. I.C.A. §§507.16, 511.17.

License and Regulation. Agents must procure license from Commissioner of Insurance before acting in state. Requirement applies to persons offering to public for a fee or commission to engage in offering and advice, counsel, opinion, service regarding the benefits, advantages or disadvantages promised under any policy of insurance which could be issued in this state. Commissioner for good cause may decline to issue and may revoke license. I.C.A. § 522.

APPRAISAL

Appraisal is supplementary arrangement to resolve insurance dispute without formal lawsuit and if appraisal provision is included in policy, whether under policy terms or pursuant to independent agreement, provision is valid and binding on parties. *Central Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 466 N.W.2d 257, 260 (Iowa 1991). Appraisal required by standard fire insurance policy on written demand of insured or insurer requires one

party or other to make demand for appraisal before appraisal procedures are activated. I.C.A. §515.109(6); *Terra Industries, Inc. v. Commonwealth Ins. Co.*, 981 F. Supp. 581, 593-94 (N.D. Iowa 1997). Insured's suit prior to any demand for appraisal did not preempt or cut off insurer's recourse to appraisal process where policy permitted demand for appraisal when insured and insurer failed to agree as to actual cash value or amount of loss. *Id.* at 598-99.

ARBITRATION

Provisions in written agreement to submit to arbitration for an existing controversy are valid, enforceable and irrevocable unless grounds exist at law or in equity for revocation of agreement. I.C.A. §679A.1. Provisions to submit to arbitration for future controversies are also valid except in situations involving: 1) contracts of adhesion; 2) contracts between employers and employees; and 3) for claims sounding in tort unless otherwise provided in a separate writing executed by all parties to the contract. I.C.A. §679A.1.

Characterization of controversy as "existing" or "future" must be made with reference to time when parties entered into arbitration agreement. *Mut. Serv. Cas. Ins. v. Iowa Dist. Court for Woodbury County*, 372 N.W.2d 261, 263-64 (Iowa 1985).

ATTORNEYS

Appointment and Authority. Relationship between attorney and client is predicated on doctrine of principal and agent. *Dillon v. City of Davenport*, 366 N.W.2d 918, 923 (Iowa 1985). Clients are responsible for actions of their lawyers. *Wagner v. Miller*, 555 N.W. 2d 246, 249 (Iowa Ct. App. 1996); *Troendle v. Hanson*, 570 N.W.2d 753, 756 (Iowa 1997). Except for basic decisions such as whether to plead guilty, waive jury or testify in his own behalf, client ordinarily is bound by strategic decisions made by its attorney. *State v. Turner*, 345 N.W.2d 552, 559 (Iowa Ct. App. 1983).

Conflict of Interest. Conflicts are governed by Iowa Rules of Prof'l Conduct, 32:1.7, 32:1.8.

Legal Malpractice. In order to establish prima facie case of legal malpractice, plaintiff must show: 1) existence of attorney-client relationship; 2) attorney breached duty to client by his acts or failures to act; 3) attorney's breach of duty was proximate cause of injury to client; and 4) client sustained actual injury, loss or damages. *Schmitz v. Crotty*, 528 N.W.2d 112, 115 (Iowa 1995); *Huber v. Watson*, 568 N.W.2d 787, 790 (Iowa 1997). To recover for legal malpractice, plaintiff must show that but for attorney's negligence loss would not have occurred. *Blackhawk Bldg. Systems Ltd. v. Law*

Firm of Aspelmeier, Fisch, Power, Warner & Engberg, 428 N.W.2d 288, 290 (Iowa 1988).

Fees. Attorney and client should be free to contract with respect to attorney's fee in order that both parties may be adequately protected. *In re Lands*, 153 N.W.2d 706, 711 (Iowa 1967). Attorney fee disputes generally resolved under principles of contract law. *Tom Riley Law Firm, P.C. v. Tang*, 521 N.W.2d 758, 759 (Iowa Ct. App. 1994). Attorney who is retained on contingent fee basis should prepare written instrument precisely detailing all terms of employment contract. Iowa Rules of Prof'l Conduct, 32:1.5(c). Courts have authority to monitor and determine reasonableness of contingent fee contracts under their inherent power to regulate the bar. *Wunschel Law Firm, P.C. v. Clabaugh*, 291 N.W.2d 331, 334 (Iowa 1980). Contingent fee contract is unreasonable when it provides for determination of fees by factors having no logical relationship to value of service. *Id.* at 337.

AUTOMOBILES

See Law Digest Tables.

See "NEGLIGENCE."

Age. Operator's license issued at age of 18. Graduated licensing scheme between ages 14-17. I.C.A. §§321.177, 321.180B. Ages 14 to 18 may obtain an instruction permit when statutory requirements are met; ages 16 to 17 may obtain an intermediate license when statutory requirements are met; and 17 may obtain full license if driver held an intermediate license for previous 12 months and other statutory requirements are met.

Agency. Owner of motor vehicle is responsible for negligence of operator if vehicle used with consent. I.C.A. §321.493. Consent to use vehicle may be either express or implied from circumstances. *Farm & City Ins. Co. v. Gilmore*, 539 N.W. 2d 154, 159 (Iowa 1995). When ownership of vehicle is admitted, rebuttable presumption arises that vehicle was operated with consent of owner. *State Farm v. Employers Mut.*, 500 N.W.2d 80, 82 (Iowa Ct. App. 1993). Iowa does not follow initial permission rule by which permission to use automobile granted to one party bestows owner's permission to other parties to use same vehicle. *VanZwol v. Branon*, 440 N.W.2d 589, 593-94 (Iowa 1989). Vicarious liability under I.C.A. §321.493 applies only where driver engages in negligent acts and not where the driver intentionally harms another. *Tomkinson v. Turner*, No.07-1598, 2008 WL 942286, *4 (Iowa Ct. App., April 9, 2008).

Iowa vicarious liability statute (I.C.A. §321.493) is preempted by Graves Amendment to SAFETEA-LU, 49 U.S.C. §30106, so that rental car company has no vicari-



ous liability for leasee's negligence. *Martin v. Crook*, 2009 WL 2392077 (Iowa Ct. App. 2009).

Compulsory Insurance Coverage. I.C.A. §321.20B provides that "person shall not drive a motor vehicle on the highways of this state unless financial liability coverage...is in effect for motor vehicle and unless the driver has in the motor vehicle the proof of financial liability coverage card issued for the motor vehicle."

An insurer may not sell less coverage than is required by statute. *Lindhal v. Howe*, 345 N.W.2d 548, 551 (Iowa 1984). *overruled on other grounds by Miller v. Westfield*, 606 N.W.2d 301 (Iowa 2000).

Diminution in Value. Recoverable when repairs are performed on vehicle, but do not restore vehicle to pre-accident condition. Amount determined by difference in value of repaired car after accident and value before accident. *Hawkeye Motors v. McDowell*, 541 N.W.2d 914, 917 (Iowa 1995).

Family Purpose Doctrine. Not recognized as basis for holding owner liable for negligence of driver; however relationship may imply consent which will be basis for owner liability. *Bridges v. Welzien*, 231 Iowa 6, 300 N.W. 659 (1941).

Guest Cases. Iowa's guest statute held unconstitutional. *Bierkamp v. Rogers*, 293 N.W.2d 577, 585 (1980) and repealed in 1984. See 1984 Iowa Acts, Ch. 1219 §41.

Ownership/Title. "Owner" means person to whom certificate of title for vehicle has been issued or assigned or to whom manufacturer's or importer's certificate of origin for vehicle has been delivered or signed. I.C.A. §321.493(1)(a). If vehicle is leased, "owner" means person to whom vehicle is leased. *Id.*

Motorized Bicycles. Iowa Supreme Court has declined to hold there is common law duty to wear helmet. *Meyer v. City of Des Moines*, 475 N.W.2d 181, 191 (Iowa 1991). However, *Meyer* left open possibility that party failing to wear helmet could conceivably be apportioned fault greater than 50 percent and thus be barred from recovery. *Id.*

Seat Belts. Driver and front seat occupants of motor vehicle must wear seat belts whenever vehicle is in forward motion. I.C.A. §321.445(2). Failure to wear seat belt is not considered in assessing party's comparative fault, but jury is permitted to reduce claimant's judgment by up to 5 percent for failure to wear seat belt. I.C.A. §321.445(4)(b)(2).

Where party involved in auto accident leaves the scene of accident without providing identifying information or rendering assistance as required by I.C.A.

§321.261, that fact is admissible at trial as evidence of that party's "consciousness of responsibility." *Birch v. Juehring*, No.07-0417, 2008 WL 2513799, *3 (Iowa Ct. App., June 25, 2008).

Service of Process Upon Non-resident Motorists. Acceptance by any non-resident of privileges extended by laws of Iowa to operators or owners of motor vehicles is deemed an agreement by non-resident that he is subject to jurisdiction of District Court of this state, and appointment by such non-resident of Director of Transportation as his attorney on whom all notices may be served. I.C.A. §321.498.

Statute applicable to owner, agent or any person in charge of vehicle with consent of owner. I.C.A. §321.499. Also applicable to foreign corporations. *Skutt v. Dillavon*, 234 Iowa 610, 13 N.W.2d 322, 325-26 (1944).

Notice is served on non-resident by filing copy of notice with Director of Transportation and by mailing to non-resident defendant, within 10 days therefrom, by "restricted certified" mail. I.C.A. §321.501. Notice may also be served upon designated resident process agent of foreign corporation. *Schoulte v. Great Lakes Forwarding*, 230 Iowa 812, 298 N.W. 914 (1941).

In event of death of non-resident motorist any contract insuring his liability in Iowa shall be considered asset of his estate having situs in Iowa in any civil action arising out of motor vehicle accident in which said non-resident may be liable. I.C.A. §321.512. Manner of proving insurance contract and appointing local administrator approved. *In Re Fagin's Estate*, 246 Iowa 496, 66 N.W.2d 920 (1954).

Uninsured and Underinsured Endorsements. Uninsured motorist and underinsured motorist coverage is mandatory part of every policy of liability insurance unless coverage is rejected by named insured in writing. I.C.A. §516A.1. Where policy does not provide liability coverage to policy holder's spouse pursuant to named driver exclusion, I.C.A. §561A.1 does not require the insurer to offer UIM coverage for the excluded driver and signed rejection of UIM coverage not required. *Thomas v. Progressive Ins. Co.*, 749 N.W.2d 678, 686-87 (Iowa 2008).

Purpose of uninsured motorist provision is to provide victim of accident same protection that victim would have if tortfeasor had procured minimum insurance coverage. *Douglas v. Am. Family*, 508 N.W.2d 665, 667 (Iowa 1993), *overruled on other grounds by Hamm v. Allied*, 612 N.W.2d 775 (Iowa 2000).

Named driver exclusion in auto policy clear and unambiguous. *Thomas v. Progressive Ins. Co.*, 749 N.W.2d 678, 683-86 (Iowa 2008).

When injured party settles with tortfeasor, it is assumed for uninsured motorist coverage purposes, that settlement was equal to policy limits. Thus, injured party may only recover difference between liability policy limit and damages suffered, subject to uninsured motorist policy limits. *Grinnell Mut. Reinsurance v. Recker*, 561 N.W.2d 63, 69-70 (Iowa 1997).

Where uninsured motorist policy requires physical contact between insured vehicle and hit-and-run vehicle, there is no coverage in cases where insured claims to have been forced off roadway without physical contact. *Moritz v. Farm Bureau*, 434 N.W.2d 624, 627 (Iowa 1989); see also *Claude v. Guaranty Nat'l Ins.*, 679 N.W.2d 659, 666 (Iowa 2004) (insured forced into path of oncoming semi); *Country Mut. Ins. Co. v. McNelly*, 2009 WL 2170214 (Iowa Ct. App. 2009).

Owned-but-not-insured exclusions are generally valid and enforceable. *Miller v. Westfield*, 606 N.W.2d 301, 307 (Iowa 2000).

AVIATION

Where bylaw constituting part of insurance contract provided no liability for injuries received in, on or caused by aerial conveyance except while insured is passenger in, on, entering or leaving passenger plane duly licensed to carry passengers for hire, no coverage where assured killed by bailing out of army plane in which he was traveling on government business. *Richardson v. Iowa*, 228 Iowa 319, 291 N.W. 408 (1940).

Manager and operator of airport who were assisting in starting plane, held to be "crew." *Miner v. Western*, 241 Iowa 530, 41 N.W.2d 557, 559 (1950). Owner of aircraft who authorizes or causes operation of aircraft is, for liability purposes, treated as operator. *Lamasters v. Snodgrass*, 248 Iowa 1377, 85 N.W.2d 622, 626 (1957).

Where airplane crashed during instrument flight and student pilot was not rated for instrument flights, no coverage under policy which required pilot to hold valid certificate with ratings appropriate for the flight. *Jim Hawk Chevrolet v. Ins. Co.*, 270 N.W.2d 466, 468 (Iowa 1978).

BROKERS

See "AGENTS AND BROKERS."

BURGLARY INSURANCE

Sale Allowed by Statute. I.C.A. §515.48(4).

Where term "theft" was not defined in crop theft policy, it had popular meaning as word of general and broad connotation meaning any wrongful appropriation

of another's property to use of taker. *Long v. Glidden Mut. Ins. Ass'n*, 215 N.W.2d 271, 273 (Iowa 1974).

Where four hundred bushels of soy beans insured under crop theft policy were of quantity and bulk not readily susceptible to being accidentally mislaid or lost and beans were stored in such a way that they could be stolen without leaving sign of entry, there was sufficient circumstantial evidence and action to recover under crop theft policies to support trial court's finding that soy beans were lost by theft and not excluded by provision excepting losses caused by mysterious disappearance, inventory shortage, or other unaccountable shortage. *Id.* at 273-74.

Where provision of plaintiff's blanket farm package insurance policy covered direct loss by theft, excluding mysterious disappearance, inventory shortage, wrongful conversion, embezzlement and escape, but did not define term "theft," and where plaintiff's loss resulting from "sale" of his cattle in consideration for forged check did not fall under any of standard exceptions, court would define theft as used in policy by its commonly understood meaning so that plaintiff's loss, whether technically larceny by trick or false pretenses, was covered by policy. *Steinbach v. Continental Western*, 237 N.W.2d 780, 783 (Iowa 1976).

Under jeweler's burglary policy providing coverage for theft of jewelry by overt felonious act committed in presence of insured and for which he was actually cognizant, where neither insured nor his employee were actually cognizant of any overt felonious act by which jewelry in question was taken, insured could not recover under policy for loss caused when thief created distraction and covertly absconded with jewelry. *Cole v. Hartford Acc. & Indem. Co.*, 242 Iowa 416, 46 N.W.2d 811, 815-16 (1951).

Reasonable Expectations. Under doctrine of reasonable expectations, insured could have recovered for burglary loss even though insurance policy's definition of "burglary" required exterior of premises to bear visible marks of force and violence and even though only interior door of insured's warehouse was damaged, since most insured might have legally anticipated was policy requirement of visual evidence indicating burglary was "outside" rather than "inside" job and since exclusion in issue, masking as definition, made insurer's obligation to pay turn on skill of burglar, not on event parties bargained for. *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 181 (Iowa 1975).

CANCELLATION

Cancellation or non-renewal of automobile insurance policies is generally governed by I.C.A. §515D. No

policy of insurance may be canceled by insurer prior to expiration of policy except in cases of: 1) nonpayment of premium; 2) nonpayment of dues to association or organization where payment of dues is prerequisite to obtaining continuing insurance policy; 3) fraud or material misrepresentation affecting policy or presentation of claim; and 4) violation of terms or conditions of policy. *Id.* §515D1. This section does not apply to policies in effect less than sixty days at time of notice of cancellation, nor to non-renewal of policy. *Id.* §515D.3.

Notice of cancellation must be delivered or mailed to the named insured at least thirty days before effective date in cases of cancellation for all reasons but nonpayment of premium. Where cancellation is for nonpayment of premiums, notice must be mailed ten days prior to cancellation. Certificate of mailing is required as proof of receipt by insured. *Id.* §515D.5.

Notice of intent not to renew policy must be delivered or mailed to named insured at least thirty days prior to expiration date of policy. *Id.* §515D.7.

Cancellation or non-renewal of commercial lines policies is generally governed by §515.127. Such policies, if not previously renewed, may be canceled if they have been in effect for less than sixty days at time notice is given. Basis for cancellation after sixty days include: 1) nonpayment of premium; 2) misrepresentation or fraud by insured; 3) actions by insured which substantially alter risk; 4) insured violates term or condition of policy; and 5) determination by insurance commissioner that continuation of policy will jeopardize solvency of insurer. Policy may also be canceled if insurer loses reinsurance coverage and commissioner determines that cancellation because of loss of reinsurance is justified. *Id.* §515.127(3).

Notice to insured and any loss payee must state reason for cancellation and be delivered or mailed to insured at least ten days prior to effective date of cancellation or if cancellation is due to loss of reinsurance at least thirty days prior to effective date of cancellation. *Id.* §515.127.4. Notice of non-renewal of commercial policy must be delivered or mailed to named insured and any loss payee at least forty-five days prior to expiration date of policy. *Id.* §515.128.2.

Cancellation or non-renewal of commercial umbrella or excess policies is generally governed by §515.129. Such policies if not previously renewed may be canceled if they have been in effect for less than sixty days at time notice is given. Basis for cancellation after sixty days include reasons set forth for commercial lines policies under §515.127, subsections 2 and 3, as well as where following conditions exist: 1) material change in limits, scope of coverage, or exclusions in underlying

coverage; 2) cancellation or non-renewal of one or more of underlying policies where policies are not replaced without lapse; and 3) reduction in financial rating or grade of one or more of insurers insuring one or more of underlying policies.

Notice of cancellation to insured and any loss payee must state reason for cancellation and be delivered or mailed via certified mail at least ten days prior to effective date of cancellation. Notice of non-renewal of commercial umbrella or excess policy must be delivered or mailed to named insured and any loss payee at least forty-five days prior to expiration date of policy. *Id.* §515.129(4),(6).

Parties may cancel by mutual consent notwithstanding different policy provisions. *Home Ins. v. Fidelity Phenix*, 279 N.W. 425 (Iowa 1938).

CHATTEL MORTGAGE

See "FIRE INSURANCE."

CONSTRUCTION OF POLICY

See "LIABILITY INSURANCE COVERAGE."

CONTRIBUTION

See "FIRE INSURANCE"; "LIABILITY INSURANCE."

COORDINATION OF BENEFITS

"Other insurance" clauses generally valid and enforceable. *William C. Brown Co. v. Gen. Am.*, 450 N.W.2d 867, 871 (Iowa 1990).

Four categories of "other insurance" clauses: 1) pro rata; 2) excess; 3) escape or no liability; and 4) coordination of benefits. *Id.*

"Pro rata" clauses apportion concurring insurers' liability when coverages overlap. *AID Ins. Co. v. United Fire*, 445 N.W.2d 767, 769 (Iowa 1989). "Excess" clauses limit an insurer's liability for losses covered by other insurance, and retain liability only for losses exceeding other coverage. *Id.* "Escape" or "no liability" clauses deny all coverage when other insurance coverage is present. *Id.* "Coordination of benefits" clauses set out specific rules to be applied to determine whether coverage is primary or secondary. *William C. Brown Co.*, 450 N.W.2d at 871.

Conflict between "Other Insurance" Clauses. *Pro Rata v. Excess*: pro rata insurer has primary liability up to coverage limits. *Motor Vehicle Casualty v. LeMars Mut. Ins. Co.*, 116 N.W.2d 434, 437 (Iowa 1962).

Pro Rata v. Escape: pro rata insurer has primary liability up to coverage limits. *Burcham v. Farmers*, 121 N.W.2d 500, 503 (Iowa 1963).

Excess v. Excess: each insurer liable on pro rata basis. *Truck Ins. v. Maryland Cas.*, 167 N.W.2d 163, 164 (Iowa 1969); *Union Ins. v. Iowa Hardware*, 175 N.W.2d 413, 419 (Iowa 1970).

Medicaid is not “other insurance” for purposes of “other insurance” clause. *Becker v. Central States*, 431 N.W.2d 354, 358 (Iowa 1988), *overruled on other grounds by Johnston Equip. v. Indus. Indem.*, 489 N.W.2d 13 (Iowa 1992). *But see Gentry v. Wise*, 537 N.W.2d 732, 737 (Iowa 1995) (holding for purposes of uninsured motorist coverage statute (I.C.A. §516A.2), “insurance or other benefits” includes social security disability payments), *Shatzer v. Globe American*, 639 N.W.2d 1, 5 (Iowa 2001) (holding uninsured motorist policy that allowed insurer offset for amounts paid under “workers’ compensation, medical or disability benefits law or any similar law” did not allow offset for private disability benefits received from employer).

“Always secondary” provision in individual health insurance policy, which is mandated by I.C.A. §513C and Iowa Administrative Rule 191–75.7(4), does not “relate to” and is not “connected to” ERISA group health plans and thus, is not preempted by ERISA. *Magellan Health Servs. v. Highmark Life Ins Co.*, 749 N.W.2d 705, 712-13 (Iowa 2008).

DAMAGES

Collateral Source Rule. Common law rule modified by statute. I.C.A. §§668.14; 147.136. In tort action, court generally allows evidence of previous payment or right of future payment unless pursuant to a state or federal program, or from assets of the claimant or members of the claimant’s immediate family. I.C.A. §668.14.

In workers’ compensation case where employer has properly perfected its lien and employee must repay benefits received out of any recovery of damages, evidence of workers’ compensation benefits received is inadmissible. *Schonberger v. Roberts*, 456 N.W.2d 201, 203 (Iowa 1990). No recovery for losses paid by insurance in medical malpractice action. I.C.A. §147.136. “Eggshell Plaintiff” rule applies. *Benn v. Thomas*, 512 N.W.2d 537, 539-40 (Iowa 1994); *Grebash v. State*, 674 N.W.2d 682 (Iowa Ct. App. 2003).

Where reduction-in-benefits provision in UIM policy provided that it would not make duplicate payment for the same elements of loss and insured already recovered workers’ compensation benefits, insured could still recover past and future pain and suffering, past and future loss of function, and spouse of insured could re-

cover loss of consortium, because those elements of loss are not compensated by workers’ compensation benefits. *Greenfield v. Cincinnati Ins. Co.*, 737 N.W.2d 112, 121-24 (Iowa 2007).

Punitive Damages. Conduct must constitute willful and wanton disregard for rights or safety of another and proven by a preponderance of clear, convincing and satisfactory evidence. I.C.A. §668A.1. The fact finder must determine if conduct was directed specifically at plaintiff. If so, then plaintiff receives all of the award. Otherwise, award is divided 25% to the plaintiff and remainder to the civil reparations trust fund administered by state court administrator. *Id.*

Claim for punitive damages survives the death of plaintiff and may be brought by plaintiff’s estate. *Berenger v. Frink*, 314 N.W.2d 388, 393 (Iowa 1982); I.C.A. §611.20. Notwithstanding section 611.20, however, claim for punitive damages does not survive tortfeasor’s death because the deterrent purpose cannot be served. *Wolder v. Rahm*, 249 N.W.2d 630, 632 (Iowa 1977).

State (I.C.A. §669.4) and governmental subdivisions not liable for punitive damages. *See* I.C.A. §670.4(5).

Elements for punitive damages existed under instructions as given for bad faith. *Nassen v. National Standard Ins. Co.*, 494 N.W.2d 231, 238 (Iowa 1992).

To establish claim of bad faith, plaintiff must show 1) insurer had no reasonable basis for denying plaintiff’s claim or for refusing to consent to settlement, and 2) insured knew or had reason to know that its denial or refusal was without reasonable basis. *Bellville v. Farm Bureau*, 702 N.W.2d 468, 473 (Iowa 2005); *Etten v. U.S. Food Serv.*, 446 F. Supp. 2d 968, 975 (N.D. Iowa 2006).

UIM insurer has good faith duty to consent to insured’s settlement with tortfeasor when no reasonable basis to believe tortfeasor has any assets or other ability to contribute toward satisfaction of insurer’s subrogation rights. *Bellville*, 702 N.W.2d at 485.

Where bad faith cause of action arises from insurer’s investigation and denial of claim under policy and seeks damages that may fairly be construed to include policy benefits, that cause of action is governed by a limitations provision in the policy. *Ingrim v. State Farm*, 249 F3d 743, 746-47 (8th Cir. 2001).

Appellate court will review punitive award and can award remittitur. *Ezzone v. Riccardi*, 525 N.W.2d 388, 399 (Iowa 1994). Punitive damages not allowed in contract action unless fraud, malice or illegal act involved. *Clark-Pet. v. Ind. Ins. Assoc.*, 514 N.W.2d 912, 916

(Iowa 1994); *Molo Oil v. River City Ford*, 578 N.W.2d 222, 229 (Iowa 1998).

Future noneconomic damages not reduced to present value. *Brant v. Bockholt*, 532 N.W.2d 801, 803 (Iowa 1995).

Loss of consortium damages may be recovered by parent for injury or death to minor child, and parent may recover for expense and actual loss of services, companionship, and society resulting from death of an adult child. (New legislation, Iowa Senate File 538, currently codified at Iowa Code §613.15A. Applies to all actions filed on or after July 1, 2007).

Parent's loss of consortium claim is not for an injury to the child, but for an injury to the parent. Thus, parent has claim for damages resulting from bodily injury. *Jones v. State Farm Mut. Auto. Ins. Co.*, 760 N.W.2d 186 (Iowa 2008).

No recovery in tort where only loss is economic. *Richards v. Midland Brick*, 551 N.W.2d 649, 650-51 (Iowa App. 1996). However, in product liability case, economic loss can be recovered where action sounds in tort and not in contract. *American Fire & Cas. Co. v. Ford*, 588 N.W.2d 437, 439-40 (Iowa 1999).

DEATH

See Law Digest Tables.

Abatement and Survival of Actions. All causes of action survive and may be brought notwithstanding death of person entitled or liable to same. I.C.A. §611.20. However, notwithstanding section 611.20, a claim for punitive damages does not survive tortfeasor's death because the deterrent purpose cannot be served. *Wolder v. Rahm*, 249 N.W.2d 630, 632 (Iowa 1977). Court on motion may allow action to be continued by or against legal representatives or successors in interest of deceased party. I.C.A. §611.22.

Action For Wrongful Death. Damages for wrongful or negligent death of woman same as those for man, with all common law disabilities or restrictions on rights of women with respect thereto removed. In case of both men and women, administrator or spouse or child may recover value of services and support as spouse or parent. I.C.A. §613.15. Damages can be recovered by parent for loss of companionship and society during minority of child in wrongful death action, *Wardlow v. City of Keokuk*, 190 N.W.2d 439, 442 (Iowa 1971). Parent can recover expense, loss of consortium and loss of services as result of death of unborn viable child. *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830, 831-34 (Iowa 1983). Spousal and parental consortium recoverable. *Audubon-*

Exiva Ready Mix v. Illinois Central Gulf R.R. Co., 335 N.W.2d 148, 151-52 (Iowa 1983).

Damages recoverable are those which deceased would have recovered had he survived, including damages for pain and suffering. *Fitzgerald v. Hale*, 247 Iowa 1194, 78 N.W.2d 509, 511-12 (1956).

Presumption Of. Generally held, in Iowa, that absence of person for seven years, when his whereabouts are unknown, creates presumption of death. *In re Schlicht's Estate*, 221 Iowa 889, 266 N.W. 556 (1936).

Unborn fetus is not person within survival statute. *McKillip v. Zimmerman*, 191 N.W.2d 706, 709 (Iowa 1971); *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830, 831 (Iowa 1983); *Weitt v. Moes*, 311 N.W.2d 259, 270 (Iowa 1981), *overruled on other grounds by Audubon-Exira Ready Mix v. Ill. Cent. Gulf R.R. Co.*, 335 N.W.2d 148 (Iowa 1983).

Uniform Simultaneous Death Act. §633.523 *et seq.*

DISABILITY

While there has been variance of opinion as to interpretation of disability clauses contained in insurance policies, it is generally held that language of policy is given usual or ordinary meaning, unless policy shows different meaning was intended or is required to prevent unreasonable result. *Hawkins v. John Hancock*, 205 Iowa 760, 218 N.W. 313 (1928).

Total disability, defined in policy as "prevented from performing any work or engaging in any occupation whatever for remuneration or profit" does not mean absolute helplessness but only "inability of insured to do all substantial and material acts necessary to prosecution of business or occupation of insured or some other business or occupation which he might enter in customary and usual manner." *Smith v. Penn Mut. Life Ins. Co.*, 233 Iowa 340, 7 N.W.2d 41, 43-44 (1942).

Where policy provides that if assured becomes totally and permanently disabled by bodily injuries or disease, so as to be continuously and wholly prevented thereby for life from engaging in any occupation or performing any work for compensation or profit, he shall be deemed permanently and totally disabled, held that such provision does not require insured to be entirely helpless or to continue helpless to entitle him to permanent disability benefits. *Wood v. Federal Life*, 224 Iowa 179, 277 N.W. 241 (1938).

Where life policy provided that disability for more than three months was presumed to be permanent and insured was totally disabled for ten months, but recovered before suit brought. Held, insured could not recover under permanent and total disability clause because pre-

sumption provided for in policy was not conclusive presumption. *Graham v. Equitable*, 221 Iowa 748, 266 N.W. 820 (1936).

Farmer suffering from arthritis held totally disabled. Court abandoned strict rule and adopted so-called "liberal" rule. *Hoover v. Mutual Trust*, 225 Iowa 1034, 282 N.W. 781 (1938). Does not require insured to be absolutely helpless, but that he be unable to do all substantial and material acts necessary to prosecution of his, or similar, business or occupation. *Eller v. Preferred*, 226 Iowa 474, 284 N.W. 406 (1939); *Mason v. Loyal Protective Life*, 91 N.W.2d 389, 392 (Iowa 1958).

"Permanent Disability" in policy of insurance means for "indefinite and undeterminable period" and does not contemplate absolute perpetuity. *Wallace v. Brotherhood*, 230 Iowa 1127, 300 N.W. 322 (1941).

Occupational disability policy provides benefits if claimant is unable to perform regular job; general disability policy provides benefits if claimant is unable to perform any job which he or she is qualified by reason of education, training or experience. *Cuna Mut. v. Matzke*, 532 N.W.2d 759, 760 (Iowa 1995).

Alcoholism is "sickness." *Kitchen v. Time Ins.*, 232 N.W.2d 863, 865 (Iowa 1975).

FINANCIAL RESPONSIBILITY LAW

See Digest of New Financial Responsibility Law, in the Law Digest Tables.

FIRE INSURANCE

Arson. Application of the intentional act exclusion to arson claims has undergone a recent transformation. Whether an innocent co-insured was entitled to recover was formerly determined under contract principles. *Vance v. Pekin Ins. Co.*, 457 N.W.2d 589, 591-92 (Iowa 1990). For example, where policy excluded coverage for intentional loss by "an insured" court construed "an insured" to mean any insured and innocent co-insured denied recovery for arson loss caused by other insured. *Webb v. American Family Mut. Ins. Co.*, 493 N.W.2d 808, 812-13 (Iowa 1992). In contrast, where policy excluded coverage if "the insured" increased the chance of loss court construed "the insured" to mean insured making the claim for benefits and innocent co-insured who made claim for benefits could recover for arson loss by other insured who was not making claim. *Jensen v. Jefferson County Mut. Ins. Ass'n*, 510 N.W.2d 870, 871-72 (Iowa 1994). In *Sager v. Farm Bureau Mut. Ins. Co.*, 680 N.W.2d 8, 15 (Iowa 2004), the Iowa Supreme Court held that use of the term "an insured" in an intentional act exclusion conflicted with Iowa Standard Fire Insurance Policy as set forth in Iowa Code §515.109, and

therefore an innocent co-insured could recover for a loss caused by a fire intentionally set by another insured. The state legislature thereafter amended the language of Iowa Code §515.109 to abrogate the *Sager* decision. 2005 Iowa Acts ch. 70 §§19-21.

To prevail on arson defense insurer must demonstrate 1) incendiary fire, 2) motive, and 3) other unexplained surrounding circumstantial evidence implicating insured. *St. Paul Fire & Marine v. Salvador Beauty College*, 731 F. Supp. 348, 350 (S.D. Iowa 1990). In assessing whether other circumstantial evidence implicates insured with arson court will look at: (a) whether property was overinsured; (b) incendiary nature of fire; (c) insured's access to premises; (d) evidence of breaking and entering or burglary; and (e) other unexplained circumstances implicating insured. *Toney v. Black Hawk Mut. Ins. Assoc.*, 584 N.W.2d 570, 572 (Iowa Ct. App. 1998).

Assignment. Statutory standard policy provides that fire insurance policy cannot be assigned without consent of insurer before loss upon penalty of forfeiture, but is generally held that insured may assign right to benefits after loss. *Stoner v. First*, 218 Iowa 720, 253 N.W. 821 (1934); *Moore v. St. Paul Fire & Marine*, 176 Iowa 549, 156 N.W. 676 (1916); I.C.A. §515.109. General rule is that insurance policies, particularly those regarded as personal contracts (e.g., fire insurance and liability), are not assignable prior to loss without insurer's consent. *Conrad Bros. v. John Deere Ins.*, 640 N.W.2d 231, 236 (Iowa 2001).

Cancellation. See "CANCELLATION."

Chattel Mortgage. Insured's subsequent giving of chattel mortgage on insured property without consent of insurer may avoid policy if done in violation of stipulation against increased risk or other policy provision requiring consent to encumbrances. *Greco v. Continental Ins. Co.*, 219 Iowa 150, 257 N.W. 201 (1934); *Collins v. Merchants & Bakers Mut.*, 95 Iowa 540, 64 N.W. 602 (1895); *Lee v. Agricultural Ins.*, 79 Iowa 379, 44 N.W. 683 (1890). If loss is made payable in whole or in part to mortgagee not named in policy as insured such interest may be canceled by giving to mortgagee ten day written notice of cancellation. I.C.A. §515.109. Insured not bound to disclose encumbrance on property unless inquiry is made as to existence thereof. *Parker v. Iowa Mut.*, 220 Iowa 262, 260 N.W. 844 (1935).

Contribution. Statutory standard policy provides insurer not liable for greater proportion of any loss than amount insured by policy shall bear to whole insurance covering property against peril involved, whether or not collectible. I.C.A. §515.109.

Contract-Policy–Binder. Binders or other contracts for temporary insurance may be made and shall be deemed to include all terms of standard policy and such applicable endorsements as may be designated in such contract of temporary insurance except that cancellation clause of such standard policy and clause thereof specifying hour of day at which insurance shall commence may be superseded by express terms of contract of temporary insurance. I.C.A. §515.109(3).

Contract-Policy–Cancellation. Policy shall be canceled at any time at request of insured and company as shall upon demand surrender excess paid premium above customary short rates for expired time. Policy may be canceled at any time by insurer by giving to insured five days written notice of cancellation with or without tender of excess paid premium above pro rata premium for expired time, which excess if not tendered shall be refunded on demand. Notice of cancellation shall state that excess premium (if not tendered) will be refunded on demand. I.C.A. §515.109(6).

Contract-Policy–Mortgage Clause. There are two types of mortgage clauses: open (simple) and standard (union). Open mortgage clauses do not create new contract between insurer and designated person and in event of loss designated person's rights rise no higher than insured's and recovery by designated person is subject to affirmative defenses based on acts or admissions of insured. Standard loss payable clauses create new contract between insurer and designated person, and mortgagee is not subject to defenses insurer may have against insured based on mortgagor's conduct. *Farmers & Merchants Sav. Bank v. Farm Bur. Mut.*, 405 N.W.2d 834, 836 (Iowa 1987).

Contract-Policy–Reformation. When policy does not represent intention of parties solely because of some fault of agent equity will reform policy so as to make it express such intention. *Mortenson v. Hawkeye Cas.*, 234 Iowa 430, 12 N.W.2d 823, 825 (1944). Court of equity may grant reformation of insurance contract even when provision at issue is inhibited by statute provided statute does not make it void and parties are not en pari delicto. *Johnson v. United Investors Life*, 263 N.W.2d 770, 773-74 (Iowa 1978). Doctrine of reasonable expectations provides objectively reasonable expectations of applicants and intended beneficiaries regarding terms of insurance contracts will be honored even though painstaking study of policy provisions would have negated expectations. *Westfield Ins. v. Economy Fire & Cas.*, 623 N.W.2d 871, 881 (Iowa 2001). Doctrine applies where either policy was such that ordinary person would misunderstand coverage or circumstances attributable to insurer fostered coverage expectations. *Bituminous Cas. Corp. v. Sand Livestock Sys.*, 728 N.W.2d 216, 222

(Iowa 2007). Insured must prove condition at issue is bizarre or oppressive, eviscerates terms explicitly agreed to, or eliminates dominant purpose of transaction. *Id.*

Contract-Policy–Standard Provisions. Standard provisions statutorily mandated in all fire insurance policies are set forth in I.C.A. §515.109.

Damages-Excepted Risks–Explosions. “Fire” may be both burning by slow and burning by rapid combustion, either of which is covered by stipulation of indemnity for loss by fire, unless distinction is made in policy. *Furbush v. Consolidated Patrons & Farmers Mut.*, 140 Iowa 240, 118 N.W. 371 (1908). Explosion which occurred in furnace of house was covered by fire policy clause protecting insured against loss from explosion resulting from hazards inherent to occupancy of dwelling. *Sargent v. Mechanics Ins. Co.*, 216 Iowa 688, 247 N.W. 267 (1933). Damage from explosion caused by fire held within policy excepting damage by explosion. *Githens v. Great Am. Ins.*, 201 Iowa 266, 207 N.W. 243 (1926). Breaking of plate glass in store by explosion of gas in room, generated from gasoline being used to clean clothes, prior to fire in building, is not caused by “blowing up of building” within the exception to policy. *Vorse v. Jersey Plate Glass Ins.*, 119 Iowa 555, 93 N.W. 569 (1903). Damage caused by explosion occurring when escaping gas was ignited by flame of lighted gas jet held “damage by fire” within policy. *Skelly v. Bremer County Farmers Mut.*, 215 Iowa 368, 245 N.W. 280 (1932).

Damages-Excepted Risks–Fixtures. Underground electric cable from electric transmission line to transformer fifty feet from insured building was not fixture to building within clause of fire policy covering permanent fixtures of building. *Indianola Country Club v. Firemans Fund Ins.*, 250 Iowa 1, 92 N.W.2d 402, 405 (1958). Where fire policy covered building and personal property and building stood upon leased ground fixtures attached to building were covered by clause insuring personal property. *Tubs v. Mechanics Ins.*, 131 Iowa 217, 108 N.W. 324 (1906). Boiler attached to pipes which conveyed hot water to several rooms in house was part of realty and covered by provision in policy insuring house. *West v. Farmers Mutual Ins.*, 117 Iowa 147, 90 N.W. 523 (1902).

Where insurance policy excluded coverage for “glass constituting part of building,” court held mirrors were more than just glass, but affirmed denial of coverage because mirrors were part of building. *Northwestern Nat'l Ins. v. Pope*, 791 F.2d 649, 653 (8th Cir. 1986).

Farm security insurance policy that excluded coverage for “standing seed or forage crops, straw or stubble,” did not prevent insured from recovering for “stover” that was lost in fire. *Stamp v. Western Iowa*

Mut. Ins. Ass'n, 739 N.W.2d 503, 2007 WL 2255460 *2 (Iowa Ct. App. 2007).

Damages-Excepted Risks-Friendly Fires. Damage to eggs in cooler caused by excessive heat from oil stove when flame on wick flared up held not “loss and damage by fire” within fire policy. *Sigourney Produce Co. v. Milwaukee Mechanics Ins.*, 211 Iowa 1203, 235 N.W. 284 (1931). Where insured’s property injured by smoke and soot escaping from oil stove on account of burners on stove being turned too high and stove extinguished by merely turning burners down there could be no recovery against insurer because fire was limited to stove itself. *Hanson v. LeMars Mut. Ins.*, 93 Iowa 1, 186 N.W. 468 (1922).

Damages-Proof of Loss. Insured must furnish sworn proof of loss within sixty days after loss unless such time is extended in writing by insurer. I.C.A. §515.109(6). Fraudulent proof of loss voids policy even as to innocent co-insured. *Webb v. American Family Ins.*, 493 N.W.2d 808, 811-12 (Iowa 1992).

Damages-Repair-Replacement Value. Insurer electing to repair building must place in substantially as good a condition as was prior to fire. *Cocklin v. Home Mut. Ins.*, 207 Iowa 4, 222 N.W. 368 (1928). Provision of policy limiting liability to cost to insured of repairing or replacing property loss held not to entitle insurer to repair or replace property in lieu of paying loss and measure of damages held to be cost of replacing, less salvage value, or in other words difference between fair and reasonable market value before and after fire. *Farmers Mercantile Co. v. Farmers Ins.*, 161 Iowa 5, 141 N.W. 447 (1913). When insured did not establish action seeking damages from insurer, that insured crane was not repairable, proper measure of damages was reasonable cost of repairs plus reasonable value of use of crane during repairs not exceeding value of crane before accident. *Hulsing v. Iowa Nat. Mut.*, 329 N.W.2d 5, 7-8 (Iowa 1983). Under clause providing that insurance company shall not be liable beyond actual cash value of property covered and that liability shall not exceed the cost to insured to repair or replace property destroyed measure of insured manufacturer’s cost of replacing whiskey whose value increases with age is not cost of raw material of which like product may be made and of labor required to make it, but is cost of immediately replacing article by like product by purchase or otherwise. *Mechanics Ins. Co. v. C.A. Hoover Distilling*, 182 F. 590 (8th Cir. 1910).

Actual Cash Value. Where policy fails to define “actual cash value,” and it is possible to determine the building’s market value apart from the land upon which it sits, then market value is usually taken to be the actual cash value at time of loss. *Farmers Casualty Ins. Co. v.*

Birkby, 746 N.W.2d 280, 2008 WL 238599, *2 (Iowa Ct. App. 2008). If there is no recognized market value fairly indicative of the property’s real value, fact finder should consider size and dimensions of the building, the kind and quality of materials of which it is constructed, its age, the amount of wear and tear to which it has been subjected, its state of repair and all other pertinent matters. *Id.*

Damages – Subrogation. Iowa case law provides that a party may recover the replacement cost for damage property if it does not exceed the value of the property prior to injury. *Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 495 (Iowa 2000). In determining the value of a building before a fire, the court looks to the value of the building in its entirety, even if that includes portions of the building which were undamaged by the fire and utilized in reconstruction. *Id.*

Multiple Policies. Standard fire policy provides other insurance may be prohibited or amount of insurance may be limited by endorsement. I.C.A. §515.109(6). If further insurance exists, standard policy dictates payment to be made on pro rata liability basis. *Id.*

FRAUD

See “AGENTS AND BROKERS.”

GUEST CASES

See “AUTOMOBILES.”

HOSPITALS

Liens. See Ch. 582 Iowa Code. Lien applies not only to tortfeasors liability carrier but also to under insured benefits. *Baker v. Iowa Meth. Hosp.*, 542 N.W.2d 847, 848-49 (Iowa 1996).

HUSBAND AND WIFE

See Law Digest Tables.

Wife entitled to recover damages for loss of consortium. *Acuff v. Schmit*, 248 Iowa 272, 78 N.W.2d 480, 485-86 (1956).

Doctrine of interspousal immunity abolished. *Shook v. Crab*, 281 N.W.2d 616, 619 (Iowa 1979).

INFANTS

See “AUTOMOBILES, Age”; “LIABILITY INSURANCE, Violation of Law”; “NEGLIGENCE, Age.”

Unemancipated minor children may sue parents for negligence torts. *Turner v. Turner*, 304 N.W.2d 786,

787-89 (Iowa 1981). Child cannot recover for negligent supervision. *Wagner v. Smith*, 340 N.W.2d 255, 256 (Iowa 1983).

Child of any age has cause of action for loss of parental consortium, but claim must be brought by decedent's administrator. *Audubon-Exira v. Ill. Cent. Gulf R. Co.*, 335 N.W.2d 148, 152 (Iowa 1983); I.C.A. §613.15.

INLAND MARINE

Defined in I.C.A. §515.48 (9).

LIABILITY INSURANCE

Cancellation. Generally policy or contract of insurance may not be forfeited, suspended or canceled without prior notice to insured. I.C.A. §515.125. Notice must be mailed or delivered to insured at least 30 days before effective date of cancellation or if cancellation is for nonpayment of premium at least ten days prior to date of cancellation. *Id.* If insured pays full amount due prior to date of cancellation, policy shall revive and be in full force and effect provided such payment is made during term of policy and before loss occurs. I.C.A. §515.131.

Compromise of Claims. Courts recognize cause of action in tort against insurance carrier for bad faith conduct relating to claim made by its insured. *Dolan v. Aid Ins. Co.*, 431 N.W.2d 790, 790-91 (Iowa 1988). To successfully assert cause of action against insurer for bad faith conduct concerning insured's claim a plaintiff must prove 1) absence of reasonable basis for denying claim, and 2) that defendant knew or had reason to know denial was without reasonable basis. *Sampson v. American Standard Ins. Co.*, 582 N.W.2d 146, 149 (Iowa 1998). When an objectively reasonable basis for denying the claim exists, the insurer cannot be held liable for bad faith as a matter of law. *Bellville v. Farm Bureau*, 702 N.W.2d 468, 473 (Iowa 2005).

Policy provision stating that insured will defend any lawsuit and make such investigation and settlement as it deems expedient gives insurer control over settlement and trial and requires insurer to pay for defense of any suit. *Kooyman v. Farm Bureau Mut. Ins. Co.*, 315 N.W.2d 30, 32-33 (Iowa 1982).

Insurer is liable for judgment in excess of policy limits where insurer acted in bad faith in not making proposed settlement within policy limits. *Henke v. Iowa Home Mut.*, 250 Iowa 1123, 97 N.W.2d 168, 173 (1959).

In action by deceased life policy applicant's widow court held standard of care to be applied to agent's failure to notify applicant of counteroffer by insurer is that of ordinarily prudent person under circumstances and not "high degree of care." *Werthman v. Catholic Order*

of Foresters, 257 Iowa 483, 133 N.W.2d 104, 109-10 (1965).

Insured has burden to show bad faith on part of insurer in not settling case where insured attempts to hold insurer liable for judgment obtained against insured in excess of policy limits. *Kohlstedt v. Farm Bureau Mut.*, 258 Iowa, 337, 139 N.W.2d 184, 185 (1965).

Contribution between Joint Tortfeasors. See "Negligence" for discussion of Comparative Fault. Contribution claims exempted from statute of repose in products liability actions. I.C.A. §614.1(2A). However, where products liability claim against manufacturer is barred by statute of repose, there can be no common liability as required to support claim for contribution. *Estate of Ryan v. Heritage Trails Associates, Inc.*, 745 N.W.2d 724, 730-31 (Iowa 2008).

Cooperation of Insured in Defense of Action. Kind of cooperation required by insurance policy is honest cooperation, which requires insured to tell truth. *Western Mut. Ins. Co. v. Baldwin*, 258 Iowa 460, 137 N.W.2d 918, 924 (1965). Where insured breaches duty to cooperate, prejudice to insurer is presumed. *Id.* at 925. This presumption is rebuttable but insured has burden to show lack of prejudice by satisfactory evidence. *Id.*

Where insured lied to attorney hired by insurer to defend him under insurance policy for over two years concerning his culpability in the alleged acts, insured failed to cooperate with insurer and insurer was not obligated to defend or pay resulting judgment. *Wildrick v. North River*, 75 F.3d 432, 437 (8th Cir. 1996).

Coverage - Construction of Terms. Interpretation requires court to determine meaning of contractual words while construction requires court to determine policy's legal effect. *LeMars Mut. Ins. Co. v. Joffer*, 574 N.W.2d 303, 306-07 (Iowa 1998). Policy of insurance is contract and as such must be interpreted like other contracts. *Kantor v. New York Life Ins. Co.*, 219 Iowa 1005, 258 N.W. 759 (1935). Words used, unless otherwise defined, should be given ordinary meaning to achieve fair interpretation. *Id.* When construing policy, courts will construe policy as whole, giving words their ordinary (not technical) meanings in order to achieve practical and fair interpretation. *Morgan v. American Family Mut. Ins. Co.*, 534 N.W.2d 92, 99 (Iowa 1995), *overruled on other grounds by Hamm v. Allied*, 612 N.W.2d 775 (Iowa 2000).

Where provision in endorsement and provision in policy are in irreconcilable conflict, provision in endorsement prevails. *Motor Vehicle Cas. v. LeMars Mut.*, 116 N.W.2d 434, 436 (Iowa 1962).



Standard Provisions. See following cases for discussion of some standard terms in insurance policies. *Tacker v. American Family Mut. Ins. Co.*, 530 N.W.2d 674, 676-77 (Iowa 1995) (discussing term “arising out of”); *IMT Ins. v. West Bend Mut. Ins. Co.*, No.07-0161, 2007 WL 4191933, **2-3 (Iowa Ct. App., Nov. 29, 2007) (same); *Dico v. Emp. Ins.*, 581 N.W.2d 607, 612-13 (Iowa 1998) (“occurrence”); *AMCO Insurance Company v. Rossman*, 518 N.W.2d 333, 334-35 (Iowa 1994) (discussing term “resident”); *First National Bank of Colfax v. Hartford Accid. & Indem. Co.*, 295 N.W.2d 425, 429 (Iowa 1980) (discussing term “original counterpart”); *Long v. Glidden Mutual Insurance Association*, 215 N.W.2d 271, 273 (Iowa 1974) (discussing term “theft”); *Weber v. IMT Ins.*, 462 N.W.2d 283, 286-87 (Iowa 1990) (“sudden and accidental”); *Miser v. I.S.T.M.A.*, 223 Iowa 662, 273 N.W. 155 (1937) (discussing words “accident” and “accidental”); *Smutz v. Central Iowa Mut. Ins. Ass’n*, 742 N.W.2d 605, 2007 WL 3085794, **6-7 (Iowa Ct. App., Oct. 24, 2007) (discussing terms “vacant” and “unoccupied”).

Clean-up cost required by EPA held to be damages under general liability policy. *A. Y. McDonald Indus. v. Ins. Co. of North Am.*, 475 N.W.2d 607, 621 (Iowa 1991). However, civil penalties imposed by government for failing to follow environmental regulations not “damages” for purposes of CGL policy. *Id.* at 626.

Term “sudden” as used in pollution exclusion in CGL policy means abrupt event. *Iowa Comp. Underground Storage Fund v. Farmland Ins.*, 568 N.W.2d 815, 817 (Iowa 1997).

Direct Action against Insurer upon Insolvency of Insured. All policies insuring legal liability of insured shall provide that in event execution on judgment be returned unsatisfied in action by person injured, judgment creditor shall have right of action against insurer to same extent that insured could have enforced his claim against such insurer had such insured been paid such judgment. I.C.A. §516. 1. No settlement between insurer and insured after loss shall bar action unless consented to by judgment plaintiff. I.C.A. §516.2. Such action may be brought against insurer within 180 days from entry of judgment in case no appeal is taken; if appealed, within 180 days after judgment is affirmed on appeal. I.C.A. §516.3. *Pries v. M.F.A. Mut. Ins. Co.*, 255 Iowa 442, 122 N.W.2d 925, 927 (Iowa 1963).

Liability between Insurers. See “COORDINATION OF BENEFITS.”

Doctrine of reasonable expectations discussed. *Shelter Mut. Ins. Co. v. Davis*, No.07-0007, 2008 WL 2200082 (Iowa Ct. App., May 29, 2008) (reasonable expectations doctrine required coverage of guest’s inju-

ries where insured requested “full coverage” of ATV and off-premises policy exclusion effectively eliminated the dominant purpose of requested policy); *Benavides v. Penn Life*, 539 N.W.2d 352, 356-57 (Iowa 1995).

Exclusions. Intentional Acts. Intentional injury exclusion is triggered if insured had intent, actual or inferred, both to do act which caused injury and to cause some kind of bodily injury. *AMCO Ins. Co. v. Haht*, 490 N.W.2d 843, 845 (Iowa 1992). Insured’s intent may be inferred from nature of act and accompanying reasonable foreseeability of harm. *Id.*

Insured’s sexual abuse of victim fell within intentional injury exclusion to insured’s homeowner’s and umbrella liability policies. *Altena v. United Fire & Cas. Co.*, 422 N.W.2d 485, 490 (Iowa 1988).

Wrongful termination of employment held to be intentional act precluding coverage under liability policy. *Smithway Motor Xpress, Inc. v. Liberty Mut. Ins. Co.*, 484 N.W.2d 192, 195 (Iowa 1992).

No coverage for emotional distress and indecent exposure damages because insured’s indecent sexual conduct directed towards plaintiffs was intentional. *United Fire v. Shelly Funeral Home*, 642 N.W.2d 648, 653 (Iowa 2002).

No coverage under intentional acts exclusion for personal injury liability arising from insured’s assault on employee of golf pro shop even though insured was intoxicated when assault took place. *Dolan v. State Farm*, 573 N.W.2d 254, 257 (Iowa 1998).

Insured’s actions in assaulting his secretary were intentional even though he experienced difficulty controlling his temper. *Allied Mut. v. Costello*, 557 N.W.2d 284, 288 (Iowa 1996). Intent to cause injury may be actual or inferred from insured’s conduct. *Id.* at 286.

Intentional injury exclusion applied where 13-year old babysitter hit 5-month old baby’s head against floor repeatedly, resulting in death. *Am. Fam. v. DeGroot*, 543 N.W.2d 870, 872 (Iowa 1996).

Intentional injury exclusion applied where 15-year old boy fired a bb gun at another, causing injury. *Am. Fam. v. Wubben*, 496 N.W.2d 783, 785 (Iowa Ct. App. 1992).

No coverage under intentional act exclusion for intentional discrimination where employee was terminated because of alcoholism; however, facts supported coverage under reasonable expectations doctrine. *Clark-Peterson v. Independent Ins.*, 492 N.W.2d 675, 677 (Iowa 1992).

Intentional injury exclusion applied even if insured acted in self-defense; assault was intentional act. *McAn-*

draws v. Farm Bureau, 349 N.W.2d 117, 120 (Iowa 1984).

Violation of Law. Policy which excluded liability while automobile being operated or manipulated by any person prohibited from driving or unauthorized by law to drive automobile held not to cover car driven by sixteen-year-old girl without operator's license but with permission and in presence of owner. *Twogood v. American*, 229 Iowa 1133, 296 N.W. 239 (1941).

Miscellaneous Exclusions. Provision in general liability policy excluding coverage for bodily injury to any employee of insured arising out of and in course of their employment by insured applies regardless of whether employer has any liability under workers' compensation laws to employee; all that is required is that bodily injury arose out of and in course of employment. *Ottumwa Housing Authority v. State Farm Fire and Cas. Co.*, 495 N.W.2d 723, 727 (Iowa 1993). Automobile exclusion in general liability insurance policy will not apply unless vehicle-related negligence was or could have been determined to be sole proximate cause of injury. *American Family Mut. Ins. Co. v. Allied Mutual Ins. Co.*, 562 N.W.2d 159, 166 (Iowa 1997).

General liability policy does not provide coverage for damages arising from general contractor's own defective workmanship. *Continental Western Ins. Co. v. Jerry's Homes, Inc.*, 713 N.W.2d 247 (Iowa Ct. App. 2006). Defective workmanship resulting in damages only to the work product itself is not a covered occurrence that is covered under a general liability policy. *Id*; see also *W.C. Stewart Constr., Inc. v. Cincinnati Ins. Co.*, 2009 WL 928871 (Iowa Ct. App. 2009).

"Total" or "absolute" pollution exclusion clauses, which broadly define pollutants as "any solid, liquid, gaseous, or thermal irritants or contaminant," are clear and unambiguous, and therefore enforceable. *Bituminous Cas. Corp. v. Sand Livestock Sys. Inc.*, 728 N.W.2d 216, 220-22 (Iowa 2007).

UM Coverage. Pyramiding of uninsured motorist coverage is not permitted. *Holland v. Hawkeye Security*, 230 N.W.2d 517, 519-20 (Iowa 1975). Offset clause in uninsured motorist policy reducing benefits for disability policy payments is valid. *Jackson v. Farm Bureau Ins.*, 528 N.W.2d 516, 517 (Iowa 1995). Duty of insured to discover other applicable insurance discussed. *Frunzar v. Allied Prop. & Cas. Co.*, 548 N.W.2d 880, 888-89 (Iowa 1996). Where policy is silent as to "stacking" of benefits, insured is entitled to highest single UIM coverage; no stacking permitted. *Ewing v. American Nat'l Property & Casualty Co.*, No.07-1166, 2008 WL 375201, *1 (Iowa Ct. App., Feb. 13, 2008); I.C.A. §516A.2. Reasonable expectations doctrine not applica-

ble where insured attempts to avoid directly-applicable statutory language. *Id.* *2.

Where policy is silent regarding stacking of UIM benefits, I.C.A. §516A.2 provides default rule allowing insured covered by multiple policies to recover highest single applicable UM limit, paid by all insurers according to their other insurance clauses. *Swainston v. Am. Fam. Mut. Ins. Co.*, 2009 WL 2059802 (Iowa 2009).

Punitive Damage. Insurance policy requiring company to pay "all sums that insured shall become legally obligated to pay as damages ... includes coverage for punitive damages." *Skyline Harvest Store Systems v. Centennial Ins. Co.*, 331 N.W.2d 106, 107-08 (Iowa 1983). Municipalities are immune from claims for punitive damages. I.C.A. §670.4(5); *Parks v. City of Marshalltown*, 440 N.W.2d 377, 379 (Iowa 1989).

LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Accident and Sickness Insurance. No action prior to expiration of sixty days after written proof of loss, nor after three years from written proof of loss. Uniform Individual Accident and Sickness Policy §514A.3.

Fire Insurance. No action on policy until all requirements of policy have been complied with, and unless commenced within twelve months after inception of loss. I.C.A. §515.109.

Life Insurance. Cannot limit time within which notice or proofs of death must be given to less than one year after knowledge by beneficiary. I.C.A. §511.35.

Insurance policy provision limiting the time to file suit to less than Iowa statute of limitations is not unenforceable. Court rejected insured's argument that discovery rule should apply so that cause of action against UIM insurer did not accrue until insured discovered the other party was underinsured. Insured had duty to make reasonable inquiry. *Rolf v. Nationwide Mut. Ins. Co.*, 766 N.W.2d 648 (Iowa Ct. App. 2009).

UCC applies for breach of implied warranties. *City of Carlisle v. Fetzer*, 381 N.W.2d 627, 628-29 (Iowa 1986).

Sexual abuse of child 4 years from discovery. I.C.A. §614.8A. *Frideres v. Schiltz*, 540 N.W.2d 261, 264 (Iowa 1995); *Woodroffe v. Hasenclever*, 540 N.W.2d 45, 48 (Iowa 1995).

Claims against State of Iowa. Must file claim in writing to state appeal board within two years after claim accrued. I.C.A. §669.13. (note exceptions under I.C.A. §669.14).

Claims against Municipality. Must file action within six months unless written claim is made to governing body of municipality within sixty days after which states time, place and circumstances thereof and amount demanded. I.C.A. §670.5. Upon providing notice claimant has two years to commence action from date of notice. *Id.* I.C.A. §614.8, which tolls the statute of limitations for minors in some actions, does not apply in actions against municipalities. *Rucker v. Humboldt Community Sch. Dist.*, 737 N.W.2d 292, 293-94 (Iowa 2007).

Statute of Repose – Improvements to Real Property. Action based on negligent reconnection of sewer line 27 years earlier is not barred by statute of repose because it is not an “improvement to real property.” *St. Paul’s Evangelical Lutheran Church v. City of Webster City, Iowa*, 766 N.W.2d 796 (Iowa 2009).

MALPRACTICE

Insurance Agent. Expert testimony required for insurance agents standard of care. *Humiston Grain v. Rowley*, 512 N.W.2d 573, 575 (Iowa 1994).

Expert Opinion. Iowa committed to liberal rule on admission of opinion testimony, Daubert considered. *Williams v. Hedican*, 561 N.W.2d 817, 822-23 (Iowa 1997); *Mensink v. American Grain*, 564 N.W.2d 376, 380-81 (Iowa 1997). Specific negligence of physician may be established 1) through expert testimony, 2) through evidence showing that physician’s lack of care is so obvious as to be within comprehension of a layman, and 3) through evidence that physician injured part of body not involved in treatment; first is rule and others are exception to rule. *Perin v. Hayne*, 210 N.W.2d 609, 613 (Iowa 1973).

Generally when ordinary care of physician is issue in medical malpractice suit only experts can testify and establish standard of care and skill required. *Graeve v. Cherny*, 580 N.W.2d 800, 801 (Iowa 1998).

District court did not commit error in permitting director of surgery to testify to standard of care for nurses. *Grams v. Renner*, 2009 WL 2184826 (Iowa Ct. App. 2009).

Statute of limitations in medical malpractice does not begin to run until the discovery of both the injury and its factual cause. *Rathje v. Mercy Hosp.*, 745 N.W.2d 443, 461 (Iowa 2008). In negligent misdiagnosis case, plaintiff could not have known of the injury and its caused until being properly diagnosed with cancer, at the earliest. *Rock v. Warhank*, 757 N.W.2d 670 (Iowa 2008).

Collateral Source Rule. In action for malpractice, damages awarded shall not include damages, which are replaced or indemnified by insurance or service benefit

programs or from any other source except assets of claimant or members of claimant’s immediate family. I.C.A. §147.136; *see also Heine v. Allen Memorial Hosp. Corp.*, 549 N.W.2d 821, 823-24 (Iowa 1996).

Lost chance of survival theory approved. *Wendlund v. Sparks*, 574 N.W.2d 327, 330-31 (Iowa 1998).

Claim that a professional failed to exercise reasonable care is a negligence claim and not a contract claim. *Kemin Indus. v. KPMG*, 578 N.W.2d 212, 221 (Iowa 1998).

Res ipsa Loquitur. Plaintiff in medical malpractice claim can pursue both general negligence (res ipsa loquitur) and specific negligence theories. To prove res ipsa claim, plaintiff must show injury was caused by instrument in exclusive control of defendant and that the injury would not normally occur in the absence of negligence. *Verwers v. Rhoades*, 2009 WL 1212726 (Iowa Ct. App. 2009).

To succeed on a legal malpractice claim, plaintiff must show that but-for the attorney’s negligence, it would have been successful in the underlying suit. *Addison Ins. Co. v. Knight, Hoppe, Kurnick & Knight, L.L.C.*, 2009 WL 2170221 (Iowa Ct. App. 2009).

NEGLIGENCE

See Law Digest Tables.

See “AUTOMOBILES.”

Age. Negligence and contributory negligence of infants discussed. *Kallansrud v. Libbey*, 234 Iowa 700, 13 N.W.2d 684 (1944).

Attractive Nuisance. To children, doctrine discussed. *Smith v. Iowa City*, 213 Iowa 391, 239 N.W. 29 (1931), *overruled in part by Hall v. Keota*, 79 N.W.2d 784 (Iowa 1956); *Rosenau v. City of Estherville*, 199 N.W.2d 125, 134-37 (Iowa 1972).

Bystander. May recover for emotional distress under certain circumstances. *Barnhill v. Davis*, 300 N.W.2d 104, 108 (Iowa 1981); *Clark v. Estate of Rice*, 653 N.W.2d 166, 170 (Iowa 2002). Plaintiff must have a sensory and contemporaneous observation of the injury-causing accident to recover for bystander emotional distress. *Moore v. Eckman*, 762 N.W.2d 459 (Iowa 2009). Plaintiff only needs to observe some part of the accident as it occurs; it is not necessary to witness entire accident. *Martin v. Crook*, 2009 WL 2392077 (Iowa Ct. App. 2009).

Comparative fault legislation adopted Chapter 668. Joint and several liability does not apply to defendant found to bear less than 50% of total fault. Plaintiff cannot recover if more than 50% fault. Parties to action, for



purposes of comparing fault, are plaintiffs, defendants, third party defendants and parties released. Applies to strict liability. *Smith v. Air Feeds*, 556 N.W.2d 160, 163-64 (Iowa Ct. App. 1996). As to settling defendant "proportionate credit" rule applies based upon percentage of fault. *Thomas v. Solberg*, 442 N.W.2d 73, 77 (Iowa 1989). Comparative fault does not apply to purely contractual claims. *Ethyl Corp. v. BP Perf.*, 33 F.3d 23, 24-25 (8th Cir. 1994). *But see Kemin Indus. v. KPMG Peat Marwick*, 578 N.W.2d 212, 220-21 (Iowa 1998) (exception in cases of professional negligence). Does not apply to dram shop claim. *Horak v. Argosy Gaming*, 648 N.W.2d 137, 142 (Iowa 2002); *Jamieson v. Harrison*, 532 N.W.2d 779, 781 (Iowa 1995). Only the fault of parties toward plaintiff which is placed in issue can be considered. *Kragel v. Wal-Mart*, 537 N.W.2d 699, 706 (Iowa 1995).

Contributory Negligence. Not complete defense. Comparative negligence adopted. Defendant has burden of pleading and proving contributory fault. I.C.A. §619.17.

Assumption of risk abolished where contributory negligence available as defense. *Rosenau v. City of Estherville*, 199 N.W.2d 125, 133 (Iowa 1972). Not a complete defense under Comparative Fault Act. *Arnold v. City of Cedar Rapids*, 443 N.W.2d 332, 333 (Iowa 1989).

Government Immunity. Waived subject to certain exceptions, State Tort Claims Act, ch. 669; Tort Liability of Governmental Subdivisions, ch. 670. Liability of Governmental subdivision for dangerous railroad crossing. *Symmonds v. C.M. & P.R. Co.*, 242 N.W.2d 262 (Iowa 1976). Strict liability not applicable. *Hoctel v. State*, 343 N.W.2d 832, 832-33 (Iowa 1984). Exceptions to immunity regarding traffic signage. *Hunt v. State*, 538 N.W.2d 659, 661 (Iowa 1995); I.C.A. §668.10.

Iowa Tort Claims Act applies to torts occurring outside of Iowa. *Griffen v. State of Iowa*, 767 N.W.2d 633 (Iowa 2009).

Imputed Negligence. Negligence of spouse not imputed to other. *Johnson v. Overland*, 227 Iowa 487, 288 N.W. 601 (1939). Negligence of driver not imputed to owner where owner asserts claim against negligent third person although owner is liable by statute for driver's negligence. *Stuart v. Pilgrim*, 247 Iowa 709, 74 N.W.2d 212, 216-17 (Iowa 1956).

Where owner is present in car, test to determine whether driver's contributing negligence is imputed to him is owner's right to control and whether control has been surrendered. *Phillips v. Foster*, 252 Iowa 1075, 109 N.W.2d 604, 607 (Iowa 1961).

Last Clear Chance. Doctrine abolished. *Stewart v. Madison*, 278 N.W.2d 284, 292 (Iowa 1979).

Recovery can be had for "lost" chance of survival in medical malpractice claim. *Sanders v. Ghrist*, 421 N.W.2d 520, 522-23 (Iowa 1988); *Wendland v. Sparks*, 574 N.W.2d 327, 329 (Iowa 1998).

Liquor Liability/Dram Shop. Requires that licensee knew or should have known that person was intoxicated or served when knew or should have known it would cause person to become intoxicated. Basic requirement of notice of injury to licensee or its insurance carrier within six months after injury. I.C.A. §§123.92, 123.93.

Two-year statute of limitations begins on the date the section 123.93 notice is served. Thus, dram shop claim filed more than two years after the injury but within two years of serving the section 123.93 was not barred. *Davis v. R&D Driftwood, Inc.*, 2009 WL 606477 (Iowa Ct. App. 2009).

Corporate Officers. May be liable for their torts even if acting in corporate capacity. *Haupt v. Miller*, 514 N.W.2d 9055, 907 (Iowa 1994).

Intervening Acts. Suicide is intervening act relieving seller of ammunition to minor. *Scoggins v. Wal-Mart*, 560 N.W.2d 564, 567-68 (Iowa 1997).

Negligent Misrepresentation. Applies only to persons in business or profession of supplying information to others. *Greatbach v. Metropolitan Federal Bank*, 534 N.W.2d 115, 117 (Iowa 1995). But see result in employment cases. *Pollman v. Belle Plaine Livestock Inc.*, 567 N.W.2d 405, 409-10 (Iowa 1977).

Premises Liability. Iowa no longer distinguishes between invitee and licensee. General negligence standard applies. *Koenig v. Koenig*, 766 N.W.2d 635 (Iowa 2009).

Where premise liability claim is based on injuries caused by third party on property, landowner is not liable unless the accident was reasonably foreseeable. Cash wash owner was not liable for death of child hit by car where owner owned four car washes and had never had a similar accident. *Childers v. Herman*, 2009 WL 1676910 (Iowa Ct. App. 2009).

Railroad Liability. Federal law preempts state crossing warning requirements where federal funds expended for crossing. *Lubben v. Chicago Central R.R.*, 563 N.W.2d 596, 600 (Iowa 1997).

NO-FAULT INSURANCE

Iowa does not have no-fault insurance.



NOTICE

Where notice provision is written as condition precedent to policy coverage, insured must show substantial compliance with the condition. *Grinnell v. Jungling*, 654 N.W.2d 530, 541-42 (Iowa 2002).

Where notice provision requires notice directly to insurer, notice to agent is not substantial compliance. *Id.* at 542.

If no substantial compliance, insured must show condition was excused, waived, or not prejudicial to insurer. *Id.*

Failure of insured to notify insurer for thirteen months of accident and claim under medical payment coverage is presumed prejudicial to insurer and to recover insured must overcome presumption by showing lack of prejudice. *Henderson v. Hawkeye*, 252 Iowa 97, 106 N.W. 86; *Met-Coil Systems v. Columbia Cas.*, 524 N.W.2d 650, 635-54 (Iowa 1994).

Three and one-half year delay in providing notice to insurer is unreasonably tardy as a matter of law. *Interstate Power v. INA*, 603 N.W.2d 751, 757-58 (Iowa 1999); see also *Fireman's Fund v. ACC Chemical*, 538 N.W.2d 259, 266 (Iowa 1995) (5-year delay unreasonably tardy as a matter of law).

PENALTY AND ATTORNEY FEES

Parties generally have no claim for attorney fees as damages in absence of Statutory or written contractual provision allowing such award but courts have recognized rare exception to rule when losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Hockenberg Equipment Co. v. Hockenberg's Equipment & Supply Co. of Des Moines, Inc.*, 510 N.W.2d 153, 158 (Iowa 1993).

PRIVILEGED COMMUNICATIONS

Privileged communications between professionals are governed by I.C.A. §622.10.

Attorney/Client. Privilege between attorney and public agency client discussed. *Tausz v. Clarion Sch. Dist.*, 569 N.W.2d 125 (Iowa 1977).

Insured's communication with insurance carrier during course of carrier's routine practice of obtaining recorded statements from insured is not discoverable under work product doctrine. *Ashmead v. Harris*, 336 N.W.2d 197, 201 (Iowa 1983).

Although communications between insurance carrier and its attorneys are generally absolutely privileged, carrier waives attorney/client privilege when it designates attorney as expert witness. *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 684-85 (Iowa 1995).

PRODUCTS LIABILITY

Iowa has adopted Restatement (Third) of Torts: Product Liability, sections 1 and 2 for product defect cases. *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 166-69 (Iowa 2002). To recover damages based on a manufacturing defect, a plaintiff must prove that the defendant sold or distributed the product; the defendant was engaged in the business of selling or distributing the product; that the product, at the time it left the defendant's control, contained a manufacturing defect that departed from its intended design; the manufacturing defect was a proximate cause of the plaintiff's damages; and the amount of damages. Iowa Civil Jury Instruction No. 1000.1; *Wright*, 652 N.W.2d at 166-69; Restatement (Third) Torts, Product Liability §§1, 2(a) and cmt. c.

To recover damages based on a design defect, the plaintiff must prove that the defendant sold or distributed the product; the defendant was engaged in the business of selling or distributing the product; the product was in a defective condition at the time it left the defendant's control; a reasonable alternative safer design could have been practically adopted at the time of sale or distribution; the alternative design would have reduced or avoided the foreseeable risks of harm posed by the product; the omission of the alternative design renders the product not reasonably safe; the alternative design would have reduced or prevented the plaintiff's harm; the design defect was a proximate cause of plaintiff's damage; and the amount of damage. Iowa Civil Jury Instruction No. 1000.2; *Wright*, 652 N.W.2d at 166-69; Restatement (Third) Torts, Product Liability, §§1, 2(b) and cmt. f.

To recover damages based on inadequate instructions or warnings, the plaintiff must prove that the defendant sold or distributed the product; the defendant was engaged in the business of selling or distributing the product; the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings; the omission of the instructions or warnings rendered the product not reasonably safe; the risk to be addressed by the instructions or warning was not obvious to, or generally known by, foreseeable product users; the omission of the instructions or warnings was a proximate cause of plaintiff's damages; and the amount of damages. Iowa Civil Jury Instruction No. 1000.3; *Wright*, 652 N.W.2d at 166-69; Restatement (Third) Torts, Product Liability, §§1, 2(c) and cmts. i and j.

Iowa Rule of Evidence 5.407, which excludes evidence of subsequent remedial measures when offered to prove negligence, does not apply in actions based on



defective product design. *Scott v. Dutton-Lainson Co.*, 765 N.W.2d 607 (Iowa Ct. App. 2009).

Warranty. Warranty theory of recovery is based on Uniform Commercial Code as codified in I.C.A. §554. Express warranty claims arise under I.C.A. §554.2313. Implied warranty of merchantability under I.C.A. §554.2314. Claim for implied warranty of fitness can be statutory pursuant to I.C.A. §554.2315 or common law. *Chicago Central & Pacific RR Co. v. Union Pacific R. Co.*, 558 N.W.2d 711, 714 (Iowa 1997). Recovery under claim of breach of warranty will extend to those in privity as well as to those who may be reasonably expected to use product or who are injured by breach. I.C.A. §554.2318; *Dailey v. Holiday Dist. Corp.*, 151 N.W.2d 477, 484-85 (Iowa 1967). However, claim does not extend to members of general public or those with no relationship to purchaser. *Houvenagle v. Wright*, 340 N.W.2d 783, 786 (Iowa Ct. App. 1983); *Hahn v. Ford Motor Co.*, 126 N.W.2d 350, 352 (Iowa 1964).

Negligence. Claim for negligence in products liability action typically is based on failure to warn either at time of sale or in post-sale context. *Olson v. Prosoco*, 522 N.W.2d 284, 289-90 (Iowa 1994); *Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911, 920-21 (Iowa 1990). Iowa has recognized and applied Restatement (Third) of Torts, §10, in context of post-sale duty to warn. *Lovick v. Wil-Rich*, 588 N.W.2d 688, 695-96 (Iowa 1999). Where dangers are open and obvious or known to user no duty to warn exists. *Olson v. Prosoco*, 522 N.W.2d 284, 291 (Iowa 1994). Under negligence theory Iowa has recognized crashworthiness-enhanced injury doctrine which imposes liability on manufacturers for design defects which enhance injuries rather than cause them. *Hillrichs v. Avco Corp.*, 478 N.W.2d 70, 74 (Iowa 1991); *Reed v. Chrysler Corp.*, 494 N.W.2d 224, 226 (Iowa 1992). Negligence claims also may exist based on duty to use reasonable care in design and manufacture of product, *Henkel v. R & S Bottling Co.*, 323 N.W.2d 185, 189 (Iowa 1982); duty to inspect finished product, *West v. Broderick & Bascom Rope Co.*, 197 N.W.2d 202, 212-14 (Iowa 1972); and duty of reasonable care in installation and maintenance of product by installers and repairers, *Jacobsen v. Benson Motors, Inc.*, 216 N.W.2d 396, 404-05 (Iowa 1974).

Defenses—Physical Harm. Physical harm to plaintiff or plaintiff's property is typically prerequisite to recovery in products liability action. *Nelson v. Todd's, Ltd.*, 426 N.W.2d 120, 122-23 (Iowa 1988); *Nebraska Innkeepers v. Pitt.-Des Moines Corp.*, 345 N.W.2d 124, 126 (Iowa 1984). However, in certain situations strict liability or negligence theory will not be available even if physical harm to property has occurred. Depends on nature of loss and whether danger to user exists by virtue

of defect. *American Fire & Cas. Co. v. Ford Motor Co.*, 588 N.W.2d 437, 439 (Iowa 1999); *Ballard v. Amana Society, Inc.*, 526 N.W.2d 558, 562 (Iowa 1995). In addition, for tort theories to apply, physical harm to property must be to property other than product itself. *Richards v. Midland Brick Sales Co.*, 551 N.W.2d 649, 651 (Iowa Ct. App. 1996).

Comparative Fault. Iowa's comparative fault act includes claims of strict liability, negligence and breach of warranty within definition of fault that is to be compared and allocated among parties. I.C.A. §668.1. Accordingly, contributory negligence of plaintiff is available as full or partial defense in product liability case. Assumption of risk and product misuse are also available as defenses. *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 536 (Iowa 1999). Product misuse may also be argued as affirmative defense. *Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911, 916 (Iowa 1990). In crashworthiness-enhanced injury cases, conduct contributing to initial cause of accident should not be submitted as comparative fault. *Reed v. Chrysler*, 494 N.W.2d 224, 226 (Iowa 1992).

Alteration or Substantial Change in Product. No liability exists where product is rendered defective by alteration or change beyond control of manufacturer. *Aller v. Rodgers Machinery Mfg. Co.*, 268 N.W.2d 830, 837-38 (Iowa 1978). In breach of warranty case alteration or modification is affirmative defense. *Etchen v. Holiday Rambler Corp.*, 574 N.W.2d 355, 359 (Iowa Ct. App. 1997).

State of the Art. Under I.C.A. §668.12, complete defense exists to persons who plead and prove product conformed to state of the art in existence at time product was designed, tested, manufactured, formulated, packaged provided with warning or labeled. *Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911, 920-21 (Iowa 1990). Typically applied in strict liability but not negligence claims. *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 290-91 (Iowa 1994).

Limitation on Liability of Non-Manufacturers. I.C.A. §613.18 provides person who is not assembler, designer or manufacturer, and who wholesales, retails, distributes, or otherwise sells product is: a) immune from suit based upon strict liability in tort or breach of implied warranty of merchantability which arises solely from alleged product defect in original design or manufacture of product; and b) not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability for product upon proof that manufacturer is subject to jurisdiction of Iowa courts and has not been declared judicially insolvent.

Expert Opinion. Iowa committed to liberal rule on admission of opinion testimony. Daubert considered and not applied. *Williams v. Hedican*, 561 N.W.2d 817, 822-28 (Iowa 1977); *Mensink v. American Grain*, 564 N.W.2d 376, 380-81 (Iowa 1977); *Johnson v. Knoxville Sch.*, 570 N.W.2d 633, 636-39 (Iowa 1977); *Leaf v. Goodyear*, 590 N.W.2d 525, 531-32 (Iowa 1999).

Disclaimer of Warranties. Seller may not exclude or limit operation of warranty in respect to personal injuries of persons reasonably expected to use or consume product. I.C.A. §§554.2318, 554.2719(3). Disclaimer can be effective to limit consequential commercial damages if conscionable. I.C.A. §554.2719(3). Likewise, implied warranties may be disclaimed if wording insures that purchaser is aware of exclusion as part of bargain. I.C.A. §554.2316.

Damages. Person injured as result of defective product may recover damages for injury under theories of strict liability, negligence and breach of warranty. Consequential damages are recoverable in actions alleging strict liability or negligence. *Ballard v. Amana Society, Inc.*, 526 N.W.2d 558, 560 (Iowa 1995). Non-privity buyers who rely on breach of warranty may not recover consequential damages. *Beyond the Garden Gate, Inc. v. Northstar Mfg.*, 526 N.W.2d 305, 309-10 (Iowa 1995). Claims for punitive damages can be made under strict liability, negligence or breach of warranty. *Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911, 919-20 (Iowa 1990); *Jacobsen v. Benson Motors, Inc.*, 216 N.W.2d 396, 405-06 (Iowa 1974). However, plaintiff must satisfy requirements of I.C.A. §668A.1, requiring proof by a preponderance of clear, convincing, and satisfactory evidence, that the conduct of the defendant constituted willful and wanton disregard for the rights or safety of another.

RELEASE

See Law Digest Tables.

Compromise adjustment of conflicting claims is favored and settlement by release of disputed claim, asserted in good faith, is sufficient consideration for compromise though claim proves later to be unfounded. *Messer v. Washington*, 233 Iowa 1372, 11 N.W.2d 727, 731 (1943).

Court set aside release for personal injuries suffered in auto accident on grounds of mutual mistake where it found none of parties knew full nature and extent of releasor's injuries. *Barnard v. Cedar Rapids City Cab Co.*, 257 Iowa 734, 133 N.W.2d 884, 892-94 (1965).

As affecting insurer's right of subrogation as held in case of *Kennedy v. Iowa State Ins. Co.*, 119 Iowa 29, 91 N.W. 831 (1902), where insured contracts away right

to recover against one primarily liable for cause of loss, he releases insurer from liability to insured or to creditor of insured covered under simple "open mortgage clause." *Conrad v. Moreland*, 230 Iowa 520, 298 N.W. 628 (1941). Release by misrepresentation on part of company's representative. See *Bockes v. Union Mut. (2 cases)*, 212 Iowa 499, 232 N.W. 156 (1930).

Covenant not to sue, providing that it is made without prejudice to injured claimant's claims against insured or other insurers, joined in by insured, estops insured from asserting that injured person's claims against insured were settled thereby. *Savery v. Kist*, 234 Iowa 98, 11 N.W.2d 23, 26 (1943).

Release must specially identify tortfeasor to be released. Boiler plate language not sufficient. *AID Ins. Co. v. Davis County*, 426 N.W.2d 631, 633-34 (Iowa 1988).

Anticipatory release that refers only to "accidents" generally and does not specifically state that person is waiving claims based on negligence is not enforceable as to negligence claims. *Sweeney v. City of Bettendorf*, 762 N.W.2d 873 (Iowa 2009).

REPRESENTATIONS AND WARRANTIES

Insurer may avoid liability on policy based on misrepresentations of insured in application, but to do so application must be attached or endorsed onto policy when issued or renewed. I.C.A. §§511.33, 515.133. Failure to do so does not invalidate policy, but will preclude insurer from raising any defense based on representations made by insured in application. I.C.A. §§511.34, 515.134. All elements of fraud must be shown to avoid liability. Regarding representations, when applicant is asked matter of opinion, such as whether or not applicant is in good health, as matter of law answer cannot be warranted as true. *Dezsi v. Mutual Benefit Health & Accid. Ass'n*, 255 Iowa 337, 125 N.W.2d 219, 223 (1963). Incorrect statements of opinion will not void the policy if made in good faith without an intention to deceive. *Olson v. Southern Surety Co.*, 201 Iowa 1334, 208 N.W. 213 (1926). Regarding reliance, insurer must show reliance on truth of representation and when applicant supplies sufficient information to put insurer on notice of facts, insurer will be presumed to know those facts which it could have learned through reasonable investigation. *Valu-Check, Inc. v. Security Connecticut Ins.*, 423 N.W.2d 556, 557-58 (Iowa App. 1988). Regarding materiality, materiality may be shown by proof that true answer would have affected risk in premium charged, or where applicant's responses to questions are inducement to issuance of policy. *Crandall v. Bankers Life Co.*, 245 Iowa 540, 62 N.W.2d 169, 173-74 (1954).

Implied warranty of workmanlike construction covers third-party purchasers. *Speight v. Walters Development Co.*, 744 N.W.2d 108, 114 (Iowa 2008).

SERVICE OF PROCESS

Service of process can be perfected by one of four methods: 1) personal service; 2) substituted service; 3) acceptance of service; and, 4) publication of service. *Life v. Best Refrigerated Express*, 443 N.W.2d 334, 335 (Iowa Ct. App. 1989). Ia. R. Civ. P. 1.305 specifies the methods for obtaining personal service.

Substituted service on a non-resident motorist is governed by I.C.A. §321. 501. For actions against non-resident corporations arising from contracts or torts, service may be made on the secretary of state pursuant to I.C.A. §617.3.

Publication of service is governed by Ia. R. Civ. P. 1.310.

Pursuant to Ia. R. Civ. P. 1.302(5), notice of the suit and a copy of the petition filed must be served on the defendant, respondent or other party within 90 days after filing the petition in order to avoid dismissal without prejudice. The court shall extend the deadline for service upon a showing of good cause by the party filing papers.

SUBROGATION

See "RELEASE."

Insurer has right of subrogation in form of lien on claim to recover from third parties who cause loss to insured employee. I.C.A. §85.22. Public contractor's surety, subrogated to claims of laborers and material men paid by it, is entitled to reimbursement only out of "retained percentage" rather than amount due on contract, as against contractor's assignee. *Hercules v. Burch*, 235 Iowa 568, 16 N.W.2d 350, 356 (1944); *Sinclair v. Burch*, 235 Iowa 594, 16 N.W.2d 359, 362-63 (1944).

Tortfeasor or his insurer has no duty to protect subrogation interest of claimant's insurer. *Farm Bureau Ins. v. Allied Mut.*, 580 N.W.2d 788, 790 (Iowa 1998).

Where policy contained provision that insurer was entitled to offset of medical payment coverage against later-assessed liability, offset was contractual and not a subrogation claim. Therefore, offset was not to be reduced by insured's comparative fault. *Wilson v. Farm Bureau Mut. Ins. Co.*, 2009 WL 2342451 (Iowa 2009).

SUICIDE

One seeking to recover double indemnity benefits for accidental death has burden of proof, aided by presumption of accidental as against suicidal death, *Allison v. Bankers*, 230 Iowa 995, 299 N.W. 889 (1941).

Presumption against suicide is strong one. *Brown v. Metropolitan Life Ins. Co.*, 7 N.W.2d 21, 25 (Iowa 1942).

Decedent's change of heart after commencing suicide procedures but before resultant death does not render death accident; rather decedent's act in setting mechanism of death in motion is controlling. *Tedrow v. Standard Life Inc. Co.*, 558 N.W.2d 195, 197-98 (Iowa 1997).

WAIVER AND ESTOPPEL

In General. Waiver is intentional relinquishment of known right. *State v. Seager*, 571 N.W.2d 204, 209 (Iowa 1997). Elements of equitable estoppel include false representation or concealment of material fact, lack of knowledge of true facts on part of actor, intention that representation or concealment be acted upon, and reliance. *In re Marriage of Gallagher*, 539 N.W.2d 479, 482 (Iowa 1995).

Waiver by Agent. Soliciting agent of insurance company has no authority to waive any of conditions of written policy. *Neiman v. Hawkeye Securities Fire Ins. Co.*, 205 Iowa 119, 217 N.W. 258 (1927); *House v. Security Fire Ins. Co.*, 145 Iowa 462, 121 N.W. 509 (1909). Where insurer's custom is to date accepted policy as of date of application for said policy, agent of insurer who takes application has implied or apparent authority to make valid preliminary contract of insurance effective from date of application until acceptance or rejection. *Muntz v. Travelers Mut. Cas. Co.*, 229 Iowa 1015, 295 N.W. 837 (1941).

Non-waiver Agreements. Even where policy contains provision stating acceptance of past due premium shall not be deemed to be waiver of any rights, customary receipt of past due premiums by insurer can estop insurer from denying coverage on basis of late payment of premiums. *Laverty v. Hawkeye Security Ins. Co.*, 140 N.W.2d 83, 87 (Iowa 1966).

Premiums. Insurer may be estopped to deny coverage on basis of lapsed policy where insured establishes custom permitting delayed payment of premium and induces belief on part of insured that delay in premium payments will not cause forfeiture. *Id.*

Proof of Loss. Defects in proofs of loss which could have been supplied if objection had been made thereto by underwriters are considered waived by failure of underwriters to object to proofs, point out defect, or call for additional information within reasonable time. *Robertson v. Mutual*, 232 Iowa 743, 6 N.W.2d 153, 157-58 (1942). Denial by insurer of all liability under policy operates as waiver of provisions requiring proofs of loss and of any defects in proofs already submitted. *Id.*

See "SUBROGATION."

WARRANTIES

See "REPRESENTATIONS AND WARRANTIES."

WORKERS' COMPENSATION

Appeal. Iowa Administrative Rule 876-4.30, requiring dismissal of appeal to commissioner where appealing party fails to pay costs of transcription, lacks adequate foundation in rational agency policy and is invalid. *Zieckler v. Ampride*, 743 N.W.2d 530, 534 (Iowa 2007).

Where party files for judicial review, benefits award is not automatically stayed. Court must consider four factors in I.C.A. § 17A.19(5). *Grinnell College v. Osborn*, ___ N.W.2d ___ (Iowa 2008). District court abused discretion in refusing to grant stay. *Wilson v. Isle of Capri*, 751 N.W.2d 396 (Iowa Ct. App. 2009).

Bad Faith. Civil tort action against employer and insurer may be predicated on bad faith failure to provide medical benefits. *Reedy v. White Cons. Ind., Inc.*, 503 N.W.2d 601, 602-03 (Iowa 1993). Civil tort action against insurer or self-insured employer may be predicated on unreasonable delay or denial of weekly compensation benefits. *Boylan v. American Motorists Ins. Co.*, 489 N.W.2d 742, 744 (Iowa 1992); *Reedy v. White Consolidated Indus. Inc.*, 503 N.W.2d 601, 603 (Iowa 1993). Employer not subject to bad faith tort liability. See *Bremer v. Wallace*, 728 N.W.2d 803, 804-06 (Iowa 2007) (refusing to recognize bad faith tort against uninsured employer); *Holst v. Gorden*, No.07-0727, 2008 WL 2039619, **2-3 (Iowa Ct. App., May 14, 2008) (refusing to extend bad faith tort liability to insured employer, holding that "bad faith tort liability for failing to impose workers' compensation benefits cannot be imposed absent an insurer/insured relationship"). Statutory penalty benefits must be imposed by the workers' compensation commissioner for any unreasonable delay or denial of weekly compensation benefits. *Meyers v. Holiday Express Corp.*, 557 N.W.2d 502, 505-06 (Iowa 1996). When employer and insurer delay payment of benefits awarded by agency, employee may maintain separate actions for penalty benefits (agency action) and to enforce the award (civil action). *Simonson v. Snap-On Tools Corp.*, 588 N.W.2d 430, 437 (Iowa 1999).

Cumulative Injuries. Injuries resulting from cumulative trauma are compensable. *McKeever Custom Cabinets v. Smith*, 379 N.W.2d 368, 374 (Iowa 1985). Injury date for cumulative injuries is date on which worker is aware of injury and causal connection of injury to his work. *George A. Hormel & Co. v. Jordan*, 569 N.W.2d 148, 152 (Iowa 1997).

Exclusive Remedy. Exclusive remedy provision is not affirmative defense, but is issue of subject matter jurisdiction which may be raised at any time. *Bailey v. Batchelder*, 576 N.W.2d 334, 337 (Iowa 1998). Employer is immune from third-party claims for non-contractual indemnity and contribution under exclusive remedy provision. *Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 317-18 (Iowa 1992); *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303, 306-08 (Iowa 1966). Employer is immune from claims for loss of consortium by injured worker's spouse and children. *Johnson v. Farmer*, 537 N.W.2d 770, 773 (Iowa 1995). Employer is not immune from liability for intentional torts (defamation and breach of fiduciary duty) committed by employer's nurse during course of worker's medical care for work-related injury. *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 137 (Iowa 1996). Co-employee immunity is personal defense and does not extend immunity to third-parties who are not employers of injured worker. *Smith v. CRST Int'l, Inc.*, 553 N.W.2d 890, 893-94 (Iowa 1996); *Veasley v. CRST Int'l, Inc.*, 553 N.W.2d 896, 899-900 (Iowa 1996); *Estate of Dean v. Air Exec, Inc.*, 534 N.W.2d 103, 104-06 (Iowa 1995).

Hearing Loss. Tinnitus is work injury compensable under normal worker's compensation act (Iowa Code ch. 85), rather than a form of hearing loss compensable under hearing loss statute (Iowa Code ch. 85B). *Ehteshamfar v. UTA Engineered Sys. Div.*, 555 N.W.2d 450, 453 (Iowa 1996).

Idiopathic Injuries. Injuries which merely coincidentally occur at work but are not caused by increased risk of injury in employment do not arise out of employment. *Miedema v. Dial Corp.*, 551 N.W.2d 309, 311-12 (Iowa 1996). Increased risk of injury can be proven by lay testimony that worker fell from ladder. *Koehler Elec. v. Wills*, 608 N.W.2d 1, 5 (Iowa 2000).

Indemnity and Subrogation. Employer's statutory rights of indemnity and subrogation do not apply to injured worker's third-party recovery in related medical malpractice claim. *Toomey v. Surgical Services, P.C.*, 558 N.W.2d 166, 169-70 (Iowa 1997); see also I.C.A. §85.22. Employer's statutory rights of indemnity and subrogation do not apply to injured worker's recovery of uninsured or underinsured motorist benefits. *March v. Pekin Ins. Co.*, 465 N.W.2d 852, 854 (Iowa 1991).

Medical Care. Employer has right to designate medical care for injured worker but the care provided must be prompt, reasonably suited to treat worker's condition and not unduly inconvenient. *West Side Transp. v. Cordell*, 601 N.W.2d 691, 693-94 (Iowa 1999). Worker's unreasonable rejection of medical care which does not seriously endanger his health and which is reasonably likely to improve his condition may support a



reduction or forfeiture of benefits. *Stufflebean v. City of Fort Dodge*, 9 N.W.2d 281, 284 (Iowa 1943).

Mental Injuries. Purely mental injury without physical stimulus or effect is compensable. *Dunlavey v. Economy Fire & Cas. Co.*, 526 N.W.2d 845, 852 (Iowa 1995). Suicide resulting from mental injury is compensable death claim. *Humboldt Community Sch. v. Fleming*, 603 N.W.2d 759, 762 (Iowa 1999).

Occupational Diseases. Latex allergy condition is work injury compensable under normal worker's compensation act (Iowa Code ch. 85), rather than occupational disease compensable under occupational disease statute (Iowa Code ch. 85A). *St. Luke's Hospital v. Gray*, 604 N.W.2d 646, 653 (Iowa 2000). Discovery rule does not apply to statute of limitations for occupational disease claims. *Ganske v. Spahn & Rose Lumber Co.*, 580 N.W.2d 812, 816 (Iowa 1998).

Brucellosis contracted from cut while working with hogs is an injury, not a disease. *IBP, Inc. v. Burress*, ___ N.W.2d ___, 2009 WL 1975399 (Iowa 2009).

"Coming and Going" Rule. Generally, absent special circumstances, injuries occurring off the employer's premises while the employee is on the way to or from work are not compensable. *Great River Med. Ctr. v. Vickers*, No.06-1476, 2008 WL 2042517, *3 (Iowa Ct. App., May 14, 2008). Several exceptions apply; however, where employee called in sick to work but was told that she would be terminated, and employee then reported to work only to be told to return home because she was sick, and employee was involved in fatal accident on her way home, employee was not engaged in "special errand" or "dual purpose" and was not entitled to workers' compensation benefits. *Id.*

Scheduled Injuries. Injury to wrist is compensated as injury to arm. *Holstein Electric v. Breyfogle*, 756 N.W.2d 812 (Iowa 2008).