

DIGEST OF INSURANCE LAW

MAINE

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Portland, Maine

CIVIL JUDICIAL SYSTEM

Courts of Original Jurisdiction

District Courts have limited original jurisdiction, concurrent with Superior Court in civil actions in which equitable relief is not sought. Jurisdictional limit of \$30,000 has been abolished. 4 M.R.S.A. §152 (2). Thirty-six (36) District Court Judges preside in 28 judicial divisions. 4 M.R.S.A. §§153, 157 (1A). District Court Judges are appointed for 7-year terms. 4 M.R.S.A. §157 (1)(A). Retired District Court Judges may be appointed to be Active Retired Judges who shall have same jurisdiction as before retirement. 4 M.R.S.A. §157-B.

Small Claims actions may be filed in District Courts to decide claims not exceeding \$6,000 exclusive of interest and costs, and not involving title to real estate. 14 M.R.S.A. §7482. Small Claims proceedings are “simple, speedy and informal.” 14 M.R.S.A. §7481 *et seq.* Defendant may appeal to Superior Court and have a trial with a jury. *Ela v. Pelletier*, 495 A.2d 1225 (Me. 1985). However, plaintiff, having commenced the action in District Court, is deemed to have waived his right to jury trial and may appeal only questions of law. *Buffington v. Arnheiter*, 576 A.2d 751 (Me. 1990).

Probate Courts have original jurisdiction of wills and estates of deceased persons who at the time of death lived in the County or owned estate in the County. 4 M.R.S.A. §251. Each of Maine’s 16 counties has one Probate Court. Probate Court Judges are elected to serve 4-year terms. 4 M.R.S.A. §301; 30-A M.R.S.A. §62 (1). Probate Court Judges may grant leave to adopt children, change a person’s name, and appoint guardians. 4 M.R.S.A. §251. Probate Courts have concurrent jurisdiction in equity with Superior Courts. 4 M.R.S.A. §252.

Courts of Original and Appellate Jurisdiction

Superior Court is court of original jurisdiction and court of last resort as to matters of fact. Superior Court has original jurisdiction over all claims brought under Maine Tort Claims Act. 14 M.R.S.A. §8106. It has concurrent original jurisdiction in certain equity matters with Supreme Judicial Court. 14 M.R.S.A. §5301. Superior Court Justices are appointed for 7-year terms. Maine Constitution, Art. VI, §4. There are 17 Superior Court

Justices who are assigned on circuit by the Chief Justice of the Superior Court. 4 M.R.S.A. §101. Whenever it becomes necessary, the Chief Justice of the Supreme Judicial Court may designate a Justice or Active Retired Justice of the Supreme Judicial Court to preside over a term of the Superior Court, 4 M.R.S.A. §101, and he or she may designate a Justice or Active Retired Justice of Superior Court to preside over a term of District Court. 4 M.R.S.A. §121.

Supreme Judicial Court (called Law Court) is court of last resort, and consists of Chief Justice and 6 Associate Justices. 4 M.R.S.A. §1. Retired Justices may be appointed Active Retired Justices who shall have same jurisdiction as before retirement. 4 M.R.S.A. §6. Justices are appointed for 7-year terms. Maine Constitution, Art. VI, §4. Law Court has concurrent original jurisdiction in certain matters of equity with Superior Court. 14 M.R.S.A. §5301. Chief Justice of Supreme Judicial Court may appoint a Justice of Supreme Judicial Court to sit in Superior or District Court, who shall have same jurisdiction as a Judge of that respective Court. 4 M.R.S.A. §2-A.

LAW

Abbreviations

A. – Atlantic Reports.
A.2d – Atlantic Reports, Second Series.
Me. – Maine Reports.
M.R.S.A. – Maine Revised Statutes Annotated.
M.R. Civ. P. – Maine Rules of Civil Procedure.
M.R. Crim. P. – Maine Rules of Criminal Procedure.
M.R. Evid. – Maine Rules of Evidence.
P.L. – Public Laws.

ACCIDENT AND HEALTH INSURANCE

See “ACCIDENTAL MEANS” and “DISABILITY.”

Group or blanket health insurance policies are regulated by Bureau of Insurance pursuant to 24-A M.R.S.A. §2801 *et seq.*



Individual health insurance contracts are regulated by Bureau of Insurance pursuant to 24-A M.R.S.A. §2701 *et seq.*

In all health insurance policies, “dependent children” means children who are under 19 years of age and are children, stepchildren, or adopted children of, or children placed for adoption with policyholder, member, or spouse of policyholder or member. 24-A M.R.S.A. §2742; 24-A M.R.S.A. §2833.

All individual and group health insurance policies providing coverage on an expense-incurred basis must provide benefits for newly born child from moment of birth. 24-A M.R.S.A. §2743; 24-A M.R.S.A. §2834.

All individual and group insurance policies providing coverage for acupuncture must provide coverage when services are performed by licensed acupuncturist under same conditions that apply to services of licensed physician. 24-A M.R.S.A. §2745-B; 24-A M.R.S.A. §2837-B.

Policy providing coverage for mental health services shall offer coverage for services performed by licensed counseling professional. 24-A M.R.S.A. §2744; 24-A M.R.S.A. §2835.

Every group or blanket health policy that provides coverage on an expense-incurred basis for in-patient hospital care shall provide that coverage for home health care services by home health care provider. 24-A M.R.S.A. §2837.

All individual health insurance policies providing coverage for treatment of mental illness must provide benefits for diagnosed 1) Schizophrenia; 2) Bipolar disorder; 3) Pervasive developmental disorder, or autism; 4) Paranoia; 5) Panic disorder; 6) Obsessive-compulsive disorder; and 7) Major depressive disorder. 24-A M.R.S.A. §2749-C.

All group and blanket health insurance policies providing coverage for treatment of mental illness must provide benefits for diagnosed 1) Psychotic disorders, including schizophrenia; 2) Dissociative disorders; 3) Mood disorders; 4) Anxiety disorders; 5) Personality disorders; 6) Paraphilias; 7) Attention deficit and disruptive behavior disorders; 8) Pervasive developmental disorders; 9) Tic disorders; 10) Eating disorders, including bulimia and anorexia; and Substance abuse-related disorders. 24-A M.R.S.A. §2843.

All group and individual health insurance policies shall provide coverage for services performed by licensed chiropractor. 24-A M.R.S.A. §2748; 24-A M.R.S.A. §2840-A. Every HMO shall provide benefits covering chiropractic services. 24-A M.R.S.A. §4236.

No individual or family health insurance policy may provide more restrictive benefits or exclude benefits for AIDS, ARC, or HIV related diseases, except through exclusion under which all sickness and diseases are treated the same. 24-A M.R.S.A. §2750.

Disease Induced by Accident. When disease is direct consequence of accident, recovery might be had under accident policy for disease and its consequences. *See Thompson v. Columbian Nat'l*, 114 Me. 1, 95 A. 229 (1915), allowing recovery for death from blood poisoning caused by accident.

Explicit “disease exclusion” will exclude coverage where disease and accident combine to cause loss. *See Pelkey v. Gen. Elec.*, 2002 ME 142, ¶ 15, 804 A.2d 385, 389.

ACCIDENTAL MEANS

Leading case is *McGlinchy v. Fid. & Cas. Co.*, 80 Me. 251, 14 A. 13 (1888), recovery allowed for death caused by fright. *Tracey v. Standard*, 119 Me. 131, 109 A. 490 (1920), injury to eye from swarm of insects deemed accidental.

Where defense to payment under accidental death policy is suicide, law imposes upon insurer presumption that death was not suicide; insurer has burden of producing evidence to overcome presumption. *Cox v. Metro. Life*, 139 Me. 167, 28 A.2d 143 (1942).

ADJUSTERS

Adjusters are regulated by Bureau of Insurance, # 34 State House Station, Augusta, Maine 04333 (Tel. 207-624-8475). Adjusters, in general, must be licensed by State. 24-A M.R.S.A. §1411.

Adjuster is person who, for fee, commission, or other compensation, investigates for, settles on behalf of, and reports to insurer, self-insurer, or insured relative to claims. 24-A M.R.S.A. §1402 (1). Licensed insurance adjuster person must be at least 18 years of age, competent, trustworthy, financially responsible, and of good personal and business reputation, and must pass a written examination, or maintain federal crop insurance certification in case of multiple peril crop insurance adjusters who established license qualification through such certification. 24-A M.R.S.A. §1472.

Each adjuster shall keep records of all investigations, adjustments, and fees received for at least 3 years. 24-A M.R.S.A. §1474.

No adjuster’s license is required for adjuster sent into Maine on behalf of authorized insurer for investigation and/or adjustment of series of losses resulting from

catastrophe common to all such losses. 24-A M.R.S.A. §1475.

Adjuster trainee is any person with less than 1 year total experience handling loss claims, employed by and subject to immediate personal supervision of an adjuster licensed in Maine and established in business of adjusting for at least 3 years. 24-A M.R.S.A. §1402 (2).

Penalty for adjusting without a license. Fine of not less than \$100 nor more than \$1,000, or imprisonment for no more than 6 months, or both. 24-A M.R.S.A. §1412 (4).

Public Adjuster Solicitation. Adjuster seeking to provide adjusting services to insured for fee may not solicit or offer adjustment services for at least 36 hours after accident or occurrence. 24-A M.R.S.A. §1476 (1). Contract with insured for adjustment services must contain provision that insured may rescind contract within two business days. 24-A M.R.S.A. §1476 (2).

AGE

See “AUTOMOBILES”; “LIABILITY INSURANCE”; “NEGLIGENCE.”

Age of majority is 18 years. 1 M.R.S.A. §72 (1); *Baril v. Baril*, 354 A.2d 392, 396 (1976). This includes capacity to execute release. Must be 21 years of age to purchase alcoholic beverages. 28-A M.R.S.A. §2 (20); 28-A M.R.S.A. §2081 (1) (A-D).

No insurer may refuse to issue motor vehicle liability policy solely because applicant is 65 years old or older. 24-A M.R.S.A. §2902-C.

AGENTS AND BROKERS

An “insurance producer” is person required to be licensed to sell, solicit, or negotiate insurance. 24-A M.R.S.A. §1402 (5).

Insurance consultant is person who, for a fee, advises or offers to advise any person on insurance matters. 24-A M.R.S.A. §1402 (4).

Insurance agent owes insured the duties to use reasonable care, diligence, and judgment in obtaining insurance coverage requested by insured. *Szelenyi v. Morse, Payson & Noyes*, 594 A.2d 1092 (Me. 1991). Failure to secure coverage or requested changes in coverage may be enforced by breach of contract if elements of contract are met. *Bates v. Anderson*, 614 A.2d 551 (Me. 1992); see also *County Forest v. Green Mountain*, 2000 ME 161, 758 A.2d 59.

Agent stands in place of company, binds company as to any insurance effected on behalf of company by him. *Id.*; *Utica v. St. Paul*, 519 A.2d 185 (Me. 1986);

Sinclair v. Home Indem. Co., 159 Me. 367, 193 A.2d 177 (1963); *Frye v. Equitable Life*, 111 Me. 287, 89 A. 57 (1913). Notice to and knowledge of agent is binding on insurer. 24-A M.R.S.A. §2422. Company may be liable where agent had apparent authority to orally issue temporary coverage. *Hurd v. Maine Mut.*, 139 Me. 103, 27 A.2d 918 (1942). Acceptance by authorized agent of overdue premium continues the policy in full force. *Northeast v. Concord Gen. Mut.*, 461 A.2d 1056 (Me. 1983). Before agent’s actions or knowledge can bind insurer, plaintiff must show: 1) agent had authority to bind insurer; and 2) insurer would have accepted risk had it received proper request. *Utica v. St. Paul*, 519 A.2d 185 (Me. 1986); *Attleboro v. Grange*, 611 A.2d 76 (Me. 1992).

Insurer is deemed to have knowledge of facts known to its agent. *Marchiori v. Am. Republic*, 662 A.2d 932, 934 (Me. 1995). “The agent’s knowledge of the insured’s needs is binding on the company, and reformation is appropriate to conform to the agreement between the agent and the insured.” *Yaffie v. Lawyers Title*, 1998 ME 77, ¶ 10, 710 A.2d 886, 889. Agent may bind company where conduct by agent of insurer misleads insured concerning scope of coverage and insured acts in justifiable reliance on conduct. *Roberts v. Maine Bonding*, 404 A.2d 238 (Me. 1979).

Superintendent of insurance prescribes all forms for applications for insurance licenses. Applications should be sent to Bureau of Insurance, # 34 State House Station, Augusta, Maine 04333 (Tel. 207-624-8475). 24-A M.R.S.A. §1421 *et seq.*

ARBITRATION

Maine has adopted Uniform Arbitration Act. 14 M.R.S.A. §§5927-5949. However, it does not apply to claims for uninsured motorist benefits. 14 M.R.S.A. §5948.

Maine policy favors arbitration. *Orthopedic Physical Therapy v. Sports Therapy*, 621 A.2d 402, 403 (Me. 1993). Parties cannot be compelled to submit to arbitration unless intent manifested in writing. *Nisbet v. Faunce*, 432 A.2d 779 (Me. 1981).

ATTORNEYS

“Attorneys are officers of the court and the Supreme Judicial Court of Maine has the inherent authority to define and to regulate their practice of law.” *Harrington v. Lord*, 1997 ME 201, ¶ 7, 704 A.2d 1211, 1213.

Legal Malpractice. Attorneys are under legal obligation to execute business entrusted to them with reasonable degree of care, skill, and dispatch. *Burton v. Merrill*, 612 A.2d 862, 865 (Me. 1992). Measure of



damages in legal malpractice action is amount of money client would have recovered but for attorney's malpractice. *Hoitt v. Hall*, 661 A.2d 669, 672 (Me. 1995).

Attorneys' fees. Maine has adopted American Rule that litigant must pay his attorney's fees absent statutory provision, contractual agreement, or court's inherent authority to sanction serious misconduct in judicial proceeding. *Colquhoun v. Webber*, 684 A.2d 405, 413 (Me. 1996); *Storage Realty v. N. Am. Envtl. Servs.*, 2004 ME 11, 841 A.2d 812. Attorneys' fees are subject to court discretion. *Anderson v. Elliott*, 555 A.2d 1042, 1049 (Me. 1989); *Harrington v. Lord*, 1997 ME 201, ¶ 7, 704 A.2d 1211, 1213.

When an insurer has duty to defend but fails to do so, insurer is guilty of breach of contract that renders it liable to pay such damages, including attorneys' fees, as will place insured in position equally as good as if the insurer had fully performed its duty. *Gibson v. Farm Family Mut.*, 673 A.2d 1350, 1354-55 (Me. 1996).

AUTOMOBILES

See "NEGLIGENCE"; "FINANCIAL RESPONSIBILITY LAW"; "LIABILITY INSURANCE."

Age. Minimum age to obtain motor vehicle operator's license is 15 years if applicant has completed driver education course, based on employment or educational need. 29-A M.R.S.A. §1256. Applicant receives special restricted license only, allowing operation between residence, school, and place of employment. 29-A M.R.S.A. §1256 (1) (B). Otherwise, minimum age is 16 years. 29-A M.R.S.A. §1251 (5).

Every owner knowingly permitting minor to operate motor vehicle is jointly and severally liable for that minor's negligence. 29-A M.R.S.A. §1651. One engaged in business of renting motor vehicles is jointly and severally liable for damages caused by negligence of renter and renter's permittee, except as to damages sustained by passenger of rented vehicle. 29-A M.R.S.A. §1652; *but see* 49 U.S.C. §30106 (stating that there is no such liability).

Agency. Employer vicariously liable for negligent operation of motor vehicle by employee acting within scope of express, implied, or apparent authority. *Stevens v. Frost*, 140 Me. 1, 32 A.2d 164 (1943).

Family Purpose Doctrine not followed. *Pelletier v. Mellon Bank*, 485 A.2d 1002, 1003 n.3 (Me. 1985).

Coverage. Registered owners of motor vehicles are required to have liability coverage of at least \$50,000 per person bodily injury; \$100,000 bodily injury aggregate; \$25,000 property damage; and \$2,000 medical payments coverage. 29-A M.R.S.A. §§1605, 1605-A. When provi-

sions of insurance policy conflict with mandatory statutory provisions, statutory provisions must prevail. *Moody v. Horace Mann*, 634 A.2d 1309, 1311 (Me. 1993). Policies issued to residents will be reformed by Court, if necessary, to comply with Maine's financial responsibility law. *Concord Gen. v. McLain*, 270 A.2d 362, 364 (Me. 1970).

Guest Cases. Guest injured in automobile may maintain action of negligence against host operating automobile. Maine law considers guest to be Invitee and rule of ordinary negligence applies. Guest held to duty of exercising some care even though merely passenger and is chargeable with negligence. *Scammon v. City of Saco*, 247 A.2d 108 (Me. 1968). Negligence of driver is not imputable to passenger or guest, *Dansky v. Kotimaki*, 125 Me. 72, 130 A. 871, 874 (1925), unless there is joint enterprise and guest had equal right in control and management of automobile. *Trumpfeller v. Crandall*, 130 Me. 279, 155 A. 646, 650 (1931); *Illingworth v. Madden*, 135 Me. 159, 164, 192 A. 273, 276 (1937).

Owner or person controlling motor vehicle who permits person who he knows or should know is under influence of alcohol or drugs, or has blood alcohol level of .08 percent or more by weight of alcohol in blood, shall be jointly and severally liable with intoxicated individual for damages caused by negligence of intoxicated. 29-A M.R.S.A. §1653.

Liability insurance policy covering motorcycle may not exclude coverage for injuries sustained to passenger unless insurer notifies Bureau of Insurance in writing and notifies each agent in Maine and exclusion is provided by separate endorsement to policy. 24-A M.R.S.A. §2902-B.

Seat Belts. Seat belts must be used. 29-A M.R.S.A. §2081. Non-use of seat belts not admissible as evidence in civil trial. 29-A M.R.S.A. §2081 (5).

Uninsured/Underinsured Motorists Coverage: Uninsured/Underinsured motorist coverage is mandated on all motor vehicle liability insurance policies. Every liability policy issued in connection with motor vehicle registered or principally garaged in Maine must provide coverage for protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured, underinsured, or hit-and-run motor vehicles. Bodily injury must be "sustained by an insured person." 24-A M.R.S.A. §2902 (1). The amount of UM coverage provided must be at least \$50,000/\$100,000 bodily injury coverage, plus \$25,000 property damage coverage, plus \$2,000 medical payments coverage. 24-A M.R.S.A. §2902 (2); 29-A M.R.S.A. §1605 (1). Maine does not allow stacking of uninsured motorist coverage on liability coverage but Maine allows stacking of uninsured and underinsured

motorist coverages. *Connolly v. Royal Globe*, 455 A.2d 932 (Me. 1983). Insured claimant is limited to stated limits for uninsured motorist provisions even if automobile liability insurance policy insured more than one car. *Dufour v. Metro. Prop. & Liab.*, 438 A.2d 1290 (Me. 1982).

Motor vehicle is underinsured if the claimant's underinsured coverage exceeds the tort-feasor's liability insurance coverage. *Tibbetts v. Maine Bonding*, 618 A.2d 731 (Me. 1992).

The limit of UIM coverage is determined by comparing the limit of liability coverage afforded the motor vehicle in which claimant was riding with the UIM coverage. *McGillivray v. Royal Ins.*, 675 A.2d 524 (Me. 1996).

To assert the "no consent to settlement" clause, UM insurer must demonstrate prejudice as a result of loss of subrogation rights. *Greenvall v. Maine Mut.*, 1998 ME 204, 715 A.2d 949.

Underinsured motorist carrier is entitled to credit for face amount of tort-feasor's liability insurance coverage. *Mullen v. Liberty Mut.*, 589 A.2d 1275 (Me. 1991). When there is more than one UM insurer, "gap approach" followed in allocating payments between primary and excess insurers. *Tibbetts v. Dairyland*, 2010 ME 61, 999 A.2d 930.

Insurance policy provision requiring physical contact was repugnant to statute requiring liability policies to provide uninsured and underinsured motorist coverage, and hence the policy provision was invalid. *Lanzo v. State Farm Mut. Auto Ins. Co.*, 524 A.2d 47 (Me. 1987). Insurance coverage is available even though there was no contact between the vehicles. *Id.*

"Replacement automobile" clause extends coverage to second automobile bought by insured during policy year, when later the only automobile described in the policy became inoperable. *Merchants Mut. v. Maine Bonding*, 596 A.2d 1009 (Me. 1991).

Insured is entitled to underinsured coverage only if face amount of tort-feasor's policy is less than insured's underinsurance coverage. Fact that insured may only recover small fraction of tort-feasor's available coverage, due to multiple claimants, is irrelevant. *Mullen v. Liberty Mut.*, 589 A.2d 1275 (Me. 1991).

Insured's failure to give insurer timely notice required by terms of insurance policy does not bar claim unless insurer was prejudiced by delay. *Lanzo v. State Farm Mut. Auto*, 524 A.2d 47 (Me. 1987).

In collision involving insured vehicle and uninsured vehicle, guest of insured driver can recover under uninsured motorist provisions of both his own and his in-

sured driver's policies. *Wescott v. Allstate*, 397 A.2d 156 (Me. 1979).

Insured must prove uninsured or underinsured driver was negligent to recover uninsured or underinsured benefits. *Lanzo v. State Farm*, 524 A.2d 47 (Me. 1987).

Workers' Compensation lien covers uninsured motorist proceeds paid by all but employee's insurer. *Wallace v. S. Portland*, 592 A.2d 1076 (Me. 1991).

Carrier does not have to pay interest on judgment or costs if judgment exceeds amount of uninsured/underinsured coverage, unless carrier acts in "bad faith." Refusal to settle with insured does not constitute "bad faith." *Simpson v. Hanover*, 588 A.2d 1183 (Me. 1991), *overruled on other grounds*, *Greenvall v. Maine Mut.*, 1998 ME 204, 715 A.2d 949.

Insured claimant may not recover punitive damages from insurer under uninsured motorist coverage for outrageous, tortious conduct of uninsured motorists. *Braley v. Berkshire Mut.*, 440 A.2d 359 (Me. 1982).

AVIATION

Maine laws relating to aeronautics and aviation enumerated in 6 M.R.S.A. §§1-303. The Commissioner of Transportation administers laws and regulations relating to aeronautics in Maine. 6 M.R.S.A. §12. Maine complies with regulations issued by Federal Aviation Administration under authority of the "Federal Aviation Act of 1959," as amended, and all federal regulations superseding those issued under authority of Federal Aviation Act of 1959. Maine does not license pilots but does register aircraft and airports open to public, 6 M.R.S.A. §52, and aircraft dealers, 6 M.R.S.A. §53.

Maine law provides, "Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control, in the capacity of owner, lessee or otherwise, of the aircraft, shall be deemed to be engaged in the operation of aircraft..." 6 M.R.S.A. §3 (24). Law appears to impose vicarious liability upon any person who causes or authorizes operation of aircraft including owner. Law Court has not ruled on this provision.

BROKERS

See "AGENTS AND BROKERS."

BURGLARY INSURANCE

Statement "force and violence" in burglary insurance policy does not require any particular degree of force as prerequisite to coverage but requires only that whatever force was used must be illegitimate. *Ross v. Travelers*, 325 A.2d 768 (Me. 1974).

Insurance policy provided coverage where there was burglary by means of felonious entry or exit by actual force and violence as evidenced by visible marks made by tools or physical damage to exterior or interior of premises. *Id.*

CANCELLATION

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

Property insurance is governed by the Maine Property Insurance Cancellation Control Act. 24-A M.R.S.A. §3048 *et seq.* Reasons for cancellation: 1) nonpayment of premium; 2) conviction of crime involving act tending to increase hazard; 3) fraud or material misrepresentation; 4) negligent act or omissions substantially increasing hazard; 5) physical changes in property rendering it uninsurable; 6) property vacant with no custodial care; 7) presence of trampoline 30 days after a notice for removal; 8) presence of swimming pool without fence 30 days after notice of non-compliance; 9) dog bite loss unless dog is removed after notice of cancellation or nonrenewal; 10) failure to comply with reasonable loss control recommendations within 90 days after notice. 24-A M.R.S.A. §3049. Notice of cancellation must be received by insured at least 20 days prior to effective date stated in notice (at least 10 days where cancellation is for nonpayment of premium). Like notice must also be sent to any party named as a mortgagee on policy. 24-A M.R.S.A. §3050; *Maine Bonding v. Knowlton*, 598 A.2d 749 (Me. 1991). Notice of intention not to renew must be received by named insured, and any named mortgagee, at least 30 days prior to expiration date of policy, except where: 1) insurer has manifested willingness to renew, 2) insured fails to pay renewal premium, or 3) insurer has transferred policy to an affiliate. Notice of intention not to renew shall contain statement of reasons, and shall be accompanied by notice of right to apply, within 30 days of receipt of such notice, for hearing before the superintendent. If the insurer transfers the policy to an affiliate, the insured must receive notice of any changes to the terms of the policy that are less favorable to the insured. This notice must be received prior to the date of renewal. 24-A M.R.S.A. §3051.

Purported cancellation that does not comply with statute and its time requirements is void. When calculating time under notice of cancellation, first day is excluded and last day is included in computation. *Valley Forge v. Concord Group*, 623 A.2d 163 (Me. 1993).

Automobile insurance is governed by Maine Automobile Insurance Cancellation Control Act. 24-A M.R.S.A. §2911 *et seq.* Act is not applicable to policies: 1) under assigned risk plan; 2) covering certain public

hazards; 3) insuring more than four automobiles; 4) issued principally to cover personal or premises liability, within certain limitations. 24-A M.R.S.A. §2913. Reasons for cancellation: 1) nonpayment of premium; 2) fraud or material misrepresentation; 3) violation of policy conditions; 4) suspension or revocation of driver's license. 24-A M.R.S.A. §2914. Notice of cancellation must be received by insured at least 20 days prior to effective date (10 days where cancellation is for nonpayment of premium). 24-A M.R.S.A. §2915. Reasons for nonrenewal: 1) conviction of specific crime; 2) when an operator shall be involved in two accidents during policy period (with certain exceptions); 3) increased hazard in type of vehicle insured. 24-A M.R.S.A. §2916-A. Notice of intention not to renew must be received by insured 30 days prior to expiration date, except where: (1) insurer has manifested willingness to renew, (2) insured fails to pay renewal premium, or (3) insurer has transferred policy to an affiliate. 24-A M.R.S.A. §2917. Within 30 days of cancellation or nonrenewal, named insured may request hearing before superintendent of insurance. 24-A M.R.S.A. §2920.

Insured under assigned risk auto policy must renew policy at least 15 days before policy terminates, or insurer can terminate coverage. For insurer to cancel coverage in that circumstance, it must notify insured of nonrenewal at least 10 days before coverage expires. 24-A M.R.S.A. §2924. (Note the small 5-day "window" for nonrenewal, between 10 and 15 days before policy expires).

Mere fact that policy holder obtains new insurance with intention that it takes the place of existing insurance does not, by itself, terminate original insurance. *North-east v. Concord Gen.*, 461 A.2d 1056 (Me. 1983).

No insurance company authorized to transact business in this State may refuse to insure or continue to insure, limit the amount, extent or kind of coverage or charge a rate different from normally charged for same coverage because insured or applicant is blind or partially blind or has physical or mental handicap. 24-A M.R.S.A. §2159-A.

Insured's increased age may not be basis for cancellation or refusal to renew. 24-A M.R.S.A. §2916, *see generally Bard v. Fireman's*, 108 Me. 506, 81 A. 870 (1911).

CHATTEL MORTGAGE

See "FIRE INSURANCE."

Security interests in personal property created by use of security agreement called "chattel mortgage" in some other jurisdictions. Creation, perfection, and enforcement of security interests in Maine is governed by

Uniform Commercial Code. 11 M.R.S.A. §9-1101 *et seq.*

CONSTRUCTION OF POLICY

Contract of insurance to be construed in accordance with intention of parties. *Maine Drilling v. I.N.A.*, 665 A.2d 671, 673 (Me. 1995). Policy should be construed more strongly in favor of coverage but must not frustrate intention of parties. *Apgar v. Commercial Union*, 683 A.2d 497, 500-01 (Me. 1996). Intention to be ascertained by examining policy as a whole. *Farm Bureau v. Waugh*, 159 Me. 115, 188 A.2d 889 (1963).

In construing insurance policy, “contract is only ambiguous if it is reasonably susceptible to two or more interpretations.” *North East Ins. v. Soucy*, 1997 ME 106, ¶ 10, 693 A.2d 1141, 1144. Interpretation of terms of unambiguous insurance contract is question of law. *Mack v. Acadia*, 1998 ME 91 709 A.2d 1187. If insurance policy is ambiguous it will be construed against insurer so as to comply with reasonable expectations of insured. *Colford v. Chubb Life*, 687 A.2d 609 (Me. 1996). “A liability insurance policy must be construed to resolve all ambiguities in favor of coverage.” *Maine Drilling v. I.N.A.*, 665 A.2d 671, 673 (Me. 1995); *Geyerhahn v. USF&G*, 1999 ME 40, 724 A.2d 1258. Narrow construction of exclusion from coverage is in accord with policy of liberally construing policy in favor of insured. *Travelers v. Dingwell*, 414 A.2d 220 (Me. 1980).

Supreme Judicial Court of Maine ruled that “the term ‘resident’ is ambiguous because it is reasonably susceptible of different interpretations.” *Cambridge Mut. v. Vallee*, 687 A.2d 956, 957 (Me. 1996).

If terms of insurance policy conflict with mandatory statutory provisions, statutory provisions prevail. *Moody v. Horace Mann*, 634 A.2d 1309, 1311 (Me. 1993).

Public Policy. Public policy does not prohibit insurance coverage for insured whose negligence contributed to injury from sexual abuse, notwithstanding public policy prohibits coverage for intentional sexual abuse. Insurer has duty to defend insured mother in daughter’s underlying suit alleging that mother negligently failed to prevent daughter’s sexual abuse by father. *Hanover v. Crocker*, 1997 ME 19, 688 A.2d 928.

Exclusion in homeowner’s policy of coverage for “bodily injury or property damage which is either expected or intended from standpoint of insured” referred only to bodily injury that insured in fact subjectively wanted to be result of his conduct or in fact subjectively foresaw as practically certain to be result of his conduct. Insured’s criminal conviction of aggravated assault following shooting could have rested on jury finding only

that he was aware of “a risk” that his conduct would cause bodily injury; verdict did not necessarily include determination that injury caused by insured was “either expected or intended” by him. Collateral estoppel could not be applied to reach conclusion that insurer owed no duty to afford him defense to civil action brought against him by victim of assault. *Patrons-Oxford v. Dodge*, 426 A.2d 888 (Me. 1981).

Choice of Laws. Validity and effect of contract is determined by local law of state which, with respect to particular issue, has most significant relationship to transaction and parties. *Baybutt Constr. v. Commercial Union*, 455 A.2d 914 (Me. 1983), *overruled on other grounds*, *Peerless v. Brennon*, 564 A.2d 383 (Me. 1989).

DAMAGES

When joint tort-feasors by their separate negligent acts cause single injury incapable of apportionment, each tort-feasor is liable for entire amount of damages. *Palleschi v. Palleschi*, 1998 ME 3, 704 A.2d 383. Burden of proof is on defendant to establish portion of damages for which he is not responsible. *Id.*, *Lovely v. Allstate*, 658 A.2d 1091 (Me. 1995).

Defendant takes plaintiff as he finds him or her even though plaintiff’s pre-existing frailty of health makes damages more severe than normal person. *Packard v. Whitten*, 274 A.2d 169, 177-78 (Me. 1971); *Palleschi v. Palleschi*, 1998 ME 3, 704 A.2d 383.

Triers of fact are permitted to make most intelligible and probable estimate with respect to damages which nature of case will permit, given all facts and circumstances having relevancy, to show probable amount of damages suffered. *Merrill Trust v. State*, 417 A.2d 435, 441 (Me. 1980). Uncertain, contingent, or speculative damages not recoverable. *Michaud v. Steckino*, 390 A.2d 524, 530 (Me. 1978); *King v. King*, 507 A.2d 1057, 1059 (Me. 1986). Amount of damages can be established by approximation if jury can reach specific conclusion. *Doane v. Pine State Volkswagen*, 377 A.2d 481, 485 (Me. 1977). Damages for prospective profit losses are recoverable only if they can be estimated with reasonable certainty. *Marquis v. Farm Family Mut.*, 628 A.2d 644, 650 (Me. 1993). Business interruption and loss of prospective profits, *see Ginn v. Penobscot Co.*, 334 A.2d 874 (Me. 1975), *modified*, 342 A.2d 270 (Me. 1975).

Damages for rental of replacement motor vehicle limited to 45 days rental fee. 14 M.R.S.A. §1454. Rule includes rentals of replacement trucks and other commercial vehicles. *Flynn Constr. v. Poulin*, 570 A.2d 1200, 1202 (Me. 1990).

For consequential damages in contract breach, plaintiff must establish amount to “reasonable certainty,”



and must establish that such damages were reasonably within contemplation of contracting parties when agreement was made. *Forbes v. Wells Beach Casino*, 409 A.2d 646, 654-55 (Me. 1979).

Emotional Distress. Damages may be recovered for intentional infliction of emotional distress (absent any physical injury). *Vicire v. Ford Motor Credit*, 401 A.2d 148, 154-55 (Me. 1979). Maine has adopted definition of emotional distress enumerated in Restatement (Second) of Torts §46. *Henriksen v. Cameron*, 622 A.2d 1135, 1138 (Me. 1993). Emotional distress alone may constitute compensable damage if there is liability. *Bryan R. v. Watchtower Bible*, 1999 ME 144, 738 A.2d 839. Plaintiff can claim emotional distress as one element of his damages if he sustains a personal injury.

Negligent infliction of emotional distress is not derivative from any other tort. Plaintiff must show: 1) defendant owed duty to plaintiff; 2) defendant breached duty; 3) plaintiff was harmed; 4) breach was cause of harm. No general duty to avoid negligently causing emotional harm. See *Curtis v. Porter*, 2001 ME 158, ¶ 19, 784 A.2d 18, 25-26.

A bystander may recover damages for negligent infliction of emotional distress (absent physical injury) if reasonably foreseeable that plaintiff would sustain psychic injury and if plaintiff 1) was present at scene of accident; 2) suffered serious mental distress; and 3) was closely related to victim. *Cameron v. Pepin*, 610 A.2d 279, 284-85 (Me. 1992).

Liquidated Damages and Penalties. Intent of parties governs. *Interstate Indus. Uniform Rental v. Couri Pontiac*, 355 A.2d 913, 919 (Me. 1976); court will enforce good faith attempt to fix damages for prospective injury, but mere label "liquidated damages" is not sufficient, and if instrument is facially ambiguous court will hold it a penalty. *Dairy Farm Leasing v. Hartley*, 395 A.2d 1135, 1137-38 (Me. 1978). Agreement unenforceable unless (a) damages caused by breach are very difficult to estimate accurately, and (b) amount fixed is reasonable forecast of amount necessary to justly compensate for loss. *Id.* at 1137.

Punitive Damages. May be awarded when plaintiff can establish by clear and convincing evidence that defendant's conduct was motivated by malice, express or implied. *Kleinschmidt v. Morrow*, 642 A.2d 161, 165 (Me. 1994). Reckless conduct alone or mere negligence will not support award of punitive damages. *Id.* Generally not available for breach of contract. *Forbes v. Wells Beach Casino*, 409 A.2d 646 (Me. 1979). Not recoverable against municipality. 14 M.R.S.A. §8105 (5).

Insured claimant may not recover punitive damages from insurer through uninsured motorists provisions for

outrageous tortious conduct of uninsured motorist. *Braley v. Berkshire Mut.*, 440 A.2d 359, 361 (Me. 1982).

Collateral Source. Maine has adopted collateral source rule excluding such evidence. *Werner v. Lane*, 393 A.2d 1329 (Me. 1978); *Potvin v. Seven Elms*, 628 A.2d 115, 116 (Me. 1993).

Amount. Award will be held excessive only if not rationally supportable. *Souza v. Bangor Hydro-Elec.*, 391 A.2d 349, 354 (Me. 1978). Even marked disparity between actual expenses incurred and total damages awarded will only rarely, if ever, provide per se basis for holding damages excessive. *Jamshidi v. Bowden*, 366 A.2d 522, 524 (Me. 1976); *Gilmore v. Cent. Me. Power*, 665 A.2d 666 (Me. 1995).

DEATH

Person who is absent for continuous period of 5 years, during which he has not been heard from is presumed to be dead. 18-A M.R.S.A. §1-107 (3). Presumption of death may be rebutted by circumstances. *Bernstein v. Metro. Life*, 139 Me. 388, 34 A.2d 682 (1943). Leading case on presumption against suicide is *Cox v. Metro. Life*, 139 Me. 167, 168, 28 A.2d 143, 144 (1942); on voluntary exposure to danger exclusion, *Archibald v. United Comm. Trav.*, 117 Me. 418, 419, 104 A. 792, 792 (1918).

Recovery for Wrongful Death. 18-A M.R.S.A. §2-804. Actions brought in name of personal representative of such deceased person; amount recovered shall be for exclusive use, except as hereafter provided, of surviving spouse, if no minor children, and of minor children, if no surviving spouse, and if both, then for exclusive use of all equally, and, if neither, of his or her heirs. Jury may give such damages as they shall deem just compensation, with reference to pecuniary injuries resulting from such death to persons for whose benefit such action is brought, and such damages as will compensate estate of deceased for reasonable expense of medical, surgical and hospital care, and treatment. Jury may also award damages not exceeding \$500,000 for loss of comfort, society, and companionship of deceased, including damages for emotional distress, to persons for whose benefit action is brought. Punitive damages may be recovered not exceeding \$250,000. Action must be commenced within 2 years after death.

Wrongful death claim will be barred, even if 2 year statute of limitations has not run, if wrongful death action is not commenced within limitation period from when underlying tort occurred. *Ogden v. Berry*, 572 A.2d 1082, 1083 (Me. 1990).

Wrongful death action cannot be maintained under Wrongful Death statute for death of viable fetus. *Milton v. Cary Medical Ctr.*, 538 A.2d 252, 256 (Me. 1988).

Deceased is presumed to have been in the exercise of due care. 14 M.R.S.A. §160.

Uniform Simultaneous Death Act provides that, where decedents and beneficiaries are insured respectively in policies of life or accident insurance and there is not sufficient evidence that they died otherwise than simultaneously, proceeds of each policy shall be distributed as if person whose life was insured had survived. 18-A M.R.S.A. §2-805.

DISABILITY

There is no statutory definition on this subject. “Disability” and “recurrent disability” are not ambiguous and are interpreted as their “plain, commonly accepted meaning.” *Johnson v. John Hancock*, 507 A.2d 559, 560 (Me. 1986). Total disability is caused independently and exclusively of all other causes wholly and continuously disables insured from performing any and every kind of duty pertaining to his occupation. Partial disability is one that disables insured from performing one or more important daily duties pertaining to his occupation.

“Noncancellable disability insurance” means insurance against disability resulting from sickness, ailment, or bodily injury, but not including insurance solely against accidental injury, under any contract which does not give insurer option to cancel or otherwise terminate contract at or after one year from its effective date or renewal date. 24-A M.R.S.A. §2737.

Insured’s one-day attempt to return to work did not separate two periods of recurrent disability into new disability period to permit payment of benefits beyond 18-month limit of disability policy. *Johnson v. John Hancock*, 507 A.2d 559, 560 (Me. 1986).

FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables; “AUTOMOBILES, Compulsory Coverage.”

Uninsured vehicle also includes underinsured vehicle. 24-A M.R.S.A. §2902.

Financial responsibility laws are enumerated at 29-A M.R.S.A. §§1551-1612. Motor vehicle liability insurance policies must provide at least \$50,000 coverage arising from bodily injury or death to any one person, \$100,000 coverage for all bodily injury or death claims arising from one accident, \$25,000 property damage coverage, and \$2,000 medical payments coverage. 29-A M.R.S.A. §1605; 29-A M.R.S.A. §1605-A; 29-A M.R.S.A. §1607.

Additional minimum insurance requirements are: (a) \$350,000 combined single limit for rental vehicles, emergency vehicles, and vehicles for hire that transport freight or merchandise; (b) coverages from \$125,000 to \$2,000,000, depending on the number of passengers for various sized vehicles transporting passengers for hire within the State of Maine; (c) coverages from \$1,500,000 to \$5,000,000 for various sized vehicles transporting passengers to points outside the State of Maine; (d) \$500,000 for school buses transporting no more than 30 passengers and \$1,000,000 for school buses transporting 31 or more passengers; (e) \$125,000 combined single limit for rental trucks with registered gross weight of 26,000 pounds or less and rented or leased for fewer than 30 days. 29-A M.R.S.A. §1611.

Coverage required by financial responsibility law forms part of all policies tendered in compliance with statute and affords coverage coextensive with that required by statute. *Concord Gen. v. McLain*, 270 A.2d 362 (Me. 1970).

FIRE INSURANCE

Fire insurance policies must contain the language of the standard fire policy set forth in 24-A M.R.S.A. §3002. Any insurer may, with consent of Superintendent, use an endorsement or rider attached to printed policy to comply with this requirement. 24-A M.R.S.A. §3002 (2).

Fire insurer owes insured duty of good faith and fair dealing. *Marquis v. Farm Family Mut.*, 628 A.2d 644 (Me. 1993). Breach of duty may only be enforced by breach of contract or breach of statutory provision, not in tort. *Id. See County Forest v. Green Mountain*, 2000 ME 161, 758 A.2d 59.

Appraisal. In case insured and insurer fail to agree as to amount of loss, each shall select appraiser and appraisers shall select umpire to adjust their differences. Each party pays its own appraiser and shares equally cost of retaining umpire. 24-A M.R.S.A. §3002. Insurer must adjust loss in good faith, and dispute on amount of loss must be in good faith. *County Forest v. Green Mountain*, 2000 ME 161, 758 A.2d 59.

Assignment. “Assignment of this policy shall not be valid except with written consent of this Company.” 24-A M.R.S.A. §3002.

Cancellation and nonrenewal of policies are governed by 24-A M.R.S.A. §§3005 and 3007.

Mortgagee Interests and Obligations. Mortgagee may render proof of loss and shall be subject to provisions relating to appraisal and time of payment. If insurer claims no liability to mortgagor or owner, it shall be subrogated to extent of payment of loss to mortgagee,

or insurer may pay off mortgage debt and require assignment thereof and of the mortgage. 24-A M.R.S.A. §3002.

Contribution. Standard Policy requirements provide that in case there is other insurance, insurer shall not be liable for greater proportion of loss than amount of policy bears to whole of insurance. *Id.*

Proof of Loss. Must be filed within 60 days, unless time is extended by insurer, in writing, and must be signed and sworn to by assured, stating value of property and insured's interest therein; all other insurance thereon in detail; purposes for which property was used and persons in building; and time and manner of fire so far as known to insured. *Id.* Insurer must prove prejudice in order to deny coverage based on any failure of insured requirements in case loss occurs. *Marquis v. Farm Family Mut.*, 628 A.2d 644 (Me. 1993).

Common Standard Policy provision, and leading cases touching upon same are as follows: Standard Form, *Opinion of Justices*, 97 Me. 590, 55 A. 828 (1903); Cancellation, *St. Pierre v. North East Ins.*, 471 A.2d 1049 (Me. 1984). Requirement that insured submit to examination under oath may be delayed until after criminal charge of arson is dismissed. *Marquis v. Farm Family Mut.*, 628 A.2d 644 (Me. 1993); Arbitration Clause, *Oakes v. Franklin Fire*, 122 Me. 361, 120 A. 53 (1923); Notice of other Insurance, *Gould v. Maine Farmers' Mut.*, 114 Me. 416, 96 A. 732 (1916); Increase of Risk, *Giberson v. York County Mut.*, 127 Me. 182, 142 A. 481 (1928); Vacancy Clause and Waiver, *Roberts v. Maine Bonding*, 404 A.2d 238 (Me. 1979); Levy and Collection of Assessment Not Waiver, *Towle v. Dirigo Mut.*, 107 Me. 317, 78 A. 374 (1910); Fraud and False Swearing, *Hildebrand v. Holyoke Mut. Fire Ins. Co.*, 386 A.2d 329 (Me. 1978).

Policy void if any material fact or circumstance willfully concealed or misrepresented and insurer acted in reliance thereon. See "REPRESENTATIONS AND WARRANTIES." Coverage exclusions include military action by armed forces, civil commotions, riots, or any military or usurped power. Two year statute of limitations. Clause protecting mortgagee. No abandonment to insurer of property insured. 24-A M.R.S.A. §3002.

Leasing of property does not destroy insured's insurable interest. *Gendron v. Pawtucket Mut.*, 384 A.2d 694 (Me. 1978).

GUEST CASES

See "AUTOMOBILES, Guests."

HOSPITALS

Attested copies of hospital records are admissible into evidence. 16 M.R.S.A. §357.

Liens. Hospitals may file liens for services rendered by filing written notices with clerk of municipality in which hospital is located and sending copy to person that should be liable and to insurer of that person. 10 M.R.S.A. §§3411, 3412.

Third parties may be liable to Medicaid recipients for medical care paid by Medicaid. 22 M.R.S.A. §14.

Immunity. Although Maine recognizes doctrine of charitable immunity, organization seeking to invoke defense of charitable tort immunity must show that it derives its funds primarily from charities. *Thompson v. Mercy Hosp.*, 483 A.2d 706, 707-08 (Me. 1984). In *Thompson*, Mercy Hospital could not invoke doctrine of charitable immunity because less than one percent of annual revenues were derived from gifts. Charity shall be deemed to have waived tort immunity for claims covered by liability insurance. 14 M.R.S.A. §158.

Releases and Statements. Releases and statements, oral or written, recorded by patient confined in hospital or sanitarium are not admissible into evidence if obtained within 30 days after injuries were sustained. 17 M.R.S.A. §3964.

HUSBAND AND WIFE

Doctrine of interspousal immunity is not followed. *MacDonald v. MacDonald*, 412 A.2d 71 (Me. 1980). Married person may recover damages for loss of consortium. 14 M.R.S.A. §302. Spouse may not recover damages for loss of consortium unless there was actual loss of services or affection. *Pelletier v. Ft. Kent Golf Club*, 662 A.2d 220, 224 (Me. 1995).

Right of consortium tracks existence of marital relationship. Live-in boyfriend or girlfriend does not have cause of action for loss of consortium. *Sawyer v. Bailey*, 413 A.2d 165, 166 (Me. 1980).

INFANTS

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

Unemancipated minor can maintain suit against parents for ordinary negligence. *Black v. Solnitz*, 409 A.2d 634, 639 (Me. 1979); *Flagg v. Flagg*, 458 A.2d 748, 749 (Me. 1983). No proposed settlement of infant's claim valid unless approved by Court. 14 M.R.S.A. §1605. If parties agree to settlement, parent or guardian of minor may file application for approval of proposed settlement with Court. M.R. Civ. P. 17A; 14 M.R.S.A. §1605. Emancipation occurs upon reaching age of majority, marriage, or renunciation of care and custody by



parent. *Trenton v. Brewer*, 134 Me. 295, 186 A. 612 (1936).

Minor children have no independent cause of action for loss of parental consortium against third person who negligently injured parent. *Durepo v. Fishman*, 533 A.2d 264, 264-65 (Me. 1987).

INLAND MARINE

Marine and transportation insurance, and marine protection and indemnity coverage, are addressed in 24-A M.R.S.A. §708. Capital stock and surplus requirements governed by 24-A M.R.S.A. §410. Captive insurance companies may engage in business of marine insurance. 24-A M.R.S.A. §6702(7). Maritime insurance fraud is crime. 17 M.R.S.A. §1751.

LIABILITY INSURANCE

Cancellation. Cancellation and non-renewal of motor vehicle policies governed by Maine Automobile Insurance Cancellation Control Act. 24-A M.R.S.A. §2911 *et seq.*

Unfair Claims Settlement Practices. Unfair claims settlement practices and overdue payments governed by 24-A M.R.S.A. §§2436, 2436-A. Insurer must pay interest at rate of 1½% per month plus reasonable attorney's fees for failing to pay any undisputed part of a claim when due, or (a) knowingly misrepresenting to insured pertinent facts or policy provisions relating to coverage; (b) failing to acknowledge, review, pay, or deny claims within a reasonable time following receipt of a written notice of claim by insured; (c) threatening to appeal from an arbitration award for sole purpose of compelling insured to accept a settlement less than the arbitration award; (d) failing to affirm or deny coverage within a reasonable time after receiving completed proof of loss forms; (e) failing "without just cause" to effectuate "prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear." 24-A M.R.S.A. §§2436, 2436-A. Claims must be paid or disputed within 30 days of receipt of proof of loss, or 60 days in the case of fire loss. 24-A M.R.S.A. §2436 (1). This statute applies to first party claims only.

In every insurance contract insurer owes a duty to act in good faith and deal fairly with insured. *Marquis v. Farm Family Mut.*, 628 A.2d 644, 648 (Me. 1993); *Greenvall v. Maine Mut.*, 1998 ME 204, ¶ 14, 715 A.2d 949, 955.

Compromise of Claims. Most recent case on insurer's liability to pay judgment in excess of policy limits due to "bad faith" failure to settle within policy limits decided in 1950. Without deciding issue, court held that insured must, at a minimum, prove insurer was negli-

gent. *Wilson v. Aetna*, 145 Me. 370, 76 A.2d 111 (1950). See also *State Fire & Cas. v. Haley*, 2007 ME 42, ¶ 17, 916 A.2d 952, 957 (Dana, J., dissenting).

Cooperation In Defense. Insured must cooperate in defense of action. Failure to do so is defense in action under policy, but not in reach and apply action. *Michaud v. Mut. Fire*, 505 A.2d 786 (Me. 1986). Insured must not do anything to render defense difficult, and must not collude with party claiming damages from him. Insurer cannot defend insured without reservation, and then disclaim coverage after verdict. *Camire v. Commercial Ins.*, 160 Me. 112, 198 A.2d 168 (1964).

To avoid either its duty to defend or indemnify based on insured's delay in giving notice, liability insurer must show (a) breach of notice provision and (b) prejudice to insurer. *Ouellette v. Maine Bonding*, 495 A.2d 1232 (Me. 1985).

Coverage. A policy should be construed more strongly in favor of coverage but not so as to frustrate the intention of the parties. *Apgar v. Commercial Union*, 683 A.2d 497, 500-01 (Me. 1996). Dog bite of a child on the flatbed of a truck did not arise out of the "use" of the truck; child's claim was covered by homeowners, not automobile, liability policy. *Maine Mut. v. Am. Underwriters*, 677 A.2d 1073 (Me. 1996). Passenger in a car which had been struck by a truck exited the car to attempt to ascertain truck's license plate number was held to be an "occupant" of the car even though he had walked "about 100 yards towards the truck" when he was struck by the truck again. *Genthner v. Progressive*, 681 A.2d 479 (Me. 1996). Standard automobile liability policy does not require insurer to pay prejudgment interest in excess of policy limit. *Nunez v. Nationwide*, 472 A.2d 1383 (Me. 1984). Prejudgment interest cannot be awarded above limit of the UM coverage. *Simpson v. Hanover*, 588 A.2d 1183 (Me. 1991), *overruled on other grounds*, *Greenvall v. Maine Mut.*, 1998 ME 204, 715 A.2d 949.

Direct Action against Insurer. Reach and apply actions. Following final judgment against insured for loss within coverage of policy, judgment creditor may maintain direct action against insurer to have insurance proceeds applied to satisfaction of judgment, provided that insurer received notice of loss prior to entry of judgment. See 24-A M.R.S.A. §2904. Section 2904 sets forth available defenses. No action can be brought against insurer before 20 days have elapsed from rendition of final judgment. Plaintiffs could not maintain civil action for damages directly against defendant's automobile liability insurers, and could not join insurers as parties defendant in action against insureds, until after rendition of judgment against insured. *Allen v. Pomroy*, 277 A.2d 727 (Me. 1971).

Duty to Defend. Duty of an insurer to defend insured is broader than duty of insurer to indemnify insured so insurer may have to defend before it is clear whether there is a duty to indemnify. *State Mut. v. Bragg*, 589 A.2d 35 (Me. 1991). Maine has adopted a broad “comparison test” which requires comparison of plaintiff’s allegations in complaint with policy’s coverage to determine whether there is a duty to defend. *Baywood Corp. v. Maine Bonding*, 628 A.2d 1029 (Me. 1993). Court will not look to extrinsic proof, *Commercial Union v. Royal Ins.*, 658 A.2d 1081 (Me. 1995), even if the undisputed facts show that the injury in question was not covered by the policy. *Elliott v. Hanover Ins. Co.*, 711 A.2d 1310, 1312 (Me. 1998). It will look only to allegations in complaint. *Merrimack Mut. v. Brennan*, 534 A.2d 353 (Me. 1987). Insurer has duty to defend if plaintiff’s complaint shows any potential that the facts ultimately proved may come within scope of coverage provided under insurance policy. *Maine Bonding v. Douglas Dynamics*, 594 A.2d 1079 (Me. 1991); *Vigna v. Allstate*, 686 A.2d 598 (Me. 1996). Once insurer breaches its duty to defend, insured is free to protect her interest; insured is entitled to settle without jeopardizing her right to coverage otherwise available to her. *Cambridge Mut. v. Perry*, 692 A.2d 1388 (Me. 1997).

If insured prevails in a declaratory judgment action between insurer and insured, regarding duty to defend or duty to indemnify, then insurer shall pay insured’s court costs and “reasonable attorney’s fees.” 24-A M.R.S.A. §2436-B(2); *Foremost Ins. v. Levesque*, 2007 ME 96, 926 A.2d 1185.

Liability Between Insurers. Conflicting excess liability insurance coverage provisions are disregarded, general coverage of each policy applies; in such case loss is prorated equally up to limits of lesser policy. *Carriers Ins. v. Am. Policyholders’*, 404 A.2d 216 (Me. 1979).

Exclusions - Intentional Acts. Intentional exclusion of bodily injury or property damage which is either expected or intended from the standpoint of the insured, refers only to damages that insured subjectively intended to be result of his conduct. *Maine Mut. v. Gervais*, 715 A.2d 938, 941 (Me. 1998). “Committing an armed robbery is so highly likely to cause injury to the victim that the law will infer [it] ... is the result of an intentional act and not the result of a negligent act.” *Landry v. Leonard*, 1998 ME 241, ¶ 15, 720 A.2d 907, 911. There is no coverage under homeowner’s policy for “negligent” sexual molestation of a minor because: 1) such conduct in conclusively presumed to be intentional, and therefore excluded under intentional act exclusion, and 2) coverage would be void as against public policy. *Perreault v. Maine Bonding*, 568 A.2d 1100 (Me. 1990). Home-

owner’s policy’s exclusion that excluded coverage for damage “which is expected or intended by the insured” applied when insured raped victim. *Mut. Fire v. Hancock*, 634 A.2d 1312 (Me. 1993). Similarly, no coverage provided if insured is convicted of murder or attempted murder. *State Mut. v. Bragg*, 589 A.2d 35 (Me. 1991).

Time within which Payment Must Be Made. Claim for payment of benefits under policy is payable within 30 days after proof of loss is received by insurer, unless insurer notifies insured in writing within 30 days that claim is disputed and grounds upon which it is disputed. If insurer notifies insured within 30 days that reasonable additional information is required, an undisputed claim shall not be overdue until 30 days following receipt by insurer of additional required information. If insurer fails to pay undisputed claim, or any undisputed part thereof, that part thereof shall bear interest at rate of 1½ % per month after due date. Reasonable attorney’s fee for advising and representing claimant on overdue claim shall be paid by insurer if overdue benefits are recovered in action against insurer or if overdue benefits are paid after receipt of notice of attorney’s representation. 24-A M.R.S.A. §2436; see *County Forest v. Green Mountain*, 2000 ME 161, 758 A.2d 59. Time limits are 60 days for fire losses. 24-A M.R.S.A. §2436 (1).

“Each person” limitation for “all damages for bodily injury sustained by any one person” includes spouse’s loss of consortium claim that is derivative from her husband’s bodily injury claim and is damage to the spouse’s psychic interests rather than bodily injury. *Gillchrest v. Brown*, 532 A.2d 692 (Me. 1987).

“Defective workmanship” exclusion in standard comprehensive general liability policy is enforceable. *Peerless v. Brennon*, 564 A.2d 383 (Me. 1989).

Insured, who is required by state to clean up contamination, cannot obtain indemnification for clean-up costs from his homeowner’s insurer, since such expense does not constitute “amounts the insured is legally obligated to pay as damages.” *Patrons Oxford v. Marois*, 573 A.2d 16 (Me. 1990).

An insurer may not sell or renew a motor vehicle liability insurance policy with a provision that excludes coverage for injury to the insured or any family member of the insured. 24-A M.R.S.A. §2902-D. When provisions of policy conflict with a statute, statute prevails. *State Farm v. Universal Underwriters*, 513 A.2d 283 (Me. 1986).

LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

General statute of limitations is 6 years after cause of action accrues. 14 M.R.S.A. §752.

Actions for assault and battery, false imprisonment, slander, libel, 14 M.R.S.A. §753; death actions, 18-A M.R.S.A. §2-804; against ski areas, 14 M.R.S.A. §752-B; and against state or local governments, 14 M.R.S.A. §8110 must be commenced within 2 years of date action accrues.

Breach of warranty claims limited to 4 years from tender of delivery. Breach of warranty claims when bodily injury occurs limited to 6 years from injury. 11 M.R.S.A. §2-725; *Oceanside v. Peachtree Doors*, 659 A.2d 267 (Me. 1995).

Medical malpractice actions must be brought within 3 years of accrual. Actions for professional negligence involving minor must be brought within 6 years after cause of action accrues or within 3 years after minor reaches age of majority, whichever occurs first. 24 M.R.S.A. §2902. Discovery rule applies in claims for negligently leaving foreign objects in patient. *Id.* In medical malpractice action for wrongful death, 3-year statute of limitations in the malpractice statute prevailed over 2-year statute of limitations in the wrongful death law because of the principle of statutory construction that a statute dealing with a subject specifically prevails over another statute dealing with the same subject generally. *Butler v. Killoran*, 1998 ME 147, 714 A.2d 129.

Statute of limitations for malpractice of physicians and all others “engaged in healing arts” applies to breach of implied warranty counts as well as negligence. *Bee-gan v. Schmidt*, 436 A.2d 893 (Me. 1981).

Under Standard Fire Policy action must be brought within 2 years of its accrual. 24-A M.R.S.A. §3002.

“The general purpose [of statutes of limitations and statutes of repose] is to provide eventual repose for potential defendants and to avoid the necessity of defending stale claims.” *Harkness v. Fitzgerald*, 1997 ME 207, ¶ 701 A.2d 370, 372 (Me. 1997) (citations omitted).

Estoppel prevents defendant from asserting statute of limitations when defendant has acted to induce plaintiff from commencing timely legal action that plaintiff otherwise would have taken. *Vacuum Sys. v. Bridge Constr.*, 632 A.2d 442, 444 (Me. 1993).

No statute of limitations for claims based on sexual acts to minors. 14 M.R.S.A. §752-C.

Tolling. Most statutes of limitation are tolled for minors, those who are mentally ill, imprisoned, or absent from the United States. 14 M.R.S.A. §853. “Mental illness” under the tolling statute refers to an overall inability to function in society that prevents plaintiffs from protecting their legal rights. *McAfee v. Cole*, 637 A.2d

463, 466 (Me. 1994). “Whether a person is mentally ill within the meaning of 14 M.R.S.A. §853 is a question of fact.” *Bowden v. Grindle*, 675 A.2d 968, 971 (Me. 1996). However, in medical malpractice action, mental incapacity does not toll statute of limitations. *Dasha v. M.M.C.*, 665 A.2d 993 (Me. 1995). Statute of limitations tolled for claim by minor under Maine Tort Claims Act; claimant must present notice of claim within 180 days of the minor’s attaining 18 years of age. 14 M.R.S.A. §8107(2).

Statutes usually begin to run at point when wrongful act produces injury for which potential plaintiff is entitled to seek judicial relief, regardless of whether plaintiff could have reasonably known of injury at time injury first arose. *Williams v. Ford Motor*, 342 A.2d 712 (Me. 1975). However, Law Court has applied discovery rule in a few cases - *i.e.* asbestos cases. *Bernier v. Ray-mark Indus.*, 516 A.2d 534 (Me. 1986). Discovery rules apply, too, in cases of fraud or fraudulent concealment, cases involving drafting of last will and testament for probate, or legal malpractice, but for legal malpractice involving real estate title opinions, in no event more than 20 years after act or omission giving rise to injury. 14 M.R.S.A. §§753-B, 859.

Breach of contract action against insurer due to wrongful denial of tendered defense accrues when insurer declines defense, rather than when underlying loss occurred. *Palmero v. Aetna*, 606 A.2d 797 (Me. 1992). However, tort claims against agent for wrongful failure to procure coverage accrues when underlying loss occurred. *Chiapetta v. Clark*, 521 A.2d 697 (Me. 1987).

Plaintiff must give written notice within 180 days after cause of action accrues for claims under Maine Tort Claims Act, 14 M.R.S.A. §8107, and before statute of limitations expires in medical malpractice cases. 24 M.R.S.A. §2903.

Maine applies the laches doctrine. *D.H.S. v. Bell*, 1998 ME 123, 711 A.2d 1292. “Laches is the omission to assert a right for an unreasonable and unexplained length of time and under circumstances prejudicial to the adverse party.” *Longley v. Knapp*, 1998 ME 142, ¶ 10, 713 A.2d 939, 943.

MALPRACTICE

No action for professional negligence against health care provider may be commenced until claimant has served and filed written notice of claim under oath. 24 M.R.S.A. §2903, 2853. Copy of notice of claim must be filed with clerk of Superior Court within 20 days of service if the notice is first served on the person accused of professional negligence. 24 M.R.S.A. §2853. Return of service of notice of claim on person accused of professional negligence must be filed with clerk of Superior

Court within 90 days after filing notice of claim if notice of claim is filed with Superior Court prior to service on the defendant. 24 M.R.S.A. §2853. Notice of claim by adult must be filed within 3 years after cause of action accrues, and by infant within 6 years after cause of action accrues, or within 3 years after the infant attains majority, whichever first occurs. 24 M.R.S.A. §2902. Mental incapacity of claimant does not toll statute of limitations. *Dasha v. M.M.C.*, 665 A.2d 993, 996 (Me. 1995). Condition precedent to filing suit is that parties must attend pre-litigation screening and mediation hearing unless all parties agree to bypass hearing and commence lawsuit. 24 M.R.S.A. §2853.

“When a plaintiff claims he has suffered a personal injury as the result of medical mistreatment, his remedy lies in a complaint for negligence.” *Macomber v. Dillman*, 505 A.2d 810, 812 (Me. 1986).

Maine statutorily adopted Good Samaritan Law; health care providers who provide medical services without compensation through non-profit organizations are not liable for ordinary negligence. 24 M.R.S.A. §2904.

Plaintiff ordinarily must prove physician’s negligence was proximate cause of injury by expert medical testimony establishing appropriate standard of medical care, deviation from that standard, and showing that deviation from standard proximately caused injury. *Ouellette v. Albert*, 628 A.2d 1027, 1028 (Me. 1993). Exception recognized where negligence and harmful results are sufficiently obvious as to lie within common knowledge. *Cox v. Dela Cruz*, 406 A.2d 620, 622 (Me. 1979); *Patten v. Milam*, 480 A.2d 774, 778 (Me. 1984).

Standard of care of doctor not governed by what physicians in this geographic locality do but “the standard of care of an ordinarily competent physician under like conditions.” *McLaughlin v. Sy*, 589 A.2d 448, 452 (Me. 1991).

Doctor who is nationally certified and represents himself as specialist in particular field of expertise is held to national standard of skill and knowledge normally possessed by other practitioners engaged in same specialty; refusal to instruct on prevailing community standard of care not erroneous. *Roberts v. Tardif*, 417 A.2d 444, 452 (Me. 1980).

Physician does not incur liability merely by electing to pursue one of several recognized courses of treatment, *Downer v. Veilleux*, 322 A.2d 82, 87 (Me. 1974), even though pursuit of alternative procedure might have avoided injury, *Roberts v. Tardif*, 417 A.2d 444, 452 (Me. 1980). Proof of unfavorable result, without more, will not suffice to establish liability of physician. *Caron v. Pratt*, 336 A.2d 856, 859 (Me. 1975). However, phy-

sician may be liable in contract for breach of express agreement to effect cure or to achieve particular result. *Woolley v. Henderson*, 418 A.2d 1123, 1135 (Me. 1980). Implied contract not recognized. *Id.*

Where nurses were furnished by hospital corporation, surgeon not responsible for negligence of nurses attending operation. *Watson v. Fahey*, 135 Me. 376, 377, 197 A. 402, 403 (1938).

Informed Consent. Physician has general duty reasonably to disclose to patient significant information concerning treatment. Liability based only upon fault, measured by reference to reasonable medical practitioner in same branch of medicine (ordinarily must be established by expert evidence) and not by reference to some variable lay standard of “materiality.” Physician must consider probable impact of disclosure on patient, taking into account his peculiar knowledge of patient’s psychological, emotional, and physical condition, and must evaluate magnitude of risk, frequency of its occurrence, and viability of alternative therapeutic measures; conceivably, full disclosure by physician under some circumstances could constitute bad medical practice. To establish proximate cause in malpractice action based on non-disclosure, plaintiff must show not only that undisclosed risk materialized causing him harm, but also that had he been informed of risk he would not have submitted to treatment. Causation judged by objective standard, *i.e.*, would reasonable person in plaintiff’s position have declined treatment. Physician not obligated to discuss with patient, in abstract, courses of treatment precluded by his condition. *Downer v. Veilleux*, 322 A.2d 82, 92 (Me. 1974). When physician, acting in good faith and in what he believes to be best interest of patient, deviates from proposed procedure or surgery, issue is ordinarily whether, under circumstances, physician exercised due care in deviating from proposed treatment, and not whether he exceeded scope of patient’s consent. *Woolley v. Henderson*, 418 A.2d 1123 (Me. 1980); *see generally as to duty to inform*, 20 Me. L. Rev. 143 (1968).

Health care professional whose negligent treatment of patient induced false memories of sexual abuse by third party owed no duty of care to that injured third party. *Flanders v. Cooper*, 1998 ME 28, ¶ 8, 706 A.2d 589, 591. Focus of health care practitioners “should be upon the patient and any diversion of attention or resources to accommodate the sensitivities of others is bound to detract from that devoted to patients.” *Id.*

Wrongful birth claims are barred by statute. 24 M.R.S.A. §2931.

Dentists. Statutory regulation at 32 M.R.S.A. §1061 *et seq.*; *see State v. Hussey*, 381 A.2d 665, 667 (Me. 1978).

Optometrists. See *Small v. Maine Bd. Optometry*, 293 A.2d 786 (Me. 1972).

Attorneys. Legal malpractice claim may be assigned by client to someone else with clear interest in claim, such as claimant against client. *Thurston v. Cont'l Cas.*, 567 A.2d 922, 923 (Me. 1989).

NEGLIGENCE

See Law Digest Tables.

Mere occurrence of accident is not evidence of negligence. *Rice v. Sebasticook*, 487 A.2d 639, 641 (Me. 1985).

Maine recognizes "a cause of action for negligent transmission of a sexually transmitted disease." *McPherson v. McPherson*, 712 A.2d 1043, 1045 (Me. 1998).

Age. Parent must use reasonable care to control minor child from creating risk of bodily harm to others if parent knows, or has reason to know, that s/he has ability to control child and knows, or should know, of necessity and opportunity to control child. Maine adopted Restatement (Second) of Torts §316. *Bedard v. Bateman*, 665 A.2d 214, 214-15 (Me. 1995). Parents and legal guardians of minor between age of 7 and 17 who is living at home are jointly and severally liable with minor for damage to property or injury to any person that is caused willfully or maliciously, up to amount not in excess of \$800. 14 M.R.S.A. §304. Child is required to exercise only that degree of care and judgment that children of same age, capacity, and experience ordinarily exercise under same circumstances. *Orr v. First Nat'l Stores*, 280 A.2d 785, 796 (Me. 1971). Any comparative causal negligence on part of mother of 8-year-old business invitee, who sustained injuries in fall in supermarket would be imputable to daughter, even though daughter might have been old enough to exercise some degree of care for her own safety. *Id.*

Assumption of Risk. Doctrine no longer operates as absolute defense in negligence action. Rather, assumption of risk is treated as form of contributory fault to be weighed against negligence of defendant in applying comparative negligence rule. *Wilson v. Gordon*, 354 A.2d 398, 401-02 (Me. 1976).

Attractive Nuisance. Maine has adopted attractive nuisance doctrine applying a strict interpretation of the Restatement (Second) of Torts §339. *Merrill v. Cent. Me. Power*, 628 A.2d 1062, 1063 (Me. 1993). Possessor of land who knows or has reason to know that children are likely to trespass who are "too immature to appreciate and guard against dangerous conditions which present an unreasonable risk of death or serious bodily harm," required to provide protection. *Jones v. Billings*, 289 A.2d 39, 43 (Me. 1972). If child appreciated the

danger, he may not recover. *Collomy v. SAD 55*, 1998 ME 79, 710 A.2d 893. Landowner who opens land to public for recreational use is not liable for mere negligence. 14 M.R.S.A. §159-A.

Comparative Negligence. Plaintiff may not recover if his causal fault is equal to or greater than that of defendant. 14 M.R.S.A. §156. Damages recoverable shall be reduced to extent jury thinks just and equitable having regard to claimant's share in responsibility for damage, *i.e.*, blameworthiness of causal fault. Plaintiff's relative blameworthiness may well differ from degree to which his actions contributed to cause of accident. *Wing v. Morse*, 300 A.2d 491 (Me. 1973). Defendant must prove plaintiff's contributory negligence by preponderance of evidence. *Crocker v. Coombs*, 328 A.2d 389, 392 (Me. 1974). Comparative fault statute does not apply if defendant is liable for an intentional tort. *McLain v. Training & Dev.*, 572 A.2d 494, 497 (Me. 1990).

Traditionally, a distinction between contributory negligence and mitigation of damages (also known as the avoidable consequences doctrine) is that contributory negligence is generally unreasonable behavior by plaintiff before or concurrent with injury imposed by defendant. However, avoidable consequences doctrine is applied to plaintiff's culpable act or inaction after the defendant's negligent act. *Walter v. Wal-Mart*, 2000 ME 63, ¶ 24, 748 A.2d 961, 970.

Definition–Duty. "The burden of proof in a negligence action is on the plaintiff. To prevail, a plaintiff must prove that a defendant had a duty to conform to standard of care and that the breach of that duty proximately caused an injury to the plaintiff." *Lewis v. Knowlton*, 1997 ME 12, ¶ 7, 688 A.2d 912, 913. However, when claimant has pre-existing condition, burden of proof is on defendant "to establish that portion of plaintiff's present condition for which he is not responsible." *Palleschi v. Palleschi*, 1998 ME 3, ¶ 3, 704 A.2d 383, 385.

Charitable Immunity. Doctrine recognized in Maine by statute, except to extent of insurance coverage. 14 M.R.S.A. §158. Charitable immunity does not apply to organization that derives only modicum of its financial support from charitable sources. *Thompson v. Mercy Hosp.*, 483 A.2d 706, 708 (Me. 1984).

Governmental Immunity. Common law doctrine of governmental immunity abolished. Statutory governmental immunity created by Maine Tort Claims Act, 14 M.R.S.A. §8101 *et seq.* "The Maine Tort Claims Act governs tort claims brought against a governmental entity or its employees." *Smith v. Voisine*, 650 A.2d 1350, 1352 (Me. 1994). Award of damages under Maine Tort Claims Act may not exceed \$400,000 for all claims arising out of single occurrence including court costs and



pre-judgment interest, but not accrued post-judgment interest. 14 M.R.S.A. §8105.

Exceptions to immunity of governmental entities carved out by statute include negligent acts or omissions in connection with: 1) moving vehicles, machinery, and equipment; 2) construction, operation or maintenance of public buildings; 3) sudden and accidental discharge of pollutants and; 4) events arising out of and occurring during street construction, cleaning or repair. 14 M.R.S.A. §8104-A. Public building exception applies only to care and operation of building, not to care or supervision of people in the building. *Lightfoot v. SAD 35*, 2003 ME 24, ¶ 8, 816 A.2d 63, 66.

Personal liability of employee of governmental entity is subject to limit of \$10,000 for any negligent acts or omissions within course and scope of employment, arising out of single occurrence. 14 M.R.S.A. §8104-D.

Discretionary functions of employees are immune from liability when: 1) act, omission, or decision necessarily involves basic governmental policy or objective; 2) act, omission, or decision is essential to realization of accomplishment of that policy or objective; 3) act, omission, or decision requires expertise or basic policy evaluation, judgment, and expertise on part of entity involved; and 4) governmental agency involved possesses requisite authority and duty to do or make challenged act, omission, or decision. *Norton v. Hall*, 2003 ME 118, ¶ 7, 834 A.2d 928, 931.

Police officers are immune from malicious prosecution claims even if they acted in bad faith in prosecuting criminal charges. *Dall v. Caron*, 628 A.2d 117, 119 (Me. 1993).

Police dispatcher was entitled to discretionary function immunity from liability in action commenced by wife of motorist who committed suicide based upon dispatcher's action in exercising judgment in evaluating incoming calls. *Doucette v. City of Lewiston*, 1997 ME 157, ¶ 6, 697 A.2d 1292, 1294.

Suit against governmental entity and governmental employee may be maintained only after compliance with statutory 180-day written notice provisions. 14 M.R.S.A. §8107; *Miller v. Szelenyi*, 546 A.2d 1013, 1020 (Me. 1988). Notice provisions strictly construed against plaintiff. *Faucher v. City of Auburn*, 465 A.2d 1120 (Me. 1983). Maine Tort Claims Act even governs claims of intentional torts by government employees. *Polley v. Atwell*, 581 A.2d 410, 413-14 (Me. 1990). Governmental entity cannot be equitably estopped from raising defense of lack of proper notice of claim, even if governmental entity misleads plaintiff into thinking they would pay claim without filing notice. *Smith v. SAD 58*, 582 A.2d 247 (Me. 1990). Governmental entity not liable for fail-

ure to maintain or replace traffic signs. *Stickney v. City of Portland*, 600 A.2d 405, 406 (Me. 1991).

Governmental entity may procure liability insurance coverage for any claim rendered against it or its employees. 14 M.R.S.A. §8116. If the liability insurance provides protection in excess of limit of liability enumerated in Maine Tort Claims Act or any claim in areas where governmental entity is immune, governmental entity will be liable to limits of liability insurance coverage. *Id.*

Private Violations of Constitutional Rights. 5 M.R.S.A. §§4681-4685, makes it unlawful for any person, whether or not acting under color of state law, to intentionally interfere, or to attempt to intentionally interfere, by threat, intimidation, or coercion, with exercise or enjoyment by any other person of any federal or state constitutional or statutory rights. The person who was object of interference can bring an action for damages and/or equitable relief. Prevailing party, other than the State, can be awarded attorneys' fees.

Imputed Negligence. Maine rejects doctrine of imputed parental negligence. Maine has adopted approach of Restatement that child who suffers physical harm is not barred from recovery by parents' negligence. Restatement (Second) of Torts, §488 (1965); *LaBier v. Pelletier*, 665 A.2d 1013, 1014-15 (Me. 1995). Doctrine of joint enterprise whereby negligence of one member of enterprise is imputable to others does not apply in actions between members of joint enterprise and does not prevent one member of enterprise from holding another liable for personal injuries inflicted by latter's negligence in prosecution of enterprise. *Welch v. Jordan*, 159 Me. 436, 444, 194 A.2d 841, 845 (1963); see also *Emery v. Frateschi*, 161 Me. 281, 211 A.2d 578 (1965).

Liquor Liability. Maine Liquor Liability Act (MLLA), 28-A M.R.S.A. §2501 *et seq.*, "provides the exclusive remedy against servers of alcohol for claims by persons suffering damages based on the serving of alcohol." *Swan v. Sohio Oil Co.*, 618 A.2d 214, 220 (Me. 1992); 28-A M.R.S.A. §2511. "The MLLA provides a remedy for the reckless service of liquor but not for any other reckless conduct" (*i.e.*, failure to provide transportation for an intoxicated adult is not actionable). *Jackson v. Am. Legion*, 1999 ME 26, ¶ 14, 723 A.2d 1220, 1223. Damages, except for medical expenses, may not exceed \$350,000. 28-A M.R.S.A. §2509.

Maine adopted Restatement (Second) of Torts §552 definition of tort of negligent misrepresentation. *Chapman v. Rideout*, 568 A.2d 829, 830 (Me. 1990).

Joint and Several Liability. Maine has adopted doctrine of joint and several liability. *Baker v. Jandreau*, 642 A.2d 1354, 1355 (Me. 1994). Maine law allows con-

tribution between joint tort-feasors in proportion to tort-feasor's culpability. *Packard v. Whitten*, 274 A.2d 169, 181 (Me. 1971). Contribution permitted against joint tort-feasor even though said joint tort-feasor not directly liable to plaintiff. *Purwin v. Robertson Enters.*, 506 A.2d 1152, 1156 (Me. 1986). Statute allows multiparty defendants to request of jury the percentage of fault contributed by each defendant. 14 M.R.S.A. §156. If defendant released by plaintiff under Pierringer Agreement, then released defendant is dismissed with prejudice from the case. *Id.* Dismissal bars all contribution claims. *Id.* Remaining parties may still adjudicate liability of dismissed defendant, and finding of liability binds all parties to the suit. *Id.*

Contribution and Indemnity. "Contribution requires the parties to share the liability or burden, whereas indemnity requires one party to reimburse the other entirely. Differing thus in their effect, these remedies are properly applicable in different situations. Contribution is appropriate where there is a common liability among the parties, whereas indemnity is appropriate where one party has a primary or greater liability or duty which justly requires him to bear the whole of the burden as between the parties." *Emery v. Hussey Seating*, 1997 ME 162, ¶ 9, 697 A.2d 1284, 1287.

The doctrine of equitable contribution requires parties that assume a common obligation to share equally that obligation and burden. *Daigle Commercial v. St. Laurent*, 1999 ME 167, ¶ 26, 734 A.2d 667, 675-76. Equitable right of contribution between joint tort-feasors. *Otis Elevator v. F.W. Cunningham*, 454 A.2d 335, 340 (Me. 1983). "[G]ravamen of contribution action involves determinations of rights and liabilities traditionally arising in common law suits for negligence," and therefore may be tried by jury. *Thermos Co. v. Spence*, 1999 ME 129, ¶ 21, 735 A.2d 484, 489. Contribution by joint tort-feasors shall be in proportion to comparative percentages of causal fault. *Packard v. Whitten*, 274 A.2d 169, 180 (Me. 1971).

Joint tort-feasor who is found to be less at fault than plaintiff, and thus not liable in direct action by plaintiff, may nonetheless be liable in action for contribution brought by joint tort-feasor who was found to be more at fault than plaintiff. *Otis Elevator v. F.W. Cunningham*, *supra*. Claim for contribution need not be asserted by tort-feasor until after liability is imposed on that tort-feasor. *Id.* Six-year statute of limitations starts running on claim for contribution from date judgment or settlement paid to plaintiff. See *Cyr v. Michaud*, 454 A.2d 1376, 1385 (Me. 1983).

"Indemnity is appropriate to do justice within the law so that one guilty of an active or affirmative act of negligence or intentional act will not escape liability,

while another whose fault was only technical or passive assumes complete liability." *Daigle Commercial v. St. Laurent*, 1999 ME 167, ¶ 26, 734 A.2d 667, 676.

Parents who are negligent in failing to properly supervise their child are liable for contribution to unintentional joint tort-feasor. *Purwin v. Robertsen Enters.*, 506 A.2d 1152 (Me. 1986).

Last Clear Chance Doctrine. Not applicable under comparative negligence rule. *Cushman v. Perkins*, 245 A.2d 846, 847 (Me. 1968).

Negligence per se. Maine does not recognize doctrine of negligence per se. *Binette v. Dyer Library*, 688 A.2d 898, 904 (Me. 1996). Violation of safety statute is not negligence per se but merely evidence of negligence. *Trusiani v. Cumberland & York Distribs.*, 538 A.2d 258, 262 (Me. 1988); *Russell v. Accurate Abatement*, 1997 ME 129, ¶ 21, 694 A.2d 921, 923. Violation of rule of the road, such as not seeing that which is open and apparent to prudent person, is evidence of negligence but is not negligence per se. *Lewis v. Knowlton*, 688 A.2d 912, 914 (Me. 1997).

Premises Liability. Owner or occupier of land owes same duty of reasonable care in all circumstances to all persons lawfully on land. Owner or occupier is not insurer of safety of his lawful visitors. *Poulin v. Colby College*, 402 A.2d 846, 848 (Me. 1979). Standard of care owed social invitee is same standard of care owed business invitee. 14 M.R.S.A. §159. Storekeeper not insurer of safety of invitees. *Orr v. First Nat'l Stores*, 280 A.2d 785, 792 (Me. 1971). Maine does not follow "mode of operation" rule, which imputes conduct of customers to self-service store operators. *Dumont v. Shaw's*, 664 A.2d 846, 848 (Me. 1995). Only duty owed to trespassers is to refrain from wanton, willful, or reckless acts of negligence. *Cogswell v. Warren Bros.*, 229 A.2d 215, 218 (Me. 1967).

Invitee who slips on foreign substance on the floor may prove owner's negligence by establishing one of three things: 1) owner caused substance to be there; 2) owner had actual knowledge of existence of substance; or 3) substance was on floor for such length of time that owner should have known about it. *Ottinger v. Shaw's*, 635 A.2d 948, 949 (Me. 1993). Plaintiff has burden of proving that defendant had notice of the risk. *Currier v. Toys 'R' Us*, 680 A.2d 453, 455 (Me. 1996). Storekeeper who is aware of recurrent condition that poses potential danger to invitees may not fail to respond to danger. *Dumont v. Shaw's*, 664 A.2d 846, 848 (Me. 1995). Where store customer alleges poor lighting due to temporary display rack, issue of inadequate lighting does not require expert testimony. *Doody v. Hannaford Bros.*, 672 A.2d 598, 599 (Me. 1996). Landlord is not liable for personal injuries caused by defective condition in prem-



ises under tenant's control except (a) for latent defects of which he should have known; (b) when he gratuitously makes repairs negligently; or (c) he agrees to make repairs. *Nichols v. Marsden*, 483 A.2d 341, 343 (Me. 1984). Law Court has rejected commonly accepted "storm in progress" doctrine, instead holding: "Business owners have a duty to reasonably respond to foreseeable dangers and keep premises reasonably safe when significant numbers of invitees may be anticipated to enter or leave the premises during a winter storm." *Budzko v. One City Center*, 2001 ME 37, ¶ 16, 767 A.2d 310, 315.

Proximate cause is "that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the result would not have occurred." *Ames v. DiPietro-Kay*, 617 A.2d 559, 561 (Me. 1992). Causation requires tortfeasor's negligence to be "substantial factor in bringing about the plaintiff's harm." *Walter v. Wal-Mart, Inc.*, 2000 ME 63, ¶ 17, 748 A.2d 961, 968.

In negligence action, evidence of other occurrences may be admissible to show (a) existence of defective or dangerous condition; (b) notice thereof; or (c) causation on occasion in question. *Simon v. Town of Kennebunkport*, 417 A.2d 982, 984-85 (Me. 1980).

Res ipsa loquitur. Essential element to render doctrine applicable is that accident is unexplained and instrument causing injury was under management or control of defendant, and normally accident would not have happened absent negligence. *Sheltra v. Rochefort*, 667 A.2d 868, 870 (Me. 1995). Rule does not apply where accident is in part fault of plaintiff or where nothing is left to inference. *Corbett v. Curtis*, 225 A.2d 402, 412 (Me. 1967).

Emergency. Maine has adopted emergency doctrine that one confronted with emergency to which he or she did not contribute is not held to the same standard of conduct normally applied to one not in that situation. *Ames v. DiPietro-Kay*, 617 A.2d 559, 561 (Me. 1992).

Dog Bite. Under Maine law, dog owner may be liable under three theories of liability: 1) common law; 2) statutory under 7 M.R.S.A. §3961; 3) negligence. Under so-called common-law theory, plaintiff must show that dog had dangerous propensities known to owner; fault of owner or injured party is irrelevant. Under statutory cause of action, dog owner is liable for damage caused by dog except when injured party is negligent, if injured party is on owner or keeper's premises at time of injury. *Lewis v. Penney*, 632 A.2d 439, 441 (Me. 1993); 7 M.R.S.A. §3961. If dog injures person who is not on owner or keeper's premises at time of injury, owner or keeper of dog is still liable to person injured. Any fault on the part of person injured will not reduce that person's damages unless fault of person injured exceeded

fault of dog's keeper or owner. 7 M.R.S.A. §3961. Under negligence theory, usual negligence and comparative negligence tests are applied. *Henry v. Brown*, 495 A.2d 324 (Me. 1985). Dog need not bite, or even contact, injured party to impose liability on its owner. *Id.* at 327. Under statute, 7 M.R.S.A. §3961, "keeper" of dog is liable even though he is not technically "owner" of dog. See also *Mitchell v. Chase*, 87 Me. 172, 176, 32 A. 867, 868 (1895).

NO-FAULT INSURANCE

Maine has not adopted no-fault insurance law.

PENALTIES AND ATTORNEY FEES

Insurer that does not pay undisputed claim or that fails to provide written notice that disputes claim within 30 days of insurer's receipt of all required information (except the peril of fire which is 60 days) is liable to pay 1½% per month plus reasonable attorney's fees. 24-A M.R.S.A. §2436. Insurer, other than workers compensation insurer, is liable to pay 1½% per month plus reasonable attorney's fees for unfair claims practices of knowingly misrepresenting facts to insured, failing to timely acknowledge and review claim, threatening appeal from arbitration award to force settlement for less than the award, failing to affirm or deny coverage, or failing to effectuate prompt and fair settlement without just cause. 24-A M.R.S.A. §2436-A.

PRIVILEGED COMMUNICATIONS

Attorney/Client. Maine law permits client to claim the lawyer-client privilege. M.R. Evid. 502. Privilege extends to "representative of the lawyer" who is defined as "one employed by the lawyer to assist the lawyer in the rendition of professional legal services." *Id.*

Doctor/Patient. Maine law permits a patient to assert the physician or psychotherapist-patient privilege. M.R. Evid. 503. A patient may claim the "privilege to refuse to disclose and to prevent any other person from disclosing confidential communications ... among the patient, the patient's health care professional, mental health professional, or licensed counseling professional, and persons who are participating in the diagnosis or treatment under the direction of said professionals, including members of the patient's family." *Id.*

Spousal. Maine has adopted the husband-wife privilege. M.R. Evid. 504. "A married person has a privilege to prevent his or her spouse from testifying as to any confidential communication from such person to the spouse." There are exceptions when "one spouse is charged with a crime against the person or property of 1) the other, 2) a child of either, 3) any person residing in the household of either, or 4) a third person commit-

ted in the course of committing a crime against any of them; or in a civil proceeding in which the spouses are adverse parties.” *Id.* Maine does not recognize the existence of an intrafamily privilege. *State v. Willoughby*, 532 A.2d 1020 (Me. 1987).

Clergy/Penitent. Maine has adopted the religious privilege. M.R. Evid. 505. A “‘member of the clergy’ is a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting that individual.” The clergyman is presumed to have authority to claim the privilege on behalf of the communicant. *Id.*

Maine does not recognize a news reporter’s privilege. *In re Letellier*, 578 A.2d 722 (Me. 1990).

Insurer/Insured. Maine does not recognize an insurer/insured privilege per se, but work product immunity applies because “the ordinary business of an insurance adjuster is not only to determine whether to pay its insured ... but also to prepare for litigation.” *Harriman v. Maddocks*, 518 A.2d 1027, 1033 (Me. 1986). In *Harriman*, insurer’s third-party claims file was held not discoverable. However, Law Court added that adjuster’s file may be discoverable under M.R. Civ. P. 26 (b) (3) “upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” *Harriman*, 518 A.2d at 1034, n. 7.

PRODUCTS LIABILITY

Seller of product may be held strictly liable for damages caused by product in defective condition, unreasonably dangerous to user or consumer, whether or not user or consumer bought product from or entered into any contractual relation directly with seller. 14 M.R.S.A. §221.

Maine has adopted economic loss doctrine and does not permit tort recovery for defective product’s damage to itself. Individual components lose their identity as separate products once they are integrated into finished product. *Oceanside v. Peachtree Doors*, 659 A.2d 267 (Me. 1995).

Risk/utility test, similar to negligence test, applied in design defect cases. *St. Germain v. Husqvarna Corp.*, 544 A.2d 1283 (Me. 1988).

Test for strict liability claim in warning defect case essentially negligence test. *Bernier v. Raymark Indus.*, 516 A.2d 534 (Me. 1986). Failure to warn requires three part analysis: 1) Did defendant owe plaintiff duty to warn?; 2) Was actual warning inadequate?; and 3) Did inadequate warning proximately cause plaintiff’s injury?

Pottle v. Up-Right, Inc., 628 A.2d 672, 675 (Me. 1993). Seller of dangerous product has no duty to warn of product danger which is obvious and apparent to ordinary, reasonable person. *Hatch v. Me. Tank Co.*, 666 A.2d 90 (Me. 1995).

Comparative fault of plaintiff is defense to strict liability action only to extent plaintiff’s conduct constitutes voluntary encounter of known risk, (*i.e.*, assumption of risk). *Austin v. Raybestos-Manhattan*, 471 A.2d 280 (Me. 1984). Even then, plaintiff’s fault will only bar recovery if his fault was equal to or greater than defendant’s fault. 14 M.R.S.A. §156.

Even if substantial change is made in a product, which is proximate cause of accident, manufacturer will not be relieved of liability unless change was unforeseeable. *Marois v. Paper Converting Machine*, 539 A.2d 621 (Me. 1988).

RELEASE

See Law Digest Tables.

No settlement, general release, or statement in writing, oral, or electronically recorded, made by person confined in hospital or sanitarium as patient with reference to any personal injuries for which he is confined may be used in any way at trial to recover damages for such injuries or consequential damages, if obtained within 30 days after injuries were sustained. Any such settlement or release is void. Section does not apply to workers’ compensation agreements or statements or releases obtained by police officers or inspectors of motor vehicles in performance of their duties, members of family of such person, or by or on behalf of his attorney. 17 M.R.S.A. §3964.

If attorney is not authorized by client to settle case, then attorney’s acceptance of settlement offer is not binding on the client. *Lane v. Me. Cent. R.R.*, 572 A.2d 1084, 1085 (Me. 1990).

“No-consent-to-settlement” clause in uninsured motorist endorsement to automobile liability policy is not defense where insured settled with person other than uninsured tort-feasor. To permit third party settlements to work forfeiture of uninsured motorist protection is against public policy and unenforceable. *Wescott v. Allstate*, 397 A.2d 156, 167 (Me. 1979).

Release of either personal injury or property damage does not bar action on other claim. 14 M.R.S.A. §162. Release of one or more joint tort-feasors does not bar action against remaining. 14 M.R.S.A. §163. Jury verdict against one or more tort-feasors shall be reduced by amount paid for release of other joint tort-feasors. *Id.*



Accord and satisfaction. Accord and satisfaction is an affirmative defense. M.R. Civ. P. 8 (c). A “check bearing language that states ‘full and final payment’ or ‘in satisfaction of all claims’ creates an accord and satisfaction when cashed or deposited by the payee,” *E.S. Herrick v. Me. Wild Blueberry*, 670 A.2d 944, 946 (Me. 1996), or when deposited in attorney’s trust account. *Leonard v. Gray*, 686 A.2d 1079, 1081-82 (Me. 1996).

Unless release expressly reserves right of action against releasor, all litigation between parties arising out of same cause of action is terminated as complete accord and satisfaction of all claims of immediate parties to settlement arising out of same set of circumstances, including claim for contribution against releasor for some third-party’s injuries resulting from same accident. *Butters v. Kane*, 347 A.2d 602, 604 (Me. 1975).

Maine law also permits one tort-feasor to bring claim for contribution against another tort-feasor, even though second tort-feasor has settled with plaintiff. *Lavoie v. Celotex*, 505 A.2d 481 (Me. 1986). In that case, first tort-feasor gets benefit of statutory set-off (14 M.R.S.A. §163) of amount second tort-feasor paid plaintiff and can recover remaining contribution due from settled tort-feasor. Consequently, defendant who settles should always require plaintiff to indemnify and/or hold defendant harmless from any further liability to anyone in release. A Pierringer type release does not dismiss non-settling defendant’s cross-claim without non-settling defendant’s consent. *Petit v. Key Bancshares*, 614 A.2d 946 (Me. 1992). If plaintiff released one tort-feasor in a Pierringer type release, then released tort-feasor is dismissed from plaintiff’s case and dismissal bars all related claims for contribution assertable by non-released tort-feasors. 14 M.R.S.A. §156.

Insured is not “immediate party” to settlement between his insurer and third party, and thus is not barred from asserting his own claims against third party, unless insured authorized, had knowledge of, or consented to insurer’s settlement of his own claim. *Brown v. Manchester*, 384 A.2d 449, 453 (Me. 1978).

Subrogation. Release does not affect insurer’s right of subrogation if release occurs after loss. Insurer paying loss on policy is entitled to have action in insured’s name to recover damages against party causing same. Recovery can be for full amount of damage, and insured is entitled to balance, after insurer has been recompensed. *Bean v. Atlantic*, 58 Me. 82 (1870). Statutory right of subrogation for workers’ compensation carriers. 39-A M.R.S.A. §107. However, no subrogation claims can be brought against Maine Insurance Guaranty Association. *Ventulett v. Me. Ins.*, 583 A.2d 1022, 1025 (Me. 1990).

REPRESENTATIONS AND WARRANTIES

There is 4-year statute of limitations for breach of warranty, running from date of sale of goods if injury results exclusively in property damage. 11 M.R.S.A. §2-725. If transaction is primarily for providing services, rather than for sale of goods, 4-year limitation does not apply. *Lucien Bourque v. Cronkite*, 557 A.2d 193, 195 (Me. 1989). There is 6-year statute of limitations, running from date of injury, for breach of warranty that results in personal injuries. 14 M.R.S.A. §752.

Warranty of merchantability is implied in sale of used products. *Faulkingham v. Seacoast Subaru*, 577 A.2d 772, 774 (Me. 1990).

Generally, seller of real estate only liable for affirmative misrepresentations. He has no duty to disclose known problems. *Stevens v. Bouchard*, 532 A.2d 1028, 1030 (Me. 1987). Seller must make required disclosures under 33 M.R.S.A. §173, including “known defects.” Known defect is condition known by the seller that has significant adverse effect on value of property, significantly impairs health or safety of future occupants or, if not repaired, removed, or replaced, significantly shortens expected normal life of premises. 33 M.R.S.A. §171. Maine recognizes tort of negligent misrepresentation. *Chapman v. Rideout*, 568 A.2d 829, 830 (Me. 1990).

Maine recognizes promissory estoppel. *Chapman v. Bomann*, 381 A.2d 1123, 1127 (Me. 1978). However, promissory estoppel claims will not avoid Statute of Frauds. *Stearns v. Emery-Waterhouse*, 596 A.2d 72, 74 (Me. 1991).

Statements made by insured in application for insurance or annuity are merely representations, not warranties. Misstatements may bar recovery only if material or fraudulent. 24-A M.R.S.A. §2411. All life, annuity, and fire policies must contain provision stating this rule. 24-A M.R.S.A. §§2506, 3002. All life, annuity, and health policies must provide that misstatements as to age will render policy enforceable only to extent of coverage had age been correctly stated. 24-A M.R.S.A. §§2508, 2720. Absent special agreement, insured is not obligated to inform insurer of changes in circumstances inconsistent with representations made in application. *Patrons Mut. v. Rideout*, 411 A.2d 673, 678 (Me. 1980).

If insured, under health policy, changes occupations to one more hazardous, insurer need pay benefits only at rate that premiums paid would have purchased for more hazardous occupation. 24-A M.R.S.A. §2719.

Oral contracts of insurance are enforceable. *Miller v. Liberty Ins.*, 161 Me. 438, 213 A.2d 831 (1965).

Within meaning of fire policy provision, that policy would be void if “insured” wilfully concealed or misrep-

resented any material fact or circumstance or in case of fraud by insured relating thereto, insured was specific insured, namely, insured who was responsible for causing loss and was seeking to recover under policy. Recovery by innocent wife was allowable though loss resulted from intentional act of husband and though policy defined unqualified word "insured" as including spouse if living in household. Result was same whether interests of plaintiff and her husband in destroyed property were deemed to be joint or several. *Hildebrand v. Holyoke Mut. Fire*, 386 A.2d 329, 331 (Me. 1978).

SERVICE OF PROCESS

See Law Digest Tables.

Maine's Long-Arm Statute (14 M.R.S.A. §704-A) is coextensive with the Due Process Clause of the United States Constitution. *Frazier v. BankAmerica*, 593 A.2d 661 (Me. 1991). The jurisdictional reach of Maine's Long-Arm Statute is limited only by the Due Process Clause. *Electronic Media v. Pioneer Communications*, 586 A.2d 1256 (Me. 1991).

Service of process may be made by mailing copies of summons and complaint by first class mail, postage prepaid, to person to be served together with two copies of notice and acknowledgment form and return envelope, postage prepaid, addressed to sender. If no acknowledgment is received by sender within 20 days, then service shall be made by a sheriff or deputy or under different method authorized by law. M.R. Civ. P. 4 (c) (1).

Service of process upon domestic private corporation may be made (a) by delivering a copy of summons and complaint to any officer, director, or general agent of the corporation, or if no such person is found, by delivering a copy of summons and complaint to Secretary of State provided plaintiff's attorney shall also send a copy of summons and complaint to corporation's principal office or (b) by delivering a copy of summons and complaint to any agent or attorney in fact authorized to accept service of process on behalf of corporation provided plaintiff's attorney shall notify corporation's principal office. M.R. Civ. P. 4 (d) (8).

Service of process upon public corporation may be made by delivering a copy of summons and complaint to any officer, director, or manager. M.R. Civ. P. 4 (d) (7).

Service of process upon foreign corporation may be made (a) by delivering a copy of summons and complaint to any officer, director, or agent, (b) by leaving such copies at office or place of business of corporation within state, or (c) by delivering a copy of summons and complaint to agent authorized to accept service of process on behalf of corporation. M.R. Civ. P. 4 (d) (9).

Service of process upon any officer or agency of the State of Maine including Superintendent of Insurance may be made by delivering a copy of summons and complaint to such officer or agency, or his designee, and then sending a copy of summons and complaint by ordinary mail to Attorney General of the State of Maine. M.R. Civ. P. 4 (d) (12).

Service of process may be made upon nonresident motorist for claim arising from motor vehicle accident on public way in Maine by delivering a copy of summons and complaint and fee of \$2.00 payable to Secretary of State, provided notice of this service is forthwith sent by registered mail to the defendant, and plaintiff's Affidavit of Compliance is filed with Clerk of Courts. 29-A M.R.S.A. §108.

SUBROGATION

Upon payment of a loss, insurer is entitled to subrogate against culpable party. *Emery Waterhouse v. Lea*, 467 A.2d 986 (Me. 1983).

An insurance policy may not provide for subrogation or give priority to insurer for medical payments when insured is entitled to reimbursement from a third party and the recovered damages are \$20,000 or less. For subrogation where damages exceed \$20,000, insurer must have written approval of the insured for that provision in the policy, provide that the subrogation right is subject to the deduction of a pro rata share of the insured's attorney's fees incurred in obtaining recovery, and the provision must be approved by the insurance superintendent. 24-A M.R.S.A. §2910-A.

Maine has adopted common fund doctrine, which provides that when fund is created to which more than one party is entitled to a share, each party must pay a share of expenses incurred in creating fund, including reasonable attorneys' fees. *York Ins. v. Van Hall*, 1997 ME 230, 704 A.2d 366.

Insurer that exercises its subrogation rights directly against culpable party without using an attorney is entitled to full recovery without incurring any attorney's fees. 24-A M.R.S.A. §2910-A (3).

Insurance companies may not subrogate directly against insureds. *General Electric v. Zurich-Am. Ins.*, 952 F. Supp. 18 (D. Me. 1996).

No claim or counterclaim may be brought in name of insured by right of subrogation or assignment, unless at least 10 days prior to asserting such claim insurer gives notice in writing to insured of its intention to do so, either by sheriff's service, or by registered or certified mail. Copy of such notice together with return receipt must be attached to complaint or counterclaim. If insured desires to assert claim arising out of same trans-

action or occurrence, he must notify insurer or its attorney in writing within 10 days of receipt of such notice. M.R. Civ. P. 17 (c).

Maine has adopted equitable subrogation doctrine. *Nappi v. Nappi Distribs.*, 1997 ME 54, 691 A.2d 1198. Equitable subrogation compels “the ultimate discharge of an obligation by him who in good conscience ought to pay it.” *Id.* at 1199. Promise to pay equitable subrogation “need not be express but may be implied from a party’s conduct.” *Id.* at 1200.

Insurer who settles case with injured party under mistaken belief that it was responsible to injured party, and subsequently discovers that another insurer may be responsible, may be reimbursed by second insurer under principles of equitable subrogation. *Northeast v. Concord Gen.*, 433 A.2d 715 (Me. 1981).

WAIVER AND ESTOPPEL

“Waiver is the voluntary and knowing relinquishment of a right and may be shown by a course of conduct signifying a purpose not to stand on a right.” *D.H.S. v. Bell*, 1998 ME 123, ¶ 6, 711 A.2d 1292, 1294-95.

Act or knowledge of insurance agent may bind company as estoppel, and waiver of agent is waiver of company. 24-A M.R.S.A. §2422. Some leading cases are: *Le Blanc v. Standard Ins.*, 114 Me. 6, 95 A. 284 (1915) (waiver of notice); *Tracey v. Standard Accident*, 119 Me. 131, 109 A. 490 (1920) (agent providing blank); *Bradbury v. Ins. Co. of Pa.*, 119 Me. 417, 111 A. 609 (1920) (waiver of other insurance by agent’s knowledge); *Spaulding v. York County Mut.*, 128 Me. 512, 149 A. 143 (1930) (agent filling out application); *Roberts v. Maine Bonding*, 404 A.2d 238 (Me. 1979) (waiver of vacancy clause by agent’s knowledge); *Harwood v. U.S. Fire Ins.*, 136 Me. 223, 7 A.2d 899 (1939) (waiver of policy provision requiring arbitration). There must be knowledge of company in order to waive its rights. *Trott v. Woolwich Mut. Ins.*, 83 Me. 362, 22 A. 245 (1891). Waiver may be implied as well as express. *Bradbury v. Ins. Co. of Pa.*, 119 Me. 417, 111 A. 609 (1920). Issuing policy on application missing certain answers waives right to require them. *Williams v. Me. Relief Ass’n*, 89 Me. 158, 36 A. 63 (1896). Waiver implied from circumstances, *Mowry & Payson v. Hanover Fire Ins. Co.*, 106 Me. 308, 76 A. 875 (1909). Forfeiture not favored and acceptance of overdue premiums. *Bruzas v. Peerless*, 111 Me. 308, 89 A. 199 (1913). Collection of assessment, see *Towle v. Dirigo Mut. Ins. Co.*, 107 Me. 317, 78 A. 374 (1910).

Implied waiver of coverage questions not favored. Such issues generally ones of fact for jury. Implied waiver of coverage questions will be found as matter of law only if insurer has knowledge upon which to deny

coverage but takes further actions that prejudice rights of insured. *Auburn Water v. I.N.A.*, 312 A.2d 174 (Me. 1973). Maine law has not yet resolved issue of whether or not liability insurer waives all of its coverage defenses by proceeding with defense of insured. An insurer may elect to defend under reservation of rights to refuse to indemnify on grounds of non-coverage. *Am. Policyholders’ Ins. v. Cumberland Cold Storage*, 373 A.2d 247 (Me. 1977). However, the insurer that reserves the right to deny coverage cannot control the defense. *Patrons Oxford v. Harris*, 2006 Me. 72, 905 A.2d. 819. An insured is free in such instances to stipulate to a reasonable judgment in exchange for a covenant not to execute for which the insurer will be bound in a “reach-and-apply” action, assuming no defenses are available under that statute. *Id.*

WORKERS’ COMPENSATION

See generally Title 39-A M.R.S.A.

No insurance carrier shall be qualified to issue a workers’ compensation insurance policy covering employees in Maine unless it has and continuously maintains employee or claims agent within Maine empowered to investigate claims, sign agreements for payment of compensation, and issue drafts or checks in payment of obligations arising under this chapter in amounts of at least \$1,000. 39-A M.R.S.A. §102 (14).

Entitlement of Benefits. Employee is entitled to compensation if he receives personal injury arising out of or in course of his employment, or is disabled by occupational disease. 39-A M.R.S.A. §201. Injury occurs in the course of employment when it occurs within the period of employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in something incidental thereto. *Fornier’s Case*, 120 Me. 236, 113 A. 270 (1921). Injury arises out of employment when there is some causal connection between conditions under which employee worked and injury arose, or that injury, in some proximate way, had its origin, its source, its cause in the employment. *Comeau v. Me. Coastal Servs.*, 449 A.2d 362 (Me. 1982). Aggravation of preexisting condition is compensable only if employment contributed to resulting disability in significant manner. 39-A M.R.S.A. §201 (4). Subsequent nonwork related injury not compensable. 39-A M.R.S.A. §201 (5).

Time for Notice. Employee notice of injury must be given to employer within 90 days of injury, unless employer has actual knowledge of injury. 39-A M.R.S.A. §§301, 302. Date of injury for gradual injury is when injury manifests itself. *Jensen v. S.D. Warren*, 2009 ME 35, 968 A.2d 528.

Time for Filing Petitions. Two years after injury, 39-A M.R.S.A. §306. For work-related death, petition must be filed within one year of death or two years of injury, whichever is later. *Id.* If claim is not accepted by employer-insurer by filing memorandum of payment accepting the claim, and employee fails to file petition within two years, claim is barred. Two-year period does not begin to run until employer-insurer files first report of injury. *Id.* Once claim has been accepted, employee has six years from date of most recent payment of benefits in which to file a petition; decree under the federal Longshoremen and Harbor Workers' Act does not afford employee the benefit of this limitation period. *Maloney v. Bath Iron Works*, 601 A.2d 628 (Me. 1992).

Payment of Benefits. 39-A M.R.S.A. §205. Employer-insurer must make the first payment of benefits within 14 days of notice or knowledge of work-related injury or death. *Id.* §205 (2). Benefits are not payable for the first 7 days of incapacity (except firefighters) but, if incapacity continues more than 14 days, compensation is allowed retroactive to commencement of incapacity. *Id.* §204. If benefits are not paid within 30 days of notice or knowledge of injury or death, \$50.00 per day penalty to a maximum of \$1,500.00 must be paid to employee for period of nonpayment beyond 30 day period, provided no dispute exists between employer and employee. *Id.* §205 (3).

Amount of Benefits. Weekly disability benefit for total incapacity is 80% of employee's after-tax earnings during preceding 52 weeks (*Id.* §§102, 212 (1)) plus fringe benefits that are not scheduled to continue during disability. *Id.* §102 (4) (H); *Beaulieu v. Me. Med. Ctr.*, 675 A.2d 110 (Me. 1996). Employee with partial earning capacity receives 80% of the difference between employee's after-tax weekly wage and the after-tax post-injury earnings. 39-A M.R.S.A. §213 (1). Partially disabled employees may receive benefits for a maximum of 416 weeks of both total and partial disability combined. *Id.* Board Rule, Ch. 2 M.W.C.B. §2. However, if employee's impairment is greater than 15% to the body, partially disabled employee is entitled to receive unlimited Workers' Compensation benefits. 39-A M.R.S.A. §213(2). This percentage is subject to change based on actuarial review, and is currently 11.8% *Id.*; Board Rule, Ch. 2 M.W.C.B. §1. If the employee's permanent impairment is between 11.8% and 15%, employers liable for certain dates of injury may seek recovery of benefits paid over 260 weeks from the Employment Rehabilitation Fund. 39-A M.R.S.A. §213(3).

Medical Benefits. Injured employee is entitled to payment of reasonable medical services, prescriptions, and aids necessitated by work-injury. *Id.* §206. Employer may initially select health care provider. *Id.* §206 (1). Ten days after employer selects health care provider,

employee may select different health care provider and any dispute between employer and employee regarding appropriate health care provider must be resolved by mediation pursuant to *Id.* §§313, 206 (2). Referral to a specialist by employee's health care provider is permitted although employee may not use a different specialist in same specialty unless employee receives approval from employer or Workers' Compensation Board. *Id.* §206 (4). Medical expenses are governed by medical fee schedule promulgated by Workers' Compensation Board. This schedule establishes maximum fees for hundreds of standard medical procedures. *Id.* §209 (1).

Medical Examinations. Workers' Compensation Board must maintain list of approved medical examiners who are available to perform medical examinations upon request of parties to dispute or, if parties cannot agree upon appointment of medical examiner, the Board. *Id.* §312 (1). Board must adopt findings of medical examiner if Board assigned that medical examiner unless there is clear and convincing contrary evidence. *Id.* §312(7). Cost of independent medical examiner must be paid by employer. *Id.* §312 (5). Employers retain right to order independent medical examinations on their own. *Id.* §§207, 312.

Termination/Reduction of Benefits. Partial benefits may be terminated after receipt of 260 weeks of partial and total benefits if whole person impairment is less than 15%. *Id.* §213 (1). Time period can be extended for extreme financial hardship, but not more than 520 weeks. *Id.* §213(1), (4).

Benefits may be terminated or reduced if employee returns to work. If employee rejects bona fide offer of reasonable employment without good and reasonable cause, employee is not entitled to ongoing benefits. *Id.* §214 (1) (A). If employee returns to work earning less than average weekly wage, employee is entitled to partial benefits. *Id.* §214 (1) (B). If employee returns to work earning more than average weekly wage, benefits may be terminated for duration of employment. *Id.* §214 (1) (C). If employee loses post-injury job through no fault of his own and employment lasted less than 100 weeks, employee is entitled to reinstatement of benefits based upon average weekly wage at time of injury. *Id.* §214 (1) (E). If employee returns to work for more than 100 weeks and loses job through no fault of his own, he is entitled to benefits based upon average weekly wage at time of injury assuming no new "wage earning capacity" can be established. *Id.* §214 (1) (D) (1). There is a presumption that new wage earning capacity is established once employee returns to work at any employment totaling 250 weeks. *Id.* §214 (1) (D) (2). Employee's entitlement to benefits is subject to offset for unemployment benefits received. *Id.* §220.

Employer's or Insurer's Lien. Workers' Compensation Act automatically vests in employer, who has paid or obligated himself to pay compensation to his injured employee, a lien for value of compensation paid on any damages later recovered against liable third party. Employee shall receive any recovery in excess of lien. *Id.* §107. Employer's lien extends to entire amount of employee's recovery against third party tort-feasor for bodily injury, including those portions allocable to pain and suffering and loss of wages not compensable under Workers' Compensation act. *Perry v. Hartford Acc. & Indem. Co.*, 481 A.2d 133 (Me. 1984). Employer's lien does not extend to damages for loss of consortium recovered by spouse from third party tort-feasor. *Dionne v. Ford*, 621 A.2d 414 (Me. 1993). Carrier's lien extends beyond compensation benefits paid to date of judgment or settlement of employee's action against third party. Carrier is entitled both to recoup payments already made and to set off any future compensation payments until amount so credited to carrier equals employee's net recovery from third party. *Liberty Mut. v. Weeks*, 404 A.2d 1006 (Me. 1979). Third party tort-feasor may not implead assenting employer under Workers' Compensation Act, in absence of express contract of indemnity. *Roberts v. Am. Chain & Cable*, 259 A.2d 43 (Me. 1969); *Diamond Int'l v. Sullivan & Merritt*, 493 A.2d 1043 (Me. 1985). Employee who settles claim against third-party wrongdoer for work-related injuries may still proceed against employer for workers' compensation benefits, but any award conferred by Workers' Compensation Board is to be set off by net amount of settlement received from third-party wrong-doer. *Overend v. Elan I Corp.*, 441 A.2d 311 (Me. 1982).

Immunity. Employer is immune from civil actions by employees and their representatives. *Li v. C.N. Brown*, 645 A.2d 606 (Me. 1994); 39-A M.R.S.A. §§104, 408. Employer's immunity from common law actions by employees extends to claims for loss of consortium brought by employees' spouses when such claims result from work-related injuries or disease. *McKellar v. Clark Equip.*, 472 A.2d 411 (Me. 1984). However, employer, its employees, supervisors, officers,

and directors may not be immune if sued in a separate and distinct capacity (*i.e.* as landlord). *LaBelle v. Crepeau*, 593 A.2d 653 (Me. 1991).

Exclusivity provisions of Maine's Workers' Compensation Act bar employees' civil actions against their employers under Employers' Liability Act. Employers' Liability Act does not create independent cause of action for employment related injuries. *Bond Builders v. Commercial Union*, 670 A.2d 1388, 1390 (Me. 1996).

Coemployee Immunity. Worker is immune from tort liability in a civil action commenced by a fellow employee for damages stemming from a work-related injury. *Boyce v. Potter*, 642 A.2d 1342 (Me. 1994).

Approval of lump sum settlement by Workers' Compensation Board discharges employer from further liability with respect to benefits claimed by employee. Employee shall receive no further compensation or other benefits on account of work-related injury. 39-A M.R.S.A. §352. Lump sum settlement precludes claim for apportionment by subsequent employer/comp insurer, if employee reinjures self on subsequent job. *Kennedy v. Brunswick Convalescent Ctr.*, 584 A.2d 678 (Me. 1991).

Mental Injuries. Employee must prove by clear and convincing evidence using an objective standard that work stress is (1) extraordinary and (2) the predominant cause of mental injury to recover. Even if these tests are met, injury is not compensable if it arose out of good faith disciplinary action by the employer. 39-A M.R.S.A. §201 (3).

Total Incapacity. Specified injuries (and amputations) result in entitlement up to 800 weeks of specific loss benefits (severe injuries including loss of sight, limbs and paralysis of extremities). These benefits are paid in addition to other benefits. 39-A M.R.S.A. §212 (2).

Injured employee, receiving comp benefits from employer under comp laws in another state, can still receive benefits under Maine's law; but employer entitled to off-set benefits paid in other state. *LeBlanc v. United Eng'rs & Constructors*, 584 A.2d 675 (Me. 1991).