

# DIGEST OF INSURANCE LAW

## MINNESOTA

Not Revised for this Edition

### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

Inferior courts consist of District Courts and Conciliation Courts. (Corrections of 29 July 1997).

District Courts have original and unlimited civil and criminal jurisdiction except for claims arising under Workers' Compensation Act. The state is divided into 10 judicial districts. The District Courts operate under General Rules of Practice and District Court Rules. Appeals are to Minnesota Court of Appeals.

Conciliation Courts have a civil jurisdictional limit of \$7,500 except that this limit does not apply in actions to recover rental deposits. Minn. Stat. Ann. § 491A.01. Appeals are taken to District Court, for trial de novo.

Municipal Courts and County Courts have been merged into District Court system. Minn. Stat. Ann. § 487.01 *et seq.*; Minn. Stat. Ann. § 488A.01. *et seq.*

#### Appellate Courts

Minnesota Court of Appeals has appellate jurisdiction over following: (a) all appeals from trial courts except conciliation court and first degree murder convictions, (b) Administrative Procedure Act (APA) and commissioner of economic security appeals, (c) review of arbitration matters, (d) municipal ordinance violations, and (e) matters including recognizance.

Minnesota Supreme Court has original appellate jurisdiction over decisions of Workers' Compensation Court of Appeals and Tax Court.

Minnesota Supreme Court has discretionary review in following situations: (a) before case is decided by Court of Appeals—case is of such imperative public importance it requires immediate determination by Supreme Court; or (b) after case is decided by Court of Appeals—if 1) question presented is important one upon which Supreme Court should rule; 2) Court of Appeals has ruled on constitutionality of statute; 3) lower courts have so far departed from accepted and usual course of justice as to call for exercise of Supreme Court's supervisory powers; or 4) decision by Supreme Court will help develop, clarify, or harmonize law.

Cases before Court of Appeals are decided by three-judge panels. Supreme Court has seven members. All appeals are governed by Rules of Civil Appellate Procedure.

### LAW

#### Abbreviations

A.L.R. – American Law Reports.

Fed. – Federal Reporter.

F.2d – Federal Reporter, Second Series.

Law. Ed. – United States Supreme Court Reports, Lawyer's Edition.

L.R.A. – Lawyer's Reports Annotated.

Minn. – Minnesota Reports.

Minn. Stat. Ann. – Minnesota Statutes Annotated.

N.W. – North Western Reporter.

U.S. – United States Reports (Supreme Court).

References to Dunnell are to Dunnell Minnesota Digest (Third Edition).

Commissioner of Insurance, upon application, will furnish in printed pamphlet form insurance laws of state, containing standard forms and pertinent information.

### ACCIDENT AND HEALTH INSURANCE

See "ACCIDENTAL MEANS."

There are comprehensive statutes regulating accident and health insurance and credit life and accident and health insurance. Minn. Stat. Ann. § 62A.01 *et seq.*; § 62B.01-.06 (Credit Life and Accident and Health Insurance); § 62C.01-.23 (Nonprofit Health Service Plan Corporations Act); § 62D. 01-.30 (Health Maintenance Act of 1973); § 62E.01-.19 (Comprehensive Health Ins. Act of 1976); § 62J (Health Care Cost Containment); § 62L.01-.23 (Small Employer Health Benefit Act).

Cancellation. Insurer may cancel with five days written notice. There are conversion and continuation privileges in group health insurance contracts upon separation from employment and dissolution of marriage. Minn. Stat. Ann. §§ 62A.17, 62A.21, 62A.24.



Renewal. No statutory regulation of renewals. There are continuation and conversion privileges in group policies, though those privileges generally terminate upon policy termination. Minn. Stat. Ann. §§ 62A.17, 62A.21, 62A.24.

Disease Induced by Accident. Judicial decisions in this state lead to following conclusions: (a) subject to exceptions contained in policy, if injury be proximate cause of death or disability, company is liable, but (b) if injury, or existing bodily disease or infirmity, concur and cooperate to that end, there is no liability, unless: 1) injury be cause of infirmity or disease, that is, if disease results and springs from injury, insurer is liable, though both cooperate in causing death. Distinction in this particular is found in that class of cases where infirmity or disease existed in insured at time of injury, and, on other hand, that class of cases where disease was caused and brought about by injury; 2) and even in a case where insured is afflicted at time of accident with some bodily disease, if accidental injury be of such nature as to cause death solely and independently of disease, liability exists. In those cases where question of "causation" arises, question is one for jury. *Kundiger v. Metropolitan*, 218 Minn. 273, 15 N.W.2d 487.

Excepted Risks. Exceptions in policies for claims arising from illegal activities and the use of narcotics are allowed. Minn. Stat. Ann. § 62A.04. In any case of doubtful liability in workers' compensation matters, sickness and accident insurer should immediately pay benefits on assumption that sickness or injury is covered by its policy, and later seek reimbursement if there is successful workers' compensation proceeding. *Repo v. Prudential Ins. Co. of Am.*, 252 N.W.2d 248. Recovery for death in crash of private aircraft denied under express terms of policy. *LaPlante v. Pyramid Life Ins. Co.*, 267 N.W.2d 727.

Notice and Proof of Loss. Following provisions are required for accident and health policies delivered in this state: (a) Written notice of claim must be given to insurer within 20 days after occurrence or commencement of any loss covered by policy, or as soon thereafter as is reasonably possible. (b) Notice given by or on behalf of insured or beneficiary, as case may be to insurer, or to any authorized agent of insurer, with information sufficient to identify insured, shall be deemed notice to insurer. Failure to give notice within time provided in these policies shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice, and that notice was given as soon as reasonably possible. (c) Insurer, upon receipt of such notice will furnish claimant with forms for filing proof of loss. If such forms are not furnished within fifteen days after receipt of such notice, claimant will be deemed to have

complied with requirements of policy as to proof of loss upon submitting within time fixed in policy for filing proof of loss, written proof giving occurrence, character, and extent of loss for which claim is made. Minn. Stat. Ann. § 62A.04.

Statute of Limitations. Generally, three years after proof of loss. Minn. Stat. Ann. § 62A.04, subd. 2(11).

Damages. Governed by contract – no statutory regulation.

Double Indemnity. Death by bodily injury must be through external, violent, and accidental means in order to trigger double indemnity provision in policy. *Lincoln National v. Erickson*, 42 F.2d 997.

## ACCIDENTAL MEANS

Definition. Accident and accidental are to be given their ordinary meanings. When the effect does not ordinarily follow and cannot be reasonably anticipated from the means utilized or an effect which the actor did not intend to produce, it is produced by accidental means. *Taylor v. New York Life*, 222 N.W. 912.

Where injury is caused by means insured against and medical treatment administered is rendered necessary and proper by nature of injury, death of insured, if caused solely by injury and subsequent medical treatment, is "accidental" within meaning of policy insuring against death caused by "external, violent and accidental means." *Gardner v. United Surety*, 110 Minn. 291, 125 N.W. 264.

Absent express provision in policy to contrary, injury sustained by insured while acting in violation of law does not preclude recovery under policy of accident insurance. *Jennings v. Travelers*, 163 Minn. 267, 203 N.W. 966. See also *Sleeter v. Progressive*, 191 Minn. 108, 253 N.W. 531.

In those policies wherein liability is limited to death or injury from "external, violent and accidental means," visible injuries are not limited to external injuries, but include any internal injury, existence of which may be ascertained from observation or examination. *Peterson v. Locomotive Engineers*, 123 Minn. 505, 144 N.W. 160.

Where there was no evidence in suit on accident policy as to how external violence, which caused insured's death, was inflicted there was presumption that means were accidental. *Krema v. Great Northern*, 204 Minn. 186, 282 N.W. 822.

Suicide. Sanity or insanity of person shall not be factor in determining whether person committed suicide within terms of individual or group life insurance policy. Minn. Stat. Ann. § 61A.031.

## ADJUSTERS

**Definition.** An adjuster is a person who, on behalf of an insurer or insured, for compensation as an independent contractor or as an employee thereof or as an employee of an insurer, or for a fee or commission, investigates and evaluates claims arising under insurance contracts and negotiates the settlement of such claims. Minn. Stat. Ann. § 72B.02.

**Licensing.** Independent adjuster, public adjusters, and public adjuster solicitors must be licensed. Minn. Stat. Ann. § 72B.03. Generally, adjusters must be over 18 years of age, competent, and trustworthy. Applicants must be bonded and pass an examination. Minn. Stat. Ann. § 72B.04. Public Adjuster's fee not covered by fire insurance. *Butwin's v. St. Paul Fire*, 534 N.W.2d 565.

## AGE

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

Generally, age of majority is 18. Minn. Stat. Ann. §§ 645.45, 645.451. Persons under age 21 may not purchase or consume alcoholic beverages. Minn. Stat. Ann. § 340A.503.

## AGENTS AND BROKERS

**Definition. Agent.** An agent or agency is a person acting under express authority from an insurer and on its behalf to solicit insurance, write policies, or collect premiums, or any or all of the above. Minn. Stat. Ann. § 60A.02. Agents must be licensed. Minn. Stat. Ann. § 60K.32.

**Definition. Broker.** A broker is a person who acts to procure insurance for another and is representative of insured rather than insurer, except for collecting premiums. *R.L.B. v. Liberty National*, 413 N.W.2d 551. Broker is not ordinarily agent of insurer for any purpose except to deliver policy, and receive payment therefor. He has no implied authority to bind insurer by any agreements not in policy. See *Zenith Box & Lumber Co. v. National Union Fire*, 175 N.W. 894. Whether person is acting as agent or broker is question of fact. *Eddy v. Republic National Life*, 290 N.W.2d 174; *Morrison v. Swenson*, 142 N.W.2d 640. Distinction between special, local, soliciting and general agents is not decisive of extent of their authority. See *Morrison v. Swenson*, 142 N.W.2d 640.

**For Whom.** In preparing applications agent represents insurer and not insured. Any misrepresentations by agent as to nature or effect of statements in application bind insurer. *Pomeranke v. Farmers Life Ins.*, 36 N.W.2d 703.

**Knowledge of Agent.** Notice to agent of facts within scope of his agency is notice to insurer for purposes of doctrine of estoppel and waiver. *Bemis v. Pacific Coast Cas. Co.*, 145 N.W. 622. See 16 Minn. Law Review 422. Where insurance company has clothed its agent with apparent authority to enter into oral contracts for insurance and has knowledge of and acquiesces in agent's business practices, company is prevented by equitable estoppel from denying delegation of authority. *Nehring v. Bast*, 103 N.W.2d 368. Where insurer customarily dates policies of insurance as of day of application instead of day of issuance, its soliciting agents have implied authority to enter into contracts of insurance with applicants for interim between application and acceptance. *Glens Falls v. Swanstrom*, 279 N.W. 845; *Rein v. New York Life*, 299 N.W. 385.

**Fraud by Agent.** Every agent, or examining physician, or other person of an insurance company, who knowingly or willfully makes a false or fraudulent statement in, or relative to, any application for insurance or membership for any purpose whatsoever, is guilty of a gross misdemeanor. Minn. Stat. Ann. § 72A.04. Misrepresentation by insurer's agent to illiterate insured held to come within exception to general rule that fraud may not be predicated on misrepresentations of law. *Stark v. Equitable*, 285 N.W. 466.

**Liability of Agent.** Failure to procure policy. An agent who fails to procure insurance after agreeing to do so may be liable in fact for negligence or for breach of contract. Generally, agent has no legal duty to insured beyond that specifically undertaken by agent. However, agents have been held negligent for failure to update coverages in light of known exposure, *Ossendorf v. American Family*, 318 N.W.2d 237, and for failing to offer optional coverages when the agent has a "special relationship" with the insured, *Johnson v. Urie*, 405 N.W.2d 887.

**For Insolvent Company.** Agents who place insurance with companies who are required to be, but are not authorized to conduct business in Minnesota, are liable for premiums paid and may be liable for insured's losses which would have been covered by appropriate policy. Minn. Stat. Ann. § 60K.47. Insurance agent has duty to exercise standard of skill and care that reasonably prudent person engaged in insurance business will use under like circumstances. *Johnson v. Farmers & Merchants State Bank*, 320 N.W.2d 892.

**Liability to Insurer.** Agent held liable to insurance company for loss resulting from agent's failure to obey instructions to cancel policy, *Phoenix Ins. Co. v. Pratt*, 31 N.W. 454, and for failure to obey instructions not to take specified risk, *Hanover Fire Ins. Co. v. Ames*, 39 N.W. 300. Action recognized by insurer against agent



for negligent failure to advise it of risk incurred, but only if insurer is prejudiced. *Norby v. Bankers Life*, 231 N.W.2d 665. Insurer-insured relationship not fiduciary absent special circumstances. *St. Paul Fire & Marine Ins. Co. v. A.P.I., Inc.*, \_\_\_ N.W.2d \_\_\_.

Licensing and Regulation. Comprehensive licensing set forth in Minn. Stat. Ann. § 60K. Agents must be licensed. Application must include appointment by admitted insurer. Education and testing requirements included.

### ARBITRATION

Minnesota has adopted the Uniform Arbitration Act. Minn. Stat. Ann. § 572.08 *et seq.* There is limited judicial review of awards, e.g., when arbitrators exceed their authority. Reviewing court may vacate an arbitration award only when: 1) award was procured by fraud, corruption, or other undue means; 2) evident partiality, prejudicial misconduct, or corruption of the arbitrator; 3) arbitrator exceeded his or her powers; 4) improper conduct of the hearing resulted in substantial prejudice; or 5) no arbitration agreement. Minn. Stat. Ann. § 572.19, subd. 1.

Trial court's role in reviewing arbitration decisions is severely limited because parties bargained for decision by arbitrator, not court. *AFSCME Council 65 v. Aitkin Co.*, 356 N.W.2d 295. Arbitration is common in Minnesota in uninsured motorist claims, no-fault claims and construction disputes. Arbitration awards are strongly favored, and a reviewing court must exercise every reasonable presumption in favor of the award's finality and validity. *AbdAlla v. Mourssi*, 680 N.W.2d 569.

Party seeking to recover uninsured motorist benefits was not estopped to contest arbitrability of coverage although issue not raised before arbitrators and trial court properly reviewed arbitrator's determination *de novo*. *Rosenberger v. American Family Ins.*, 309 N.W.2d 305.

### ASSIGNMENT

See "FIRE INSURANCE."

### ATTORNEYS

Appointment and Authority. Relationship between attorney and client is governed by rules applicable to principle and agent. The mere existence of relationship does not authorize attorney to make extrajudicial admissions on behalf of client, though attorney can bind client by agreement made in open court. Minn. Stat. Ann. § 481.08. Attorney has no right to settle or compromise claim without client's consent. *Albert v. Edgewater*, 15 N.W.2d 460.

Conflict of Interest. In defending a claim, attorney owes his allegiance to the insured rather than the insurer, though insurer has right to control the litigation.

Legal Malpractice. In order to show malpractice, plaintiff must show existence of attorney-client relationship, negligence or breach of contract on part of attorney, and that attorney's negligence or breach proximately caused plaintiff's damage. *Viet v. Anderson*, 428 N.W.2d 429.

Fees. Parties have unrestricted rights to agree with attorneys as to compensation, including measure and mode thereof. Minn. Stat. Ann. § 549.01. Attorneys' fees are not recoverable in litigation absent specific contract or statutory authority. *Dworsky v. Vermes Credit*, 69 N.W.2d 118. In coverage litigation, insured may not collect its attorney's fees unless insurer has breached duty to defend or if statute authorizes recovery. *American Standard v. Le*, 551 N.W.2d 923.

### AUTOMOBILES

See "NEGLIGENCE"; "NO-FAULT INSURANCE"; and "LIABILITY INSURANCE." Minn. Stat. Ann. § 169.01 *et seq.* provides comprehensive code governing operation of motor vehicles.

Age. Persons under age 16 may not be licensed, nor may persons under age 18 unless application is approved by father, mother, or guardian having custody, and person has successfully completed approved course in driver education. Minn. Stat. Ann. § 171.04. Restricted licenses for farm work may be issued to person 15 years of age. Minn. Stat. Ann. § 171.041. A person who has attained the age of 15 may be issued a license if he or she needs to drive for personal or family medical reasons. Minn. Stat. Ann. § 171.042.

Agency. Owner of motor vehicle is liable for injury or damage resulting from operation of his motor vehicle with his express or implied consent. Minn. Stat. Ann. § 170.54. This liability is limited to operation of vehicle within scope of consent given. *Ranthum v. Ferguson*, 202 Minn. 209, 277 N.W. 547. Consent must have existed at time and place accident occurred. *Patterson v. Dunn*, 201 Minn. 308, 276 N.W. 737. Whether requisite consent is present is question of fact, or of fact and law, and such consent may be inferred from all facts and circumstances of case. *Anderson v. Hedges Motor Co.*, 164 N.W.2d 364. Burden of proving lack of consent is on owner and requires strong showing that automobile was being used without owner's knowledge and contrary to his explicit instructions. See *Shuck v. Means*, 226 N.W.2d 285.

Comparative/Contributory Fault. Minnesota has adopted comparative fault. A plaintiff's claim is barred

if he or she is more negligent than tortfeasor. Defendants' fault is generally not aggregated. Minn. Stat. Ann. § 604.01-02.

**Compulsory Insurance Coverage.** Automobile insurance required including bodily injury, liability, no-fault, uninsured motorist, and underinsured motorist coverage. Current minimum is 30/60 for bodily injury liability. Minn. Stat. Ann. § 65B.48-49.

**Alcohol/DWI.** Statutes prohibit driving while under the influence of alcohol or a controlled substance and operating vehicle with blood alcohol in excess of .08. (.10 prior to 8/1/05). Minn. Stat. Ann. § 169A.20.

**Damages - Compensatory.** Damages allowed in typical case include past wage loss, medical expenses, pain, suffering, disability and emotional distress and future medical expenses, loss of earning capacity, pain, suffering, disability and emotional distress. Loss of consortium is allowable for injuries to either spouse. Minnesota does not recognize child's loss of consortium.

**Punitive.** Punitive damages are allowed for deliberate disregard to rights and safety of others and are governed by statute. Plaintiff must move the court for leave to claim punitive damages. Defendant may obtain separate trial as to punitive damages issues. Minn. Stat. Ann. §§ 549.191, 549.20.

**Family Purpose Doctrine.** Family purpose doctrine superseded by Safety Responsibility Act. Minn. Stat. Ann. § 169.09, subd. 5a; *Ellinghoe v. Guerin*, 36 N.W.2d 598. Notwithstanding parent's explicit instruction to her child forbidding operation of her automobile by anyone else, parent is deemed to have given her consent under Minn. Stat. Ann. § 169.09, subd. 5a when car is driven by third person with child's permission and under child's direction if child is actually passenger in car. *Granley v. Crandall*, 180 N.W.2d 190. See *Hutchings v. Bourdages*, 189 N.W.2d 706.

**Guests.** See "GUEST CASES."

**Imputed Negligence/Joint Enterprise.** Generally, negligence of bailee is not imputed to bailor of automobile. *Christensen v. Hennepin Transp.*, 10 N.W.2d 406. Joint enterprise applicable if there is common purpose or undertaking with each person having authority to act for all in furtherance of the common purpose. Generally, there is no joint venture between owner and driver of vehicle unless both have right to control vehicle. *Sowada v. Motzko*, 98 N.W.2d 182. Joint enterprise between passenger and driver only if each of them has right to exercise control over operation of car. Joint enterprise does not arise between them from mere co-ownership of vehicle and from fact they are husband and wife, or from association in taking motor trip for common purpose.

*Burdick v. Bongard*, 96 N.W.2d 868. Rule which imputes negligence of one joint venturer to another to bar his recovery against negligent third party is abolished prospectively in automobile negligence cases to all causes of action arising after February 13, 1970. *Pierson v. Edstrom*, 174 N.W.2d 712.

**Master and Servant.** Negligence of servant driving automobile not imputed to master riding as passenger so as to bar master's right of recovery against negligent third party. *Weber v. Stokely-Van Camp, Inc.*, 144 N.W.2d 540. Holding of *Weber v. Stokely-Van Camp*, however, does not apply to corporate employers, *Thomas Oil, Inc. v. Onsgaard*, 215 N.W.2d 793, nor does it apply to action by master for property damage, *Weckerly v. Abear*, 256 N.W.2d 79. See also *Clay County v. Burlington Northern, Inc.*, 209 N.W.2d 420.

**Last Clear Chance.** Doubtful that last clear chance doctrine applies in light of adoption of comparative fault. Jury instruction guides suggest that issue can be considered by jury in apportioning fault. Doctrine abolished by 1990 Omnibus Tort Reform Bill. Minn. Stat. Ann. § 604.01.

**Ownership/Title.** All vehicles must be registered. Registration is prima facie, but not conclusive, evidence of title. *Zappa v. Fahey*, 245 N.W.2d 258.

**Pedestrians.** A pedestrian is a person afoot or in a wheelchair. Minn. Stat. Ann. § 169.01, subd. 24. Pedestrians have right of way while crossing road within a crosswalk, but must yield to vehicle traffic when crossing a roadway between intersections. Pedestrians are also subject to traffic control signals at intersections. Minn. Stat. Ann. § 169.21.

**Motorized Bicycles.** Defined as bicycle with a motor of less than 50 cubic centimeters capable of a maximum speed of less than 30 miles per hour. Minn. Stat. Ann. § 169.01, subd. 4a, 169.974.

**Seat Belts.** Seat belt use required by driver, front seat passengers and children between ages of three and eleven. Proper passenger restraint required for children less than four. Penalty is \$25.00 fine. Minn. Stat. Ann. § 169.686. Proof of the use or failure to use seat belt or a child passenger restraint system, or proof of the installation or failure of installation of the same is not admissible as evidence in any litigation involving personal injuries or property damage from the use of a motor vehicle, except in actions involving defectively designed, manufactured, installed, or operating seat belts or child passenger restraint system. Minn. Stat. Ann. § 169.685, subd. 4(a), (b). See also *Harrison ex rel. Harrison v. Harrison*, 733 N.W.2d 451 (holding Minn. Stat. § 169.685, subd. 4(b) permits a child to bring an action

against his parents for negligent installation of a child passenger restraint system).

Service of Process, Non-resident Motorists. Minn. Stat. Ann. § 169.09, subd. 16. Statute provides for service upon non-resident motorist in action growing out of use and operation of motor vehicle within state of Minnesota by service upon Commissioner of Public Safety either by serving copy of such process on Commissioner or by filing copy in his office, together with fee of \$2.00; provided that notice of such service and copy of process are within ten (10) days thereafter sent by mail by plaintiff to defendant at his last known address and that plaintiff's affidavit of compliance with provisions of this chapter is attached to summons. Statute applies also to residents who have been absent from state continuously for six months or more following accident. *See Long v. Moore*, 204 N.W.2d 641.

Service of Process. In rem jurisdiction. Minnesota recognizes in rem jurisdiction, but it will rarely apply in automobile cases. Minnesota courts will not base in rem jurisdiction solely on the presence of an insurance policy interest in the state. *Rush v. Savchuk*, 444 U.S. 320.

Speed Limit. Governed by Minn. Stat. Ann. § 169.14. Generally, when no special hazard exists, limit is 70 m.p.h. on interstate highways outside of urban areas, 65 m.p.h. on non-interstate highways as defined in Minn. Stat. Ann. § 160.02, subd. 16, and 55 m.p.h. on other highways.

Trailers/Weight Limits. Governed by Minn. Stat. Ann. §§ 169.80 - 169.88. Wide variety of limitations based on size of vehicle, type of roadway and season of year.

Uninsured and Underinsured Motorist. See "NO-FAULT INSURANCE."

## AVIATION

Liability for Negligence. Minn. Stat. Ann. § 360.0216 imposes liability on aircraft owner for pilot's negligence when some portion of flight occurred in Minnesota.

Damages. No state statutory limitations. Airline held responsible for infliction of emotional distress resulting from sudden uncontrolled dive. *Quill v. T.W.A.*, 361 N.W.2d 438.

Service of Process. Minn. Stat. Ann. § 360.0215 allows service of process on commissioner of transportation for claims against non-resident arising out of use or operation of aircraft in Minnesota.

## BROKERS

See "AGENTS AND BROKERS."

## BURGLARY INSURANCE

Sale allowed by statute. Minn. Stat. Ann. § 60A.06. "Reasonable expectation" doctrine used to allow insured to collect on burglary policy without fulfilling policy definition of burglary. *Atwater v. Western National*, 366 N.W.2d 271.

## CANCELLATION

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

Automobile liability insurer must give insured written notice of impending cancellation setting forth specific underwriting or other reasons for cancellation. Minn. Stat. Ann. §§ 65B.15, 65B.16. Notice must not be ambiguous. *Cormican v. Anchor Cas.*, 81 N.W.2d 782. Insurer must prove only mailing of notice, not insured's receipt thereof. Minn. Stat. Ann. § 65B.18; *Dairyland Ins. v. Neuman*, 338 N.W.2d 37.

## CHATTEL MORTGAGE

"A 'chattel mortgage' is a conveyance of personal property intended as security for payment of money or for performance of some act." *Land O' Lakes Dairy Co. v. Wadena County*, 229 Minn. 263, 39 N.W.2d 164. This security interest is governed by Minn. Stat. Ann. § 336.9-102. *See also*, "FIRE INSURANCE."

## CONTRIBUTION

See "FIRE INSURANCE"; "LIABILITY INSURANCE"; "NEGLIGENCE."

## CONSTRUCTION OF POLICY

Ambiguity of Terms. Ambiguities in insurance policies are construed in favor of insured and against insurer. *Amatuzio v. U.S. Fire Ins.*, 409 N.W.2d 278.

Conditional Receipt of Application. In the absence of any statement in the application, a contract of insurance is consummated by and not until the unconditional acceptance by insurer of application or proposal for insurance. *LaFavor v. American Nat'l Ins.*, 155 N.W.2d 286. Recovery may be allowed under theory of implied contract where insurer customarily backdates policy to date of application even where no written policy is issued. *Usher v. Allstate*, 218 N.W.2d 201.

Inconsistent Policy Terms and Endorsements. The terms of a policy must be read in context of the entire

contract. The terms will not be so strictly construed as to lead to a harsh result. *Employers Mut. v. Eagles Lodge*, 165 N.W.2d 554. Particular language controls in the event of a conflict between general and particular language. *Allied Mut. v. Askerud*, 94 N.W.2d 534. Endorsements are part of the contract and must be construed together with the policy. An endorsement will govern if it conflicts with a provision in the body of the policy. *Dairyland Ins. v. Implement Dealers Ins.*, 199 N.W.2d 806.

Oral Binders. Oral agreements for insurance are valid if the agent had actual or apparent authority to enter into such an agreement. *Gulbrandson v. Empire Mut.*, 87 N.W.2d 850. Oral agreements to renew are also valid. See, e.g., *Cormican v. Anchor Cas.*, 81 N.W.2d 782.

## DAMAGES

Appellate Review - Excessive Verdicts. To be excessive, an award of damages must so greatly exceed what is adequate as to be accountable on no other basis than passion and prejudice. See *Dewitt v. Schubauer*, 177 N.W.2d 790.

Arbitration Awards. Generally. Courts have jurisdiction to enforce arbitration agreements and to enter judgement on an award pursuant to application by a party. Minn. Stat. Ann. §§ 572.18, 572.24; *Great American Ins. v. LeMieu*, 439 N.W.2d 733.

Collateral Estoppel. An arbitration decision is a "prior adjudication" so that collateral estoppel bars re-litigation at trial of issues resolved in arbitration proceeding. *Aufderhar v. Data Dispatch*, 437 N.W.2d 679. Insured's criminal conviction does not collaterally estop victim/plaintiff from litigating insured's intent in later civil action. *Ill. Farmers v. Reed*, 662 N.W.2d 529.

Collateral Sources. Trial court deducts collateral recovery from plaintiffs' awards. Minn. Stat. Ann. § 548.36. In uninsured and underinsured motorist arbitrations, the arbitrators make the collateral source deduction. *Western Nat'l v. Casper*, 549 N.W.2d 914.

Comparative Negligence. In action for personal injury or death or property damage, amount of damages shall be reduced in proportion to amount of fault attributable to person recovering. Minn. Stat. Ann. § 604.01. To recover, plaintiff's fault must be less than or equal to defendant's. Generally co-defendants' fault is not aggregated. *Id.*

Economic Losses. Since 1991, the economic loss doctrine has been governed by statute. Minn. Stat. Ann. § 604.01 (1991) barred tort claims for economic loss by "merchants in goods of the kind," but mere "merchants" could sue in tort for economic loss for damage to "other

property." Although Minn. Stat. Ann. § 604.01 (1991) was repealed in 2000, it is still effective for some transactions occurring before July 31, 2000. The new statute, Minn. Stat. Ann. § 604.101 (2000), no longer distinguishes between merchants and sets forth three situations in which a buyer may bring a tort claim.

Indemnification. Indemnity generally requires that one party reimburse another entirely for its liability. *Zontelli & Sons v. Nashwauk*, 373 N.W.2d 744. Contracts of indemnity may provide for indemnity against loss or damages and also for indemnity against liability, and single contract may indemnify against both actual loss or damages and liability. Action on strict contract of indemnity does not arise until indemnity has suffered loss by being compelled to pay. *Aetna Cas. v. Brothers*, 33 N.W.2d 46. In general, indemnity is not allowed between joint wrongdoers, with limited exceptions. *Hanson v. Bailey*, 83 N.W.2d 252; *Hendrickson v. Minnesota Power*, 104 N.W.2d 843. Indemnity for one's own negligence will not be found by implication and must be clearly stated in contract. *Johnson v. McGough Constr.*, 294 N.W.2d 286. Indemnity clauses in construction contracts are subject to Minn. Stat. Ann. § 337.02.

Interest. Prejudgment interest allowed, generally from date of service of process to date of judgment. Reduced amount if defendant's written offer is closer to award than plaintiff's written offer. Minn. Stat. Ann. § 549.09, subd. 1. Prejudgment interest allowed on arbitration awards. Minn. Stat. Ann. § 549.09 (1).

Psychic Injuries - Mental Pain and Suffering. A claimant in a personal injury action is entitled to damages for past and future mental suffering, embarrassment and humiliation. *Patterson v. Blatti*, 157 N.W. 717. No recovery can be made for fright or mental distress alone, but recovery is allowed if fright or mental distress results in physical injury, regardless of whether there was trauma. *Okrina v. Midwestern*, 165 N.W.2d 259. No recovery allowed for mental distress if claimant was outside "zone of danger." *Stadler v. Cross*, 295 N.W.2d 552. If within "zone of danger" claimant may recover for distress caused by fear for another's safety or by witnessing serious injury to another. *Engler v. Ill. Farmers*, 706 N.W.2d 764.

Punitive Damages. Punitive damages are limited to situations where "clear and convincing evidence that the acts of defendant show deliberate disregard for the rights and safety of others." Minn. Stat. Ann. § 549.20. Such damages are intended as punishment for willfully wrong act done with malice. See *Johnson v. Radde*, 196 N.W.2d 478. Punitive damages against workers' compensation insurer in certain circumstances. Minn. Stat. Ann. § 176.183. No award against a municipality for punitive damages. Minn. Stat. Ann. § 466.04. Punitive

damages not allowed in breach of contract actions absent independent tort. *Pillsbury v. National Union*, 425 N.W.2d 244. Punitive damages may be imputed to principal for illegal acts of its employee when employee has managerial capacity or when principal ratifies acts. *Tennant Co. v. Advance Machine Co., Inc.*, 355 N.W.2d 720; Minn. Stat. Ann. § 549.20. Excessive awards may violate due process. *Pulla v. Amoco*, 72 F.3d 648.

It is proper to set off punitive damages against compensatory damages. *Hognen v. Schlueter*, 355 N.W.2d 762.

Settlement. Where plaintiff uses “Pierringer” release to settle with one party and jury determines that settling party was not negligent, nonsettling party is not entitled to have amount paid by settling party subtracted from damages he is required to pay plaintiff. *Shantz v. Richview, Inc.*, 311 N.W.2d 155. One consequence of “Pierringer Release” is that non-settling tortfeasor is liable only for that part of award attributable to his percentage of causal negligence. *Klimek v. State Farm*, 348 N.W.2d 103.

Statutory Caps on Awards. Statutory limit of \$400,000 on “intangible” losses (includes embarrassment, emotional distress, and loss of consortium, but not pain, disability and disfigurement) repealed in 1990. Minn. Stat. Ann. § 549.23.

## DEATH

Abatement and Survival. When injury is caused to person by wrongful act and person later dies of unrelated cause, court-appointed trustee can maintain action for special damages only resulting from injury. Minn. Stat. Ann. § 573.02.

Action for Wrongful Death. Under Minn. Stat. Ann. § 573.02 surviving spouse and next of kin are given rights within limits of statute to recover pecuniary loss.

Death. Measure of damages in action for wrongful death is such amount as jury deems fair and just in reference to “pecuniary loss” resulting from such death, and shall be for exclusive benefit of surviving spouse and next of kin. Minn. Stat. Ann. § 573.02.

Cause of action will lie for death by wrongful act of unborn viable child. *Pehrson v. Kistner*, 222 N.W.2d 334.

Damages. Punitive damages may be recovered in wrongful death action where death or cause of action arose on or after June 15, 1983, except where death or cause of action arose from intentional act constituting murder, in which case punitive damages may also be recovered in pending wrongful death action in which

final judgment has not been entered. Minn. Stat. Ann. § 573.02.

“Pecuniary loss” is not limited to loss of earnings, contributions and services, but includes the pecuniary value of loss of counsel, guidance, advice, comfort, assistance, and protection which jury might find to be of pecuniary value if deceased had lived. See *Cummins v. Rachner*, 257 N.W.2d 808. Expectancy of contribution for support, as opposed to legal obligation to contribute, will support claim under wrongful death statute for deprivation of such expectancy. *Snellnow v. Fahey*, 233 N.W.2d 563. Remarriage or intention to remarry of surviving spouse is not relevant to damages recoverable for death by wrongful act of deceased spouse. *Davis v. Liesenfeld*, 240 N.W.2d 548.

Parties in Interest. Surviving spouse and next of kin. Minn. Stat. Ann. § 573.02.

Statute of Limitations. Action shall be commenced within 3 years of death and within 6 years after act or omission, except for death caused by professional negligence where, pursuant to 1978 amendment, action must be commenced within 2 years of death. Minn. Stat. Ann. § 573.02. Death caused by defect in improvement to realty governed by two-year statute. *Ford v. Emerson*, 430 N.W.2d 198.

Statutory presumption of decedent’s due care repealed with amendment effective for trials commenced after June 30, 1978. Minn. Stat. Ann. § 602.04; *Price v. Amdal*, 256 N.W.2d 461.

Unexplained Absence. 7 years of unexplained absence gives rise to rebuttable presumption that person is dead. See *Donea v. Massachusetts Mut.*, 19 N.W.2d 377; *Carlson v. Equitable Life*, 246 N.W. 370.

## DISABILITY

Classifications. There is no statutory regulation or provision as to what constitutes total or partial disability in Minnesota.

Total Disability. Words “Total Disability” when used in policy are not to be construed to mean state of absolute helplessness, but rather state of inability to do all material acts necessary to carrying on of insured’s calling in substantially his customary way. *Struble v. Occidental Life*, 265 Minn. 26, 120 N.W.2d 609. Total disability in occupation is to be measured by absence of individual earning capacity rather than absence of income. *Laidlaw v. Commercial Ins. Co. of Newark*, 255 N.W.2d 807.

Proof of Condition. It is generally a fact question for the jury as to whether a person is “totally disabled.” Fact that insured occasionally performs some act within

his occupation or carries on some occupation through other labor does not necessarily preclude coverage for total disability. *McKay v. Minnesota Commercial*, 165 N.W. 1061; *Wenum v. Mutual Benefit*, 54 N.W.2d 20. Expert testimony on insured's ability to be hired is relevant evidence. *Stroniek v. Berkshire*, 193 N.W.2d 286.

## FINANCIAL RESPONSIBILITY LAW

See "AUTOMOBILES."

## FIRE INSURANCE

See generally Minn. Stat. Ann. § 65A.01 *et seq.*

**Arson.** In civil case to recover under fire policy, arson must be shown only by fair preponderance of evidence rather than beyond reasonable doubt. Fact of incendiary fire and proof of insured's motive sufficient to create jury issue. *Quast v. Prudential Property*, 267 N.W.2d 493. "Innocent insured" able to recover. *Watson v. United Services*, 551 N.W.2d 500.

**Assignment.** In absence of special agreement, fire policy is not assignable. Effect of sale by insured of property insured is to put end to contract of insurance. As to fire insurance, custom and practice in this state on part of insurer and insured is to permit assignment of policy to new owner of property, but this must be done with consent of insurer. After loss by fire, interest of insured in amount of loss is assignable, and may be reached by attachment, garnishment or levy of execution. See generally *9B Dunnell's Digest Insurance* § 803 (M).

**Contract-Policy. Binder.** Contract for present insurance or for renewal of existing insurance, made orally, is valid. *Schmidt v. Agricultural*, 190 Minn. 585, 252 N.W. 671. By accepting without argument fire insurer's decision not to insure his building, insured who is unaware of his statutory right to ten days' written notice of cancellation does not waive such right. *Bacich v. Trans-america*, 208 N.W.2d 868.

**Cancellation.** After policy has been in force 60 days, insurer may cancel only for limited specified reasons. Minn. Stat. Ann. § 65A.01, subd. 3a. Cancellation notice must include statement of reason for cancellation that a person of reasonable intelligence would understand. Minn. Stat. Ann. §§ 65A.01, subd. 6, 65A.07.

**Mortgage Clause.** Minn. Stat. Ann. § 65A.11 provides for payment to mortgagees. Acts of mortgager do not defeat mortgagee's claim. *Shepherdson Co. v. Central Fire Ins.*, 19 N.W.2d 772. The mortgage clause creates a separate and divisible agreement between the mortgage company and the insurance carrier. *Minnesota*

*Fed. Sav. & Loan v. Iowa Nat'l Mut. Ins. Co.*, 372 N.W.2d 763.

**Reformation.** Insurance policies may be reformed for mistake on the same grounds and conditions as other contracts. If the mistake is mutual, and there is no evidence of fraud or inequitable conduct, the proof must be clear, precise, and convincing. *Keogh v. Sharon Twp. Mut.*, 263 N.W. 601. To justify reformation based on unilateral mistake, evidence must establish that the insurer knew of the insured's mistake and thereafter acted inequitably. *Farmers Store v. Delaware Farmers Ins.*, 59 N.W.2d 889.

**Severable Contracts.** An insurer may not make an insurance contract in Minnesota which conflicts with Minnesota Statutes. Incorporating an invalid provision does not invalidate the entire policy. *Dworsky v. Vermes*, 69 N.W.2d 118.

**Standard Provisions.** The standard fire policy language is set forth at Minn. Stat. Ann. § 65A.01. No fire insurance company shall issue on property in this state any policy which does not conform to standard provisions. No suit or action for recovery of any claim shall be sustainable in any court of law or equity unless all requirements of policy have been complied with, and unless commenced within two years after inception of loss. Minn. Stat. Ann. § 65A.01. When a fire insurer fails to include in its policy an exclusion found in the statutory policy, the insurer enforces the statutory exclusion against the insured. *Krueger v. State Farm*, 510 N.W.2d 204. Appraisal clause mandated by Minn. Stat. Ann. § 65A.01, subd. 3, is subject to statutorily mandated two-year limitation on suits or actions on policy. *Johnson v. Mut. Serv. Cas. Ins. Co.*, 732 N.W.2d 340.

**Damages. Excepted Risks. Explosions.** A loss caused by an explosion is not covered in policy which excepts such losses unless fire ensues and then policy covers only the loss caused by the fire. *Freeberg v. St. Paul Mut.*, 100 N.W.2d 753.

**Fixtures.** Standard policy includes coverage for fixtures.

**Friendly Fires.** Fires are hostile when they are excessive or unusual and where beyond control whether in or out of its proper place. *Freeberg v. St. Paul Mut.*, 100 N.W.2d 753. Fire may be hostile although burning at its usual rate if it burns substantially longer or in some fashion other than expected. *Engel v. Redwood City Farmers Mut.*, 281 N.W.2d 331.

**Smoke and Soot.** Not necessary that the fire be in insured's building. The smoke which penetrates the building and deposits smoke laden air is sufficient. *Marshall Produce v. St. Paul Mut.*, 98 N.W.2d 280.

Proof of Loss. Requirements of Minn. Stat. Ann. § 65A.01. Policy voided by exaggerated claim in proof of loss. *Foot v. Insurance Co.*, 286 N.W. 400. Failure to furnish proof of loss delays payment under policy. Minn. Stat. Ann. § 65A.01.

Repair. Fire insurers have option to repair, rebuild or replace the damaged property within a reasonable time. Insurer must give notice of such intention within 30 days after proof of loss. Minn. Stat. Ann. § 65A.01. Fire insurer who chooses to repair has duty to repair or rebuild the damaged property to put it in as good a state as it was before loss. *Walther v. Republic Underwriters*, 574 F. Supp. 686.

Replacement Value. Minn. Stat. Ann. § 65A.10 authorizes replacement cost coverage in excess of the actual cash value at the time of loss.

Multiple Policies - Co-Insurance. A policy may contain a co-insurance clause, if the insured requests such in writing, and a premium reduction is granted. Minn. Stat. Ann. § 65A.08.

Concurrent Insurance. Fire Insurance is not concurrent unless the policies are on the same property or some part thereof, on the same interest, against the same risks, and in favor of the same party. When the insurance is concurrent, each insurer pays a pro-rata share of the coverage. *Nesheim v. Iowa Mut.*, 305 N.W.2d 320; Minn. Stat. Ann. § 65A.08, subd. 4.

Contribution between Companies. When insurance is not "concurrent" the court generally applies a primary/secondary liability analysis according to the terms of the policies. The court attempts to find which policy is "closer to the risk." *Federal Ins. v. Prestemon*, 153 N.W.2d 429; *Auto Owners Ins. v. North Star Mut.*, 281 N.W.2d 700.

Excessive Policies. Insurer is generally obligated to pay actual loss up to limits of policy. In valued policies, insurer must pay the stated value in the event of a total loss. *Oppenheim v. Fireman's Fund*, 138 N.W. 777. However, proof of fraud in the procurement of a stated value policy by overvaluing insured property will defeat insured's claim. *Zuraff v. Empire Fire*, 252 N.W.2d 302 (North Dakota).

Insurable Interest. Under present Minnesota Standard Fire policy there is no requirement that insured must have unconditional ownership of insured property. If person has reasonable prospect of becoming owner of insurable property and in good faith takes out policy of fire insurance thereon, and thereafter, before loss occurs, acquires insurable interest, which subsists at time of loss, policy is binding. *Antell v. Pearl Assur. Co.*, 89 N.W.2d

726. See also *Hane v. Hallock Farmers Mut. Ins. Co.*, 258 N.W.2d 779.

## FRAUD

See "AGENTS AND BROKERS"; "FIRE INSURANCE, Proof of Loss"; "REPRESENTATIONS AND WARRANTIES."

## GUEST CASES

In absence of contributory negligence, can recover from owner for negligence of such owner or his servant resulting in injury to guest, and whether or not guest acted prudently in protesting or failing to protest as to operation is question of fact to be determined in view of all surrounding circumstances. Test is whether guest or invitee exercise the care of reasonably prudent person under existing conditions. *Sackett v. Haeckel*, 81 N.W.2d 833; *Rappaport v. Stockdale*, 199 N.W. 513. In considering negligence of guest, time, place, experience of guest, circumstances under which persons in the car are riding, control over driver, remonstrances, ability to appreciate danger, etc., may be taken into consideration. *Rahja v. Current*, 119 N.W.2d 699. Where passenger has no authority or control over driver and no reason to suspect want of due care, negligence of driver is not imputed to passenger. *Connor v. Dweyer*, 104 N.W.2d 838. Claims against social hosts for injuries caused by intoxication of minors are governed by six-year statute of limitations in Minn. Stat. Ann. § 541.05. *Christiansen v. Univ. of Minn. Bd. of Regents*, 733 N.W.2d 156.

## HOSPITALS

Evidence-Records. Under the Rules of Evidence, hospital and medical records are ordinarily admissible as business records upon proper proof of relevancy and foundation.

Liens. Hospital has a lien for its reasonable charges for care to an injured person upon any and all causes of action. Minn. Stat. Ann. § 514.68.

Immunity. A municipality operating the hospital is exercising its corporate or proprietary powers and thus is liable for negligence. *Borwege v. Owatonna*, 251 N.W. 915. Tort immunity abolished as to State of Minnesota. *Neiting v. Blondell*, 235 N.W.2d 597.

## HUSBAND AND WIFE

Community Property. Minnesota has not adopted the doctrine of community property between husband and wife. *Nelson v. Nelson*, 183 N.W. 354.

Interspousal Immunity. The absolute defense of interspousal immunity in tort actions has been abrogated. *Beaudette v. Frana*, 173 N.W.2d 416.

Loss of Consortium. The right of action of a spouse for loss of consortium includes claims for loss of comfort, companionship, and sexual relationship. The spouse's right to recover for loss of consortium exists only if the spouse recovers from the defendant and the consortium action is joined with the action of the injured spouse. *Thill v. Modern Erecting Co.*, 170 N.W.2d 865.

## INFANTS

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

Parent-Child Immunity. Parent may maintain action for personal injuries caused by unemancipated minor's negligence. *Balts v. Balts*, 142 N.W.2d 66. Doctrine of parent/child immunity not applicable where allegation was that father engaged in affirmative act of negligence by furnishing defective tool. *Willy v. K-Mart Corp.*, 354 N.W.2d 442.

Unemancipated minor child may recover for injuries caused by parent's negligence, as determined by "reasonable parent" standard, except: 1) where alleged negligent act involves exercise of reasonable parental authority; 2) where negligent act concerns ordinary parental discretion as to food, clothing, housing, medical and dental services, and other cares. *Anderson v. Stream*, 295 N.W.2d 595.

Negligence. General rule in cases of negligence is that child has duty to act with degree of care commensurate with his age, experience, and judgment, except when operating automobile, airplane, or powerboat, and, in such case, child is held to same standard of care as adult operator. *Miller v. State*, 306 N.W.2d 806.

Contributory negligence of young child issue for jury determination. Jury finding of negligence chargeable to child 5 years and 8 months of age is sustained by evidence. *Toetschinger v. Ihnot*, 250 N.W.2d 204.

Responsibility of Parent. Parent or guardian of minor under 18 living with parent or guardian and who willfully or maliciously causes injury to person or property is liable up to \$1,000. This statute provides liability in addition to and not in lieu of any other liability. Minn. Stat. Ann. § 540.18.

Wrongful Death. Cause of action will lie for death by wrongful act of unborn viable child. *Pehrson v. Kistner*, 222 N.W.2d 334.

## INLAND MARINE

"'Inland marine insurance' includes insurance now or hereafter defined by statute, or by judicial interpretation thereof, or if not so defined or interpreted, by ruling of the commissioner, or as established by general custom of the business, as inland marine insurance." Minn. Stat. Ann. § 70A.03(3). Inland marine insurance generally covers multiple risks including domestic shipments, bridges, tunnels and other instrumentalities of transportation and communication, and personal property floater risks. See *Fireman's Fund v. Vermes Credit Jewelry, Inc.*, 185 F.2d 142.

## LIABILITY INSURANCE

Cancellation. Automobile liability insurer must give insured written notice of impending cancellation setting forth specific underwriting or other reasons for cancellation. Minn. Stat. Ann. §§ 65B.15, 65B.16. The notice must not be ambiguous. *Cormican v. Anchor Cas.*, 81 N.W.2d 782. Insurer must prove only mailing of notice rather than prove insured's receipt thereof. Minn. Stat. Ann. § 65B.18; *Dairyland Ins. v. Neuman*, 338 N.W.2d 37.

Compromise of Claims. Duty to act in good faith. Where insurer has acted in bad faith in refusing to settle claim within policy limits, it may be held liable for full amount of difference between policy limits and verdict against insured. Duty to exercise good faith with respect to decision whether to accept offer of settlement within policy limits requires insurer to view situation as it would if there were no policy limits applicable to claim, including obligations to give equal consideration to financial exposure of both insured, whether solvent or insolvent, and insurer, and obligation to inform insured, in manner in which he would be advised if he consulted private counsel, in detail of potential consequences of deficiency judgement and potential conflict between interests of insurer and insured. *Lange v. Fidelity & Cas. Co.*, 185 N.W.2d 881; *Strand v. Travelers Ins. Co.*, 219 N.W.2d 622. Excess insurer subrogated to insured's rights against primary insurer for breach of primary insurer's duty to settle in good faith. *Continental Cas. Co. v. Reserve Ins. Co.*, 238 N.W.2d 862.

Right of Insurer to Settle. An insurance policy usually contains reservation by the insurer of the right to settle an action or claim.

Contribution among Joint Tortfeasors. Contribution between joint tortfeasors is determined in accordance with the degree of fault attributable to each. Minn. Stat. Ann. § 604.02. To be entitled to contribution, there must be common liability to plaintiff by each tortfeasor. *Hart v. Cessna Aircraft Co.*, 276 N.W.2d 166. *But see Lam-*



*bertson v. Cincinnati Corp.*, 257 N.W.2d 679, holding that negligent manufacturer is entitled to contribution from negligent employer in amount not to exceed workers' compensation paid or payable even though workers' compensation law bars tort liability of employer. Minn. Stat. Ann. § 604.02, subd. 1, limits liability of a tortfeasor who is 15% or less at fault to no more than four times her percentage of fault. This 15% times 4 rule does not modify the *Lambertson* rule. *Decker v. Brunkow*, 557 N.W.2d 360. Note significant legislative change effective August 2003. Joint and several liability restricted to defendants more than 50% at fault, persons acting in a common scheme or plan, and persons who commit intentional torts. Tortfeasor liable for injuries sustained by another is not entitled to contribution from party whose conduct has been adjudged less negligent than that of injured party. *Horton v. Orbeth, Inc.*, 342 N.W.2d 112. Third-party tortfeasor may recover contribution from negligent employer whether or not employee, in direct suit, would have been barred from recovery under comparative-fault statute. *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149.

**Cooperation of Insured.** Question of insured's breach of cooperation in defense of action is question of fact for jury, and insurer has burden of proving substantial and material lack of cooperation resulting in substantial prejudice to its position. *Rieschl v. Travelers Ins. Co.*, 313 N.W.2d 615. Failure or refusal by the insured to testify or to attend the trial will be regarded as a breach of the cooperation clause. *White v. Boulton*, 107 N.W.2d 370.

**Coverage - Construction of Terms.** Terms of an automobile insurance policy are construed in light of consideration that public has interest in having automobiles covered by liability insurance. See *Holland American Ins. Co. v. Baker*, 139 N.W.2d 476.

**Standard Provisions.** Cases concerning construction of term "ownership, maintenance, or use" of motor vehicle. See *Haagenson v. National Farmers Union Prop. & Cas. Co.*, 277 N.W.2d 648; *Fillmore v. Iowa Nat'l Mut. Ins. Co.*, 344 N.W.2d 875. Meaning of term "regular use" turns on facts of particular case. *Federal Ins. Co. v. Prestemon*, 153 N.W.2d 429. Garage loaner automobile held "non-owned automobile" and therefore covered under customer's auto insurance policy. *Leegard v. Universal Underwriters Ins. Co.*, 255 N.W.2d 819. Temporary-substitute-vehicle provision of liability policy covers automobile used as temporary substitute for replacement vehicle withdrawn from normal use. See *St. Paul Fire & Marine Ins. Co. v. Nyquist*, 175 N.W.2d 494. Provisions for automatic coverage of replacement vehicles in liability policy construed. See *Austin Mut. Ins. Co. v. Modern Serv. Co.*, 255 N.W.2d 224. Cases involv-

ing interpretations of non-owned automobile coverage. See *Tollefson v. American Family Ins.*, 226 N.W.2d 280. Definition of "occurrence" in construction contractor's liability policy. *Ohio Cas. Ins. Co. v. Terrace Enterpriser, Ins.*, 260 N.W.2d 450.

**Omnibus Provisions.** Effect of omnibus clause is to give non-owner status of additional insured while he is using automobile with permission of named insured. Term "consent" in Safety Responsibility Act (Minn. Stat. Ann. § 170.54) is synonymous with term "permission" as used in customary omnibus clauses. *Taylor v. Allstate Ins. Co.*, 176 N.W.2d 266. Under Minn. Stat. Ann. § 170.54 employer liable for employee's negligent use of insured motor vehicle whether employee's deviation from permission given by employer is "minor" or "gross" departure. *Millbank Mut. Ins. Co. v. UFS&G*, 332 N.W.2d 160.

**Direct Action Against Insurer.** Minnesota does not recognize right of direct action against liability insurer.

**Duty to Defend.** Insurer is required to defend its insured if any part of claim against insured is arguably within scope of coverage. *Brown v. State Auto & Cas.*, 293 N.W.2d 822. Insurer's duty to defend is determined by circumstances existing at the time defense is tendered. *SCSC Corp. v. Allied Mut.*, 536 N.W.2d 305. Liability insurer may avoid defending cause of action within policy coverage if actual facts outside complaint would exclude cause of action from coverage. However, insurer who refuses to defend its insured has burden of showing that no duty to defend exists. Liability insurer's duty to defend its insured is broader than duty to indemnify. Where a complaint against insured states cause of action excluded from insurance coverage, but insurer is aware that facts outside complaint make exclusion inapplicable, insurer will be required to defend. Where insurer has wrongfully refused to defend, insured can recover his attorney's fees, costs and disbursements, incurred in his defense and also in his action to establish insurer's obligation to defend. *Lanoue v. Fireman's Fund Am. Ins. Co.*, 278 N.W.2d 49; see also *American Standard v. Le*, 551 N.W.2d 923. Duty to defend ends if all potentially covered claims are dismissed. *Meadowbrook v. Tower Ins.*, 559 N.W.2d 411.

**Liability between Insurers.** Minnesota generally takes a Primary/Excess approach to questions of overlapping coverage.

**Primary.** Liability of insurers issuing policies which provide overlapping coverage should be determined in light of total policy insuring intent as determined by primary policy risks. The policy that is "closest to the risk" is primary. *Federal Ins. Co. v. Prestemon*, 153 N.W.2d 429.

Excess. Cases involving “excess,” “escape,” or “other insurance” clauses. *See Federal Ins. Co. v. Prestemon*, 153 N.W.2d 429; *Dairyland Ins. v. Implementation Dealers Ins. Co.*, 199 N.W.2d 806. No right of action by primary insurer against excess insurer for attorney’s fees and costs of defense by reason of excess insurer’s refusal to defend. *American Sur. Co. v. State Farm Mut. Auto Ins. Co.*, 142 N.W.2d 304. No contractual obligation exists to make primary insurer liable to excess insurer for breach of primary insurer’s duty to defend. *Iowa Nat. Mut. Ins. Co. v. Universal Underwriters Ins. Co.*, 150 N.W.2d 333. An excess insurer may recoup contribution toward settlement from primary insurer when primary insurer has notice of excess insurer’s intent to recoup prior to settlement of underlying case. *Jacobs v. Cable Constructors*, 704 N.W.2d 205.

Exclusions. Courts will enforce exclusions that are unambiguous and not in violation of public policy. “Hidden” exclusions will not be enforced if not within “reasonable expectations” of insured. *Atwater Creamery v. Western*, 366 N.W.2d 271. Ambiguous exclusions are strictly construed against insurers. *SAFECO v. Lindberg*, 380 N.W.2d 219.

Intentional Acts. Intentional injury exclusion does not relieve insurer of liability under its policy unless insured has acted with intent to cause bodily injury and exclusion does not apply where act itself was intended but resulting injury was not. *See Woida v. North Star Mut. Ins. Co.*, 306 N.W.2d 570; *Brown v. State Auto & Cas. Underwriters*, 293 N.W.2d 822. Insured not collaterally estopped by guilty plea to deny he committed intentional tort. *Glens Falls Group v. Hoiium*, 200 N.W.2d 189. Claims of sexual assault and battery are considered “intentional acts” as a matter of law. *Allstate v. S.F.*, 518 N.W.2d 37. But when such an act may be “unintentional” by reason of mental illness, trial court should submit the issue to the jury. *B.M.B. v. State Farm*, 664 N.W.2d 817.

Violations of Law. Policy excluding liability coverage while automobile driven by person violating law respecting drivers’ licenses upheld. *Giacomo v. State Farm Mut. Auto. Ins. Co.*, 280 N.W. 653.

Miscellaneous Exclusions. Resident and relative exclusion. With respect to exclusion for members of family or household, automobile insurance policy exclusion which precludes third-party liability coverage of relative who is resident of same household, but owns his own vehicle, is valid exclusion. *Toomey v. Krone*, 306 N.W.2d 549. *But see Anderson v. Ill. Farmers Ins.*, 269 N.W.2d 702, and *Iverson v. State Farm Mut. Auto. Ins. Co.*, 295 N.W.2d 573, regarding similar exclusion in no-fault basic economic loss and uninsured motorist coverage, and *Maher v. All Nation Ins. Co.*, 340 N.W.2d 675,

regarding underinsured coverage. Exclusion in auto liability policy excluding members of insured family residing in same household did not apply to adult son who was home for visit between military assignments, notwithstanding fact he used parents’ home as his permanent mailing address. *Fruchtman v. State Farm Mut.*, 142 N.W.2d 299. *See also VanOverbeke v. State Farm Mut.*, 227 N.W.2d 807. Drop-down automobile insurance policy provisions that reduce bodily-injury coverage for resident family members to minimum statutory amount are valid and enforceable. *Frey v. United Automobile Assoc.*, 743 N.W.2d 337.

Employee Exclusion. Cases involving construction of liability policy provisions excluding coverage for injury or death of employee of insured. *See Milbank Mut. Ins. Co. v. Biss*, 161 N.W.2d 622; *Hillesheim v. Stippel*, 166 N.W.2d 325; *Mutual Creamery Ins. Co. v. Gaylord*, 186 N.W.2d 176.

Faulty Workmanship Exclusion. Damages to building sustained by owner as result of breach of construction contract due to general contractor’s faulty workmanship and furnishing of defective materials in construction of building are business risk to be borne by contractor and not by his comprehensive general liability insurer, and said insurer had no duty to defend nor indemnify insured in such matter. *BOR-SON v. Employers Commercial Union*, 323 N.W.2d 58.

Homeowner’s Motor Vehicle Exclusion. Clause of homeowner’s policy that excludes coverage for injury or death arising out of use of motor vehicle does not prevent recovery where insured negligently leaves passenger who is intoxicated and unconscious in automobile and passenger dies due to combination of freezing temperatures and insured’s failure to exercise reasonable care for passenger’s safety. *Engeldinger v. State Auto. & Cas.*, 236 N.W.2d 596. *See also Waseca Mut. v. Noska*, 331 N.W.2d 917, where court finds coverage under both auto and homeowners policies.

Non-Owned Automobile Exclusion. Cases involving interpretation of non-owned automobile coverage. *See Tollefson v. American Family Ins.*, 226 N.W.2d 280. With respect to exclusion for members of family or household, automobile insurance policy exclusion which precludes third-party liability coverage of relative who is resident of same household, but owns his own vehicle, is valid exclusion. *Toomey v. Krone*, 306 N.W.2d 549. Two-week one time loan of vehicle was not “regular use,” and thus that exclusion did not apply in this instance. *Milbank Ins. v. Johnson*, 544 N.W.2d 56.

Waiver. Waiver is intentional relinquishment of known right. Waiver of terms for contract of insurance may consist in doing of some act which is inconsistent

with intention to insist on strict performance, or course of conduct inconsistent with and in disregard of terms of contract. Stipulation in policy that no officer, agent, or representative shall be deemed to have waived any of conditions therein unless such waiver is endorsed thereon is not binding. *Seavey v. Erickson*, 69 N.W.2d 889; *Andrus v. Maryland Cas.*, 98 N.W. 200.

**Reservation of Rights.** Defense of action without reservation of rights will prevent insurer from asserting defense to policy where insurer knew of claimed defense and took no immediate action. *Faber v. Roelofs*, 250 N.W.2d 817. Where insurer denies coverage and withdraws from defense before trial, insured must show actual prejudice to his defense before insurer is estopped to deny coverage. *Minnesota Mut. Co. v. Benson*, 195 N.W.2d 446. Prejudice to insured is presumed, however, where insurer has knowledge, actual or presumed, of defense under policy and conducts action to final judgement. *Boulet v. Millers Mut. Ins.*, 362 F.2d 619. When insurer is obligated to defend its insured and contests coverage, insurer must pay reasonable attorneys' fees for its insured rather than conduct defense itself. *Prahm v. Rupp*, 277 N.W.2d 389.

**Insolvency of Insured.** Minn. Stat. Ann. § 60A.08, subd. 6, provides that bankruptcy or insolvency of insured shall not relieve insurer of liability to injured third party under policy of liability insurance. Act expressly provides that this condition shall be deemed to be contained in every policy of insurance notwithstanding anything in policy to contrary. It is further provided that whenever execution against insured on final judgement is returned unsatisfied, judgement creditor shall have some right of action against insurer that insured would have had in event he had paid final judgement.

**Jury.** The fact of the defendant's insurance is not to be brought to the attention of the jury except that court has statutory authority to inquire of jury panel as to whether they are employees of or have an interest in the defendant's insurance company.

**Notice.** Notice of a claim against an insured is reasonably timely where no prejudice results to the insurer from a delayed notice. However, a delay in providing notice of a claim against the insured will allow the insurer to avoid the policy if the insurer has been prejudiced. *Hagstrom v. American Fidelity Co.*, 163 N.W. 670.

**Punitive Damages.** Homeowner's insurance policy afforded no coverage for punitive damages which were awarded to plaintiff as punishment to defendant and as deterrence to others. *Casperson v. Webber*, 213 N.W.2d 327.

## LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

**Limitation in Contract.** Absent a specific statute to the contrary, parties to an insurance contract may limit the time within which an action may be brought to a period less than that fixed by general statutes of limitation, provided the limitation is not unreasonably short. *Henning Nelson v. Fireman's Fund*, 383 N.W.2d 645 (insurer must show prejudice in order to assert one year notice provision). Insurer need not show prejudice if suit limitation period is reasonable. *L & H Transport v. Drew Agency*, 403 N.W.2d 223 (court upholds one year suit limitation provision).

**Accrual.** Statute of limitation begins to run when the cause of action "accrues." In an action for negligence, the cause of action has not accrued until damage has resulted from the alleged negligence. *Dalton v. Dow Chemical Co.*, 158 N.W.2d 580. In action for breach of contract, cause of action accrues immediately upon breach, although all actual damages resulting therefrom do not occur until afterwards. *Everett v. O'Leary*, 95 N.W. 901. A legal malpractice cause of action accrues when some compensable damage has occurred, sufficient to survive a motion to dismiss for failure to state a claim. *Antone v. Mirviss*, 720 N.W.2d 331.

**Discovery Rule.** Except in the case of fraud, ignorance of a cause of action will not ordinarily prevent the running of the statute of limitations. *Dalton v. Dow Chemical Co.*, 158 N.W.2d 580.

**Fraud.** Under Minn. Stat. Ann. § 541.05, an action for relief on the ground of fraud must be commenced within six years, but the cause of action is not deemed to have accrued until discovery of the fraud.

**Tolling.** Statute of Limitations is tolled during periods of disability listed in Minn. Stat. Ann. § 541.05, including infancy. Under Minn. Stat. Ann. § 541.13, the statute of limitations may be tolled where personal jurisdiction over the defendant cannot be obtained because the defendant is not within the State.

**Waiver.** The statute of limitations is an affirmative defense and is waived unless pleaded in the answer. *Parsons v. Town of New Canada*, 295 N.W. 907.

**Statutory and case law reference to specific limits on causes of action.** An action for recovery of wages must be commenced within two years, except limitation is three years if employer fails to submit payroll records. Minn. Stat. Ann. § 541.07. Actions for damages arising out of the defective or unsafe condition of an improvement to real property must be brought within two years of discovery of the defective or unsafe condition. Minn.

Stat. Ann. § 541.051. An action for contribution or indemnity arising out of the defective and unsafe condition of an improvement to real property may be brought not later than two years after the cause of action for contribution or indemnity has accrued, regardless of whether it accrued before or after the ten-year period of repose. Minn. Stat. Ann. § 541.051, subd. 1(b). Actions upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed, must be commenced within six years. Minn. Stat. Ann. § 541.05. Title VI and Title IX claims are governed by Minnesota's 6-year personal injury statute, not the MHRA 1-year statute. *Egerdahl v. Hibbing Comm. Coll.*, 72 F.3d 615. Under the Minnesota Uniform Commercial Code, an action for breach of any contract for the sale of goods must be commenced within four years after the cause of action accrues. Minn. Stat. Ann. § 336.2-724. Medical malpractice actions resulting in injury must be commenced within four years from the date the cause of action accrues. Minn. Stat. Ann. § 541.076. Medical malpractice actions resulting in death must be commenced within three years from the date the cause of action accrues. Minn. Stat. Ann. § 573.02. Six year limitation governs subrogations by UIM insurers. *Hermeling v. Minnesota Fire & Cas.*, 534 N.W.2d 716. Ten-year statute of repose applies to actions for breach of statutory new-home warranties and actions for breach of express written warranties on improvements to real property. *Gomez v. David A. Williams Realty & Construction*, 740 N.W.2d 775. Cause of action for breach of statutory new-home warranty or express written warranty on improvements to real property accrue upon discovery of breach. *Id.*

### MALPRACTICE

Medical. Statutory requirements and limitation. Minn. Stat. Ann. § 145.682 requires certification of expert review in all malpractice actions against health care providers in which expert testimony is necessary to establish a prima facie case. This statute requires that an affidavit of expert review be served upon the defendant along with the summons and complaint. Plaintiff must also provide an affidavit identifying all expert witnesses expected to testify at trial within 180 days of commencement of the action. This affidavit must be signed by each expert listed and by plaintiff's attorney. If the affidavit cannot be obtained before commencement of action, because of statute of limitations, the affidavit must be provided within 90 days after service of summons and complaint. Minn. Stat. Ann. § 145.682, subd. 3(b). The Supreme Court created an exception to the affidavit requirement where the standard of care, breach of that standard, and claim of causation were within the general knowledge and experience of lay persons.

*Tousignant v. St. Louis County*, 615 N.W.2d 53. If the plaintiff fails to provide the affidavit of expert review within 60 days after a demand for it, the case will mandatorily be dismissed upon motion by the defendant. Minn. Stat. Ann. § 145.682, subd. 6. Minnesota Board of Medical Practice may publish name and address of disciplined physician and nature of misconduct after temporary license suspension. *Uckun v. Minn. State Bd. of Medical Practice*, 733 N.W.2d 778.

Expert Testimony. Expert testimony is generally required to prove negligence unless the nature of the alleged conduct is such that inference to be drawn from the facts are within the range of common experience. *Larsen v. Yelle*, 246 N.W.2d 841. Instances in which an expert would not be required are rare and generally involve those in which no scientific knowledge was necessary. *Miller v. Raaen*, 139 N.W.2d 877. In order to prove that a doctor is negligent, the plaintiff must offer expert testimony 1) establishing standard of care recognized by medical communities; 2) showing that defendant doctor in fact departed from that standard of care; 3) that defendant's departure from that standard of care was a direct cause of the patient's injuries; and 4) resulting damages. *Todd v. Eitel Hospital*, 237 N.W.2d 357.

Informed Consent. If a patient does not give informed consent to a particular course of treatment, a physician may be liable under two possible causes of action: battery or negligent nondisclosure of risks. The consent may be implied in exceptional circumstances and also, consent need not be given in a case of an unconscious person in imperative need of immediate aid. If an unanticipated condition is discovered during the course of an operation, a surgeon may remove the condition if it would endanger the life or health of the patient. *Kinikin v. Heupel*, 305 N.W.2d 589. To prove a claim for negligent nondisclosure, a plaintiff must show a duty on the part of the physician to know of the risk alternative treatment program, a duty to disclose the risk by evidence that a reasonable person would attach significance to the risk in formulating a decision to consent to treatment, and the plaintiff must show a breach of that duty, causation and damage. *Cornfeldt v. Tongen*, 295 N.W.2d 638. The duty to inform the patient and get that patient's consent is generally that of the physician. The hospital would have liability for the physician's failure in those cases in which the physician would be an employee of the hospital. These cases are rare, as physicians are generally considered to be independent contractors.

Standard of Care. Generally, malpractice is defined as the failure of a physician to exercise the care and professional skill usually exercised by an ordinary member of his profession in good standing in the same or similar

locality. *Reinhardt v. Colton*, 337 N.W.2d 88. A specialist is presumed to be acquainted with national standards of his profession, and thus may not rely on the “locality rule.” *Christy v. Saliterman*, 179 N.W.2d 288. The standard of care for a hospital is similar to the standard of care for a physician. In general, a hospital’s liability for failing to provide adequate facilities or procedures must be determined in light of local communities’ standard for medical malpractice. *Bauer v. Friedland*, 394 N.W.2d 549. It is generally the jury’s function to determine the details of what constitutes reasonable care and whether there has been a breach of that duty. *Trepanier v. McKenna*, 125 N.W.2d 603. Negligent delay in diagnosis which allegedly increased likelihood of recurrence of underlying condition is not actionable where the underlying condition not caused by malpractice. *Luebner v. Sterner*, 493 N.W.2d 119.

**Wrongful Birth/Wrongful Life.** Minn. Stat. Ann. § 145.424 prohibits actions from wrongful birth and wrongful life. However, that statute does not preclude a cause of action for malpractice for failure of a contraceptive method or sterilization procedure or a claim that, but for the negligent conduct of another, tests or treatment would have been provided which would have made possible the prevention, cure or amelioration of any disease, defect, deficiency or handicap. In sterilization failure cases, the claimed damages, including the costs of raising the child, are offset by the value of the child’s aid, comfort, and society during the parents’ life expectancy. *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169.

**Hospital. Charitable Immunity/Limitations.** Governmental units operating hospitals are exercising corporate or proprietary powers and are thus liable for negligence. *Borwege v. Owatonna*, 251 N.W. 915. The tort of negligent credentialing of physician is not precluded by Minnesota’s peer review statute, Minn. Stat. Ann. §§ 145.61-.67. *Larson v. Wasmiller*, 738 N.W.2d 300. A hospital has no special duty to protect a child over whom hospital lacked control because no special relationship exists. *Becker v. Mayo Foundation*, 737 N.W.2d 200.

**Damages.** There are no specific limitations on damages. A person claiming malpractice on the part of a hospital may claim normal tort damages.

**Legal.** See “ATTORNEYS.”

**Other Professionals - Damages.** There are no particular limitations or provisions with respect to damages in malpractice cases. An injured person may claim those damages which result from the malpractice.

## NEGLIGENCE

See Law Digest Tables.

**Age.** The standard of care for a child is that care which a reasonable child of the same age, intelligence, training and experience at the time of the incident would have used. *Toetschinger v. Ihnot*, 250 N.W.2d 204. A child who operates an automobile, airplane or powerboat is held to the same standard of care as an adult. *Dellwo v. Pearson*, 107 N.W.2d 859.

**Attractive Nuisance.** Minnesota has rejected the traditional “attractive-nuisance” doctrine. Rather, a landowner has a limited duty to trespassing children. *Gimmestad v. Rose Brothers*, 261 N.W. 194. A landowner is negligent if he maintains a structure or other artificial condition on his premises causing harm to a child trespasser if: 1) he has reason to know that children are likely to trespass; 2) he should realize that the condition involves an unreasonable risk of harm to children; 3) the children do not realize the risk because of their youth; 4) the usefulness of the condition and the burden of eliminating the danger are slight compared with the risk to the children; and 5) the landowner fails to exercise reasonable care to eliminate the danger or to protect the children. *Sirek v. State Dept. of Natural Resources*, 496 N.W.2d 807.

**Assumption of Risk.** Assumption of risk is divided into two doctrines, primary assumption of the risk and secondary assumption of the risk. Primary assumption of the risk is a legal theory under which a defendant has no duty toward a plaintiff with respect to particular risks. *Armstrong v. Mailand*, 284 N.W.2d 343. Application of this doctrine has been quite limited. The most common examples are inherently dangerous sporting activities. Doctrine applies to both participants and spectators. *Jussila v. United States Snowmobile Ass’n*, 556 N.W.2d 234.

**Secondary Assumption of Risk.** This is an affirmative defense to be proved by a defendant and involves the reasonableness of the plaintiff’s conduct. It is treated as negligence by the plaintiff and compared with the fault of defendant. It is not a complete bar to recovery. *Springrose v. Willmore*, 192 N.W.2d 826. The primary element of such defense is that the plaintiff has voluntarily chosen to encounter a known appreciated danger created by the defendant and was negligent in doing so. *Thompson v. Hill*, 366 N.W.2d 628.

**Comparative/Contributory Negligence.** Minnesota is a comparative negligence state. Minn. Stat. Ann. § 604.01 provides for comparison among all parties found to be at fault. A plaintiff’s fault will not bar recovery if that fault was not greater than the fault of the person from whom recovery was sought. Plaintiff’s damages are reduced in proportion to the amount of fault attributed to the plaintiff. Minn. Stat. Ann. § 604.01. Fault is very broadly defined and includes claims based

on strict products liability and breach of warranty. Allocation of liability among joint tortfeasors is determined in accordance with the degree of fault attributable to each, except that each is jointly and severally liable for the whole award in certain limited circumstances. Minn. Stat. Ann. § 604.02.

**Damages. Compensatory.** In the typical negligence case, an injured person is entitled to claim the following: past medical expenses; past wage loss; past pain, disability, disfigurement, embarrassment, and emotional distress; future pain, disability, disfigurement, embarrassment, and emotional distress; future medical expenses, and loss of future earning capacity. A claimant may recover the total reasonable value of past medical expenses incurred even though health insurer satisfied those bills at a reduced amount. *Tezak v. Bachke*, 698 N.W.2d 137. A plaintiff must show that future damages are “reasonably certain” to occur. *Dornberg v. St. Paul City Railway Co.*, 91 N.W.2d 178. A jury cannot speculate as to what the future damages will be. *Kwapien v. Starr*, 400 N.W.2d 179, 183.

**Punitive.** Punitive damages are allowed in negligence actions when there is clear and convincing evidence of deliberate disregard for the rights or safety of others. Minn. Stat. Ann. § 549.20. Punitive damages are allowed for intentional damage to property. *Jensen v. Walsh*, 623 N.W.2d 247.

**Limitations on Awards.** The prior statutory limitation of \$400,000 for intangible losses was repealed in 1990. Minn. Stat. Ann. § 549.23.

**Definition/Duty.** Negligence is defined as the failure to use reasonable care. Reasonable care is that care which a reasonable person would use under like circumstances. Negligence is the doing of something which a reasonable person would not do, or the failure to do something which a reasonable person would do, under like circumstances. *Lommen v. Adolphson & Peterson Constr.*, 168 N.W.2d 673. A person can only be negligent if he has a duty to exercise due care. Duty may be imposed by common law or by statute. Under common law, a person has a duty to not create an unreasonable risk of harm. *Hanson v. Christensen*, 145 N.W.2d 868.

**Governmental Immunity.** The common law doctrine of governmental immunity has been abolished. However, there are certain limitations on tort liabilities of governmental units. Among those limitations are claims based on snow or ice conditions on highways, Minn. Stat. Ann. § 466.03, subd. 4; claims based on execution of a statute or ordinance, Minn. Stat. Ann. § 466.03, subd. 5; and claims based on discretionary acts, Minn. Stat. Ann. § 466.03, subd. 6. There are also limitations on damages, Minn. Stat. Ann. § 466.04, and

mandatory notice of claim provisions, Minn. Stat. Ann. § 466.05. Statutory immunity protects a government’s road maintenance and inspection procedures from tort liability if they are based on a policy that balances policy objectives, such as safety and economic considerations. *Minder v. Anoka County*, 677 N.W.2d 479.

Prior to August 2003, governmental units who were found to be less than 35% at fault, were jointly and severally liable for an amount not in excess of twice their proportionate share under Minn. Stat. Ann. § 604.02. This provision was repealed and no longer applies to events occurring after August 2003. The primary area of litigation involving governmental units is whether a particular act is “discretionary” and thus subject to governmental immunity. Discretionary functions are those policy making decisions involving a balancing of social, political, or economic considerations. *Chabot v. Sauk Rapids*, 422 N.W.2d 708. Governmental units may procure insurance against tort liability. To the extent of such insurance, the governmental unit waives its immunity. Minn. Stat. Ann. § 466.06.

**Imputed Negligence.** Negligence of one party will be imputed to another only if the second party has authorized the conduct, participated in it or had the right or power to control it. The negligence of one party to a joint enterprise is imputed to all. *Zylka v. Leikvoll*, 144 N.W.2d 358. In general, the fault of a servant or agent is imputed to his master or principle when acting within the scope of employment. The negligence of one spouse is not imputed to the other. *Burdick v. Bongard*, 96 N.W.2d 868. In the absence of a special relationship between driver and passenger, the negligence of a driver is not attributed to the passenger. *Olson v. Ische*, 343 N.W.2d 284.

**Liquor Liability/Dram Shop Act.** Governed by Minn. Stat. Ann. § 340A.801. Generally, a spouse, child, guardian, employer or other person who is injured in person, property or means of support by an intoxicated person has an action against a person who has illegally sold alcoholic beverages. Typical examples of illegal sales are sales to minors, sales after hours, and sales to “obviously intoxicated” individuals. The only common law liquor liability claims recognized in this state are claims against adults who knowingly provide or furnish alcoholic beverages to persons under the age of 21. Minn. Stat. Ann. § 340A.801, subd. 6. Liquor liability claims are governed by the comparative fault statute. Complicity or contributing to another person’s intoxication does not bar a person’s cause of action under the Civil Damages Act, but should be considered under comparative fault. *K.R. v. Sanford*, 605 N.W.2d 387. Also, there are significant limitations on subrogation



actions against liquor vendors. Minn. Stat. Ann. § 340A.801, subd. 4.

**Joint and Several Liability.** Joint and several liability is limited to certain circumstances, including defendant who is more than 50% at fault, persons who act in common scheme or plan that results in injury, and persons who commit intentional torts. Minn. Stat. Ann. § 604.02.

**Last Clear Chance.** Though there is no Supreme Court authority on this issue, most commentators agree that the doctrine of “last clear chance” is inconsistent with the Comparative Fault Act and that it would simply be an element of plaintiff’s fault for purposes of comparison.

**Negligence Per Se.** Violations of a statute or an ordinance which impose a standard of conduct designed to protect the general public or a particular class of persons is negligence per se absent a valid excuse or justification. *Mechler v. McMann*, 239 N.W. 605. Certain statutes expressly designate breach as only prima facie evidence of negligence. *Butler v. Engel*, 68 N.W.2d 226. Violation of a traffic statute is prima facie evidence of negligence only. Minn. Stat. Ann. § 169.96.

**Premises Liability.** A possessor of land owes a duty to use reasonable care to protect an entrant from unreasonable risk of harm caused by the condition of the premises or by the possessor’s activities on the premises. *Bisher v. Homart Develop.*, 328 N.W.2d 731. Minnesota has rejected the distinction between licensees and invitees. *Peterson v. Balach*, 199 N.W.2d 639. Rather, there are only two classes of people on the property, entrants and trespassers. Trespassers are those who enter or remain upon premises of another without the express or implied consent of the possessor. *Greenwood v. Evergreen Mines*, 19 N.W.2d 726. Any other person who is not a trespasser is an “entrant.” See *Peterson v. Balach*, 199 N.W.2d 639. A landlord or owner may be held negligent per se for a building code violation only if the landlord or owner knew or should have known of the code violation, the landlord or owner failed to take reasonable steps to remedy the violation, the injury suffered was the kind the code was meant to prevent, and the violation was the proximate cause of the injury or damage. *Bills v. Willow Run*, 547 N.W.2d 695.

**Proximate Causation.** Minnesota courts use the term “direct cause” rather than “proximate cause.” Direct cause is defined as “a cause which had a substantial part in bringing about the harm or occurrence, either immediately or through happenings which follow one after another. It is possible for there to be more than one direct cause. *VanGuilder v. Nat’l Freight*, 686 N.W.2d 339. Minnesota also recognizes the doctrine of supersed-

ing cause. Superseding cause is generally defined as an act which was in no way caused by the defendant’s negligence, or a force of nature, occurring after the defendant’s negligent act or omission in operating as an independent force to produce the injury. *Hafner v. Iverson*, 343 N.W.2d 634.

**Res Ipsa Loquitur.** In order to apply this doctrine, a plaintiff must show that the event which occurred would not ordinarily occur in the absence of negligence, that it was caused by an agency or instrumentality within exclusive control of the defendant, and that it was not due to any voluntary action or contribution on the part of the plaintiff. *Warrick v. Giron*, 290 N.W.2d 166.

**Sudden Emergency.** A person who is confronted with an emergency, through no negligence of his own, is not negligent in his attempt to avoid the danger if he does not choose the best or safest way, unless that choice was so hazardous that a reasonable person would not have made it under like circumstances. *Johnson v. Townsend*, 261 N.W. 859.

## NO-FAULT INSURANCE

**Arbitration.** The No-Fault Act creates a statewide arbitration system for no-fault disputes. Minn. Stat. Ann. § 65B.525. Mandatory arbitration is required for all claims for no-fault benefits arising out of bodily injury in a sum of \$10,000 or less. Claimant may waive claim to the extent that it exceeds jurisdictional amount in order to qualify for arbitration. *Brown v. Allstate*, 481 N.W.2d 17. In cases where the amount of the claim continues to accrue after the arbitration petition is filed, the arbitrator has jurisdiction to determine all amounts claimed, including those in excess of \$10,000. The American Arbitration Association is the statewide administrator of the mandatory no-fault arbitration system. The type of dispute that may be submitted to arbitration is limited to factual issues, typically, the reasonableness of the amount of benefits claimed. Questions of law involving interpretation of the No-Fault Act are not subject to arbitration. *Johnson v. American Family Mut. Ins.*, 426 N.W.2d 419. District court can determine coverage before compelling arbitration under No-Fault Act. *Auto-Owners Ins. Co. v. Windshield Repair, Inc.*, 743 N.W.2d 329.

**Benefits. Medical.** The No-Fault Act provides for the reimbursement of medical expenses only and does not provide for the value of medical services or products. The expenses incurred must be reasonable, necessary and related to the underlying accident. Minn. Stat. Ann. § 65B.44, subd. 2. Medical expense benefits are payable monthly as loss accrues. The No-Fault Act provides for a minimum of \$20,000 for medical expense benefits. Minn. Stat. Ann. § 65B.44, subd. 1.



**Wages.** Disability and income loss benefits provide compensation for 85 percent of the injured person's loss of present and future gross income from inability to work proximately caused by the non-fatal injury subject to a maximum of \$250 per week. Compensation is reduced by any income from substitute work actually performed by the injured person or by income the injured person would have earned from substitute work he unreasonably failed to undertake. "Inability to work" is defined as a disability which prevents the injured person from engaging in any substantial gainful occupation or employment on a regular basis, for wage or profit, for which the injured person is or may be training become reasonably qualified. If the injured person returns to employment and is unable by reason of the injury to work continuously, compensation for lost income shall be reduced by the income received while the injured person is actually able to work. The weekly maximums may not be prorated to arrive at a daily maximum, even if the injured person does not incur loss of income for a full week. Minn. Stat. Ann. § 65B.44, subd. 3.

**Non-Economic.** The No-Fault Act does not include benefits for non-economic damages sustained by the injured person.

**Death.** Survivor's benefits in event of death occurring within one year of date of accident, shall reimburse loss after decedent's death of contributions of money or tangible things of economic value, not including services, subject to maximum of \$200 per week. Reasonable funeral and burial expenses are reimbursable up to \$2,000. Minn. Stat. Ann. § 65B.44, subd. 4.

**Compulsory.** The comprehensive coverage scheme of the No-Fault Act is based upon the concepts of compulsory insurance and required coverage. Obligations are placed on owners to insure and upon insurers to provide minimum specified coverage. Minn. Stat. Ann. § 65B.48, subd. 1, requires every owner of a motor vehicle required to be licensed or which is principally garaged in Minnesota to purchase insurance in conformity with the No-Fault Act. Each policy of insurance must provide basic economic loss benefits in the minimum amount of \$40,000, residual liability coverage in the minimum amount of \$30,000 per person/\$60,000 per accident, uninsured motorist coverage in the minimum amount of \$25,000 per person/\$50,000 per accident, and underinsured motorist coverage in the minimum amount of \$25,000 per person/\$50,000 per accident. Insurers are required to offer the required coverage in at least the statutory minimum limits. An owner of a motor vehicle who fails to obtain the required insurance under the No-Fault Act is guilty of a misdemeanor.

**Injury Threshold.** The provisions set forth in Minn. Stat. Ann. § 65B.51 govern the right of a claimant to

initiate and recover for damages and non-economic detriment in a tort action when no-fault benefits have been paid to the claimant. A tort action can be brought only if one of the following is established: 1) medical expenses exceed \$4,000, exclusive of x-rays, MRI's, CT's and other similar types of diagnostic testing as well as rehabilitation expenses; 2) disability for more than 60 days, disability being defined as inability to engage in substantially all of the injured person's usual and customary activities; 3) permanent disfigurement; 4) permanent injury; 5) death. These thresholds apply only to motor vehicle accidents based on negligence. The thresholds need not be met when the tortfeasor failed to insure a motor vehicle when required to do so. The thresholds do not apply when insured seeks to recover non-economic damages under the uninsured motorist coverage for accident between insured vehicle and negligent uninsured motorcycle driver. *Braginsky v. State Farm*, 624 N.W.2d 789. Future medical expenses and loss of future earning capacity are considered "economic damages" and are therefore not subject to the tort threshold requirements. *Kyute v. Auslund*, 668 N.W.2d 698.

**Types of Coverage.** Basic economic loss benefits. The term "basic economic loss benefits" is limited to the benefits described in Minn. Stat. Ann. § 65B.44. Benefits are intended to provide reimbursement of loss suffered through injury arising out of the maintenance or use of a motor vehicle. The benefits included are medical expense benefits, income loss benefits, funeral expenses, replacement service loss benefits, survivor's economic loss benefits, survivor's replacement services loss benefits, and rehabilitation benefits.

**Uninsured Motorist Coverage.** Uninsured motorist insurance is a first party coverage which means that the insured's own insurance carrier will provide benefits to the insured and is also a fault-based coverage because the coverage only applies when the insured is legally entitled to recover damages from an uninsured motorist or hit and run driver. The coverage is designed to supplement liability insurance in cases where the at-fault driver is uninsured. It is "in effect a substitution for insurance that the tortfeasor should have had." *Van Tassel v. Horace Mann Ins. Co.*, 207 N.W.2d 348, 353. An uninsured motorist lawsuit is a contract cause of action, yet tort law is relevant in that the plaintiff must demonstrate fault and damages in order to claim benefits. *Miklas v. Parrott*, 684 N.W.2d 458. Uninsured motorist coverage is embodied in Minn. Stat. Ann. § 65B.49.

**Underinsured Motorist Coverage.** Underinsured motorist coverage, like uninsured motorist protection, is a first party coverage and is also a fault based coverage. Unlike uninsured motorist coverage, underinsured motorist coverage is not an alternative to liability protec-

tion; it is instead intended to afford protection for damages above the liability limits carried by the tortfeasor. In that regard, underinsured motorist coverage can appropriately be viewed as a form of excess insurance protection. This type of coverage is also embodied in Minn. Stat. Ann. § 65B.49. Claimant must resolve underlying tort claim before bringing underinsured motorist claim. *Employers Mut. v. Nordstrom*, 495 N.W.2d 855. Before an injured claimant can pursue an underinsured motorist benefits claim, s/he must first recover from the tortfeasor's liability insurance policy. S/he can do this by 1) pursuing a tort claim to a conclusion in a district court action, or 2) settling the tort claim for the "best settlement." *Murray v. Puls*, 690 N.W.2d 337. However, when a nonresident is injured in Minnesota and his/her insurance policy was not issued in Minnesota, Minnesota law does not require his/her underinsured motorist coverage to be reformed to comply with Minnesota law. *Warthan v. American Family Mut. Ins. Co.*, 592 N.W.2d 136. A person's domicile is not determinative of whether they are a Minnesota resident. *Schossow v. First Nat'l Ins. Co.*, 730 N.W.2d 556. "Reducing clause" in insurance policy that reduces amount payable for underinsured motorist benefits for liability payments made by an insurer on behalf of another at-fault, underinsured driver, violates Minn. Stat. Ann. § 65B.49, subd. 4 and is unenforceable. *Mitsch v. Amer. Nat'l Prop. & Cas. Co.*, 736 N.W.2d 355.

**Financial Responsibility Laws.** An owner is vicariously liable for the acts of persons who operate his vehicle with his express or implied consent. Minn. Stat. Ann. § 169.09, subd. 5a.

### **PENALTY AND ATTORNEY FEES**

Statutory provisions for failure to pay policy benefits.

### **PRIVILEGED COMMUNICATIONS**

**Attorney/Client.** This privilege is governed by Minn. Stat. Ann. § 595.02, subd. 1(b), which states that an attorney cannot, without the consent of the attorney's client, be examined as to any communication made by the client to the attorney or the attorney's advice given thereon in the course of professional duty, nor can any employee of the attorney be examined as to communication or advice without client's consent. Attorney/client privilege exists if the professional relationship between an attorney and a client is established and confidential communication has been made based upon that relationship. *State v. Jensen*, 174 N.W.2d 226.

**Insurer/Insured.** Minnesota recognizes that certain communications between an insurer and its insured are privileged. *State v. Anderson*, 78 N.W.2d 320.

**Clergy/Penitent.** Privilege is governed by Minn. Stat. Ann. § 595.02, subd. 1(c), and provides that communications made by a party to a clergy person or minister of any religion shall be privileged if the party seeks religious or spiritual advice, aid or comfort. *State v. Black*, 291 N.W.2d 208. The privilege belongs to the penitent. *State v. Rhodes*, 627 N.W.2d 74.

**Doctor/Patient.** Governed by Minn. Stat. Ann. § 595.02, subd. 1(d). Prohibits physician, surgeon, dentist or chiropractor, without the consent of the patient, from disclosing any information or any opinion based thereon which the professional acquired in attending the patient in a professional capacity. Doctor/patient privilege exists if information is acquired by the doctor while attending the patient, is necessary to enable the doctor to act in a professional capacity, and is for the purpose of diagnosis or treatment. A doctor includes any health provider. The privilege covers a doctor's observations of, and instructions to, the patient, as well as the patient's communications to the doctor, and communications with the doctor's employees. *Marfia v. Great Northern Ry. Co.*, 145 N.W. 385.

**Spousal.** This privilege is governed by Minn. Stat. Ann. § 595.02, subd. 1(a) and provides that a husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during the marriage. This privilege enhances the marital relationship by promoting free and unbridled communication between spouses. Only confidential statements made by the spouses in private are privileged. Neither death nor divorce terminates this privilege. *In Re Osborne Estate*, 286 N.W. 306.

**Waiver.** Privilege can only be waived by its holder.

### **PRODUCTS LIABILITY**

**Strict Liability.** To establish strict liability for a defective product the plaintiff must show: 1) that the product purchased was in a defective condition unreasonably dangerous for its use; 2) that such defective condition existed when the product first left the hands of the defendant; and 3) that the defect was the proximate cause of the injury suffered. *O'Laughlin v. Minnesota Natural Gas Co.*, 253 N.W.2d 826.

**Warranty.** The warranty theory of recovery has its roots in contract law and is embodied in the Uniform Commercial Code.

**Express Warranty.** Minn. Stat. Ann. § 336.2-313 contains the statutory formulation of the law of express warranty. That section states that an affirmation of fact,

a promise, description of the goods, sample or model which becomes part of the basis of the bargain creates an express warranty of conformity.

**Implied Warranty.** Minn. Stat. Ann. § 336.2-314 creates the implied warranty of merchantability. This warranty is deemed to exist in all sales contracts where the seller is a merchant with respect to goods of the type sold. It contains a list of standards which all goods must meet in order to be merchantable. This list is a series of minimum standards. Minn. Stat. Ann. § 336.2-314(3) indicates that other implied warranties may arise from a course of dealing or usage of trade that goes beyond the minimum requirements of subsection 2 of this statute.

**Duty to Warn.** Minnesota courts repeatedly have held suppliers of products liable under a negligence theory for products which are not in themselves defective for strict liability purposes, but which are rendered dangerous by lack of instructions or warnings. *Bigham v. J.C. Penney*, 268 N.W.2d 892. Such case as a failure to warn is itself a negligent act independent of any defective design or manufacture of the product. The duty to warn includes two duties: 1) to give adequate instructions for safe use; and 2) to warn of inherent and improper usage. *Frey v. Montgomery Ward*, 258 N.W.2d 782. Plaintiff must make prima facie showing of reliance on warning. *J&W Enterprises v. Economy*, 486 N.W.2d 179.

**Damages - Compensatory.** The type of compensatory damages recoverable in any tort action are recoverable in a products liability action.

**Indemnification.** *Hendrickson v. Minnesota Power & Light Co.*, 104 N.W.2d 843 sets out five instances where one joint tortfeasor could be indemnified by another: 1) where the one seeking indemnity is only a derivative or vicariously liable for damage caused by the one sought to be charged; 2) where the one seeking indemnity has incurred liability by action at the direction, in the interests of, and in reliance upon the one sought to be charged; 3) where the one seeking indemnity has incurred liability because of breach of duty owed to him by the one sought to be charged; 4) where the one seeking indemnity has incurred liability merely because of failure, even though negligent, to discover or prevent the misconduct of the one sought to be charged; 5) where there is an express contract between the parties containing explicit undertaking to reimburse for liability of the character involved. The *Hendrickson* rules do not apply where the joint tortfeasors have violated independent duties to the plaintiff.

**Punitive.** Punitive damages are recoverable in a products liability action.

**Defenses. State of art.** The state of the art defense is closely related to the concept of unavoidably unsafe product. In essence, defense requires only that the manufacturer apply the leading edge of scientific knowledge in the development, design, warning, or manufacture of a product. This defense finds its basis in Comment k to 402A of the Restatement.

**Assumption of Risk - Primary.** The doctrine of primary assumption of the risk technically is not a defense, but rather a legal theory which relieves the defendant of a duty which he might otherwise owe to the plaintiff with respect to particular risks. Primary assumption of the risk is a doctrine which defines the limits of the defendant's duty. Primary assumption of the risk is a complete bar to recovery in an action based on strict products liability. *Armstrong v. Mailand*, 284 N.W.2d 343.

**Secondary.** Secondary assumption of the risk occurs when the plaintiff voluntarily encounters a known and appreciated risk without an intentioned manifestation by the plaintiff that he consents to relieve the defendant of his duty. Secondary assumption of the risk is an affirmative defense to be proved by a causally negligent defendant. *Springrose v. Willmore*, 192 N.W.2d 826.

**Alteration.** Alteration as a defense to strict liability derives from the requirement of Section 402A that the plaintiff established that the product was intended to, and did, reach the user/consumer without substantial alteration or changing condition. This defense says seller is not liable to a user/consumer if the injury resulted from an unexpected change in the condition of the product.

**Comparative/Contributory Negligence.** Minn. Stat. Ann. § 604.02 provides that when two or more persons are severally liable, contributions to awards shall be in proportion to percentage of fault attributable to each, except that defendant may be jointly liable for the whole award under certain limited circumstances. In products liability cases, obligation of defendant against whom a judgment is uncollectible is reallocated to defendants and chain of manufacture. Minn. Stat. Ann. § 604.02, subd. 3. Under a negligence theory, defendant's negligence must be equal to or more than that of plaintiff in order for there to be a recovery. Buyer's contributory fault and breach of warranty action is to be considered in actions for consequential damages, but buyer's contributory fault is no defense and the comparative fault statute is not applicable in actions for damages to product itself and/or for non-consequential damages. *Peterson v. Bendix Home Systems*, 318 N.W.2d 50.

**Privity of Contract.** Privity of contract between a consumer and a manufacturer is not a prerequisite to recover under the negligence theory of products liability



and strict liability will apply even though the user has not bought the product from or entered into any contract with the manufacturer. Of the three major theories of products liability, breach of warranty is most closely affected by privity of contract. Privity of contract is not required in property damage cases based upon breach of an implied warranty of fitness, nor is privity required in personal injury cases based upon breach of unexpressed warranty.

### RELEASE

See Law Digest Tables.

**Contract Law – General.** A release, by definition, is a knowing relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists, to the person against whom it might have been asserted or enforced. *Gronquist v. Olson*, 64 N.W.2d 159. A settlement agreement or release is contractual in nature. *Theis v. Theis*, 135 N.W.2d 740. Like a contract, in order to be valid and enforceable, certain requirements must be met. To create a contract there must be a definite offer and acceptance, with the resulting meeting of the minds as to the contract terms. A contract of compromise and settlement requires these same elements. To constitute a valid and enforceable settlement agreement, there must be such a definite offer and acceptance such that it can be said that there has been a meeting of the minds on the essential terms of the agreement. *Rosenberg v. Townsend, Rosenberg & Young*, 376 N.W.2d 434.

**Consideration.** A release must be supported by consideration. *Sorensen v. Coast-to-Coast Stores*, 353 N.W.2d 666. The consideration in a standard release agreement consists of a sum of money paid by the defendant in exchange for the relinquishment of certain claims. However, the consideration may be in some form other than money. The key factor in determining the validity of a release is not the amount of consideration, unless it is merely a token amount, but whether the person receives something for which he was not previously entitled. *Schmidt-Norton Ford v. Ford Motor Co.*, 524 F. Supp. 1099.

**Accord and Satisfaction.** Accord and satisfaction is the discharge of a contract, cause of action, or disputed claim, arising either in contract or tort, by the substitution of an agreement between the parties in satisfaction of such contract, cause of action or disputed claim and by the execution of that agreement. *Action Instruments v. HI-G, Inc.*, 359 N.W.2d 664.

**Covenant Not to Sue.** The covenant not to sue is merely an agreement between the plaintiff and one of the several alleged wrong-doers whereby plaintiff agrees not

to sue that party or to proceed further against that defendant. There is no agreement to generally release contained in the covenant not to sue, nor is there an agreement on the part of the plaintiff to indemnify the settling party against claims of contribution. Accordingly, a covenant not to sue is of limited value in jurisdictions such as Minnesota which allows contribution among joint tortfeasors. Tortfeasors will not often be interested in making a payment for a covenant not to sue where he will still be exposed to crossclaims for contribution and will still have to insure the expense of defending himself in trial against those crossclaims. The covenant not to sue remains a viable settlement tool in those limited situations where an action for contribution would not lie, as in the case of intentional torts.

**Fraud and Misrepresentation.** A release may be avoided on the basis of fraud and misrepresentation. *Marino v. Northern Pacific Ry. Co.*, 272 N.W. 267. In order to avoid a release on the basis of fraud, there must be a showing of a knowing or reckless representation of a false material past or present fact which is susceptible of knowledge with intent that the other person act upon the representation, that the other person does so act in reliance upon the representation, and suffers damages as a result. *Davis v. Re-Trac Mfg. Corp.*, 149 N.W.2d 37. However, a release may not be set aside on grounds of fraudulent inducement where plaintiff, fully capable of reading and comprehending the release, never bothered to read the instrument and did not consult an attorney in connection with his execution. *Thistlethwaite v. Grover*, 405 N.W.2d 534.

**Infants/Capacity.** It is fundamental that a release, being contractual in nature, can only be entered into by one having a legal capacity to enter into a contract. Lack of capacity to execute a release is a ground for avoiding the release. The Minnesota Rules of Civil Procedure specifically provide for appointment of a guardian ad litem if a party to an action is an infant. The Code of Rules for the District Court provides a specific procedure for obtaining Court approval of settlements on behalf of an infant. When these procedures established by statute and court rules are followed, a release on behalf of a minor is as binding as though the minor possessed contractual capacity. In the absence of court approval or release of a minor's claim, such a release may still be valid and binding if it is ratified by the minor when he gains capacity.

**Joint Tortfeasors.** As a general rule, the release of one of several joint tortfeasors releases them all. *Holmgren v. Heisick*, 178 N.W.2d 854. This rule does not apply where the liabilities are wholly unrelated in scope and purpose.

Mistake. The mutual mistake of a past or present fact material to a release is grounds for voiding the release. *Doud v. Minneapolis St. Ry. Co.*, 107 N.W.2d 521. Plaintiff may avoid a release on the basis of a unilateral mistake only if the defendant wrongfully concealed facts, or at least had knowledge and took advantage of the fact that plaintiff was laboring under a mistake. *Couillard v. Charles T. Miller Hosp.*, 92 N.W.2d 96. While a release may be avoided because of a mistake of fact, a mistake of law is generally not a sufficient ground for setting aside a release. *Johnson v. St. Paul Ins. Co.*, 305 N.W.2d 571.

## REPRESENTATIONS AND WARRANTIES

Statutory Provisions. Chapter 62A of Minn. Stat. Ann. applies to accident and health policies and Minn. Stat. Ann. § 60A.09, subd. 9, applies to all other forms of insurance. Under statute, misrepresentation of a fact which increases risk of policy avoids the policy regardless of intent with which it was made, except in cases of life policies issued without previous medical examinations. *Schmidt v. Prudential Ins.*, 251 N.W. 683.

Misrepresentations. Misrepresentation of a material fact avoids a policy whether made innocently or not. Misrepresentation does not render a policy absolutely void, but rather voidable at option of insurer. *Schreiber v. German-American Hail Ins. Co.*, 45 N.W.708. Falsity of any statement in application for any policy covered shall not bar recovery thereunder unless such false statement was made with actual intent to deceive or unless it materially affected either acceptance of risk or hazard assumed by insurer. *Johnson v. National Life*, 144 N.W. 218.

Materiality. The question of materiality is often one of law but ordinarily question whether fact misrepresented increases risk is question of fact for jury. *Rice v. New York Life Ins. Co.*, 290 N.W. 798. In matters of importance, the subject should be reviewed in light of many court decisions creating exceptions and variations from rules stated. *Nielson v. Mutual Service*, 67 N.W.2d 457.

Rescission. The party to an insurance contract may rescind the contract by mutual agreement without the policy's actual surrender, whether rescission has been accomplished depends on the parties' intent as evidenced by their acts. *Miller v. Continental*, 188 N.W. 1000. Where there has been a material misrepresentation, an insurer may rescind the contract at its election.

Reformation. An insurance policy may be reformed for a mistake on the same grounds and conditions as other contracts. *Peterson v. Marlowe*, 264 N.W.2d 133.

## SERVICE OF PROCESS

See Law Digest Tables.

Upon Corporations. Service is made upon a domestic or foreign corporation by delivery of a copy to an officer or managing agent, or any other agent authorized expressly or impliedly to receive service or any agent designated by statute to receive service. Rule 4.03(c).

Upon Superintendent of Insurance. Service upon a foreign insurance company is the same as designated for service upon a corporation.

Upon Non-Resident Motorist. Service may be made upon the Commissioner of Public Safety. Minn. Stat. Ann. § 170.55.

Personal Service. Service is made upon an individual by delivery of a copy to the individual personally or by leaving a copy at the individual's usual place of abode with some person of suitable age and discretion then residing therein. Rule 4.03(a).

## SUBROGATION

In General. The doctrine of subrogation is that one who has been compelled to pay a debt which ought to have been paid by another is entitled to succeed to all of the remedies which the creditor possessed against the other. *New York Cas. Co. v. Sazenski*, 60 N.W.2d 368. Subrogation is not dependent on contract, privity or strict suretyship. *Hayward v. State Farm*, 4 N.W.2d 316. A subrogee has no greater rights than the person to whom it is subrogated. *Great West v. M.S.I.*, 482 N.W.2d 527.

Parties to Action. An insurer paying uninsured motorist benefits is entitled to bring a subrogation action against tortfeasor. *Flanery v. Total Tree*, 332 N.W.2d 642. A no-fault insurer is subrogated to a claim against a commercial vehicle and also claims based on intentional tort, strict or statutory liability, or negligence not involving the use of a motor vehicle. Minn. Stat. Ann. § 65B.53. A medical insurer has no subrogation interest in an insured's settlement where the insured was not fully compensated. *Westendoft v. Stasson*, 330 N.W.2d 699.

Liability Insurance. A liability or casualty insurer has a subrogation claim against any person wrongfully causing a compensable loss to the insured. This right is a normal incident of an insurance contract. *Great N. Oil Co. v. St. Paul Fire & Marine*, 189 N.W.2d 404.

Collision Insurance. Minnesota law recognizes the existence of right of subrogation on the part of insurer paying damages to an insured's automobile under collision coverage.



Fire Insurance. Subrogation by fire insurance is recognized. It has been held that insurer paying fire loss to holder of mechanic's lien which procured such insurance is subrogated to the lien and entitled to share of proceeds of other insurance procured by the fee owner. *Nobbe v. Equity Fire Ins.*, 297 N.W. 349. A landlord's fire insurer cannot bring a subrogation action against a tenant's employee who negligently starts a fire. *St. Paul Co. v. Van Beek*, 609 N.W.2d 256. Where insurer is deprived of subrogation by its insured who recovers in a separate action from a wrongdoer, the insured cannot recover for the same loss from the insurer under the policy. *Great N. Oil Co. v. St. Paul Fire & Marine Ins.*, 189 N.W.2d 404. A property insurer that erroneously denies coverage has no subrogation claim against a tortfeasor who settled with insured and obtained a full release of liability. *Schwicker v. Winnebago*, 680 N.W.2d 79.

Surety. A surety who pays the debt of his principal may be subrogated to the rights of a creditor against his cosureties. *Southern Sur. Co. v. Tessum*, 228 N.W. 326. Also, subsurety may be subrogated to its insured's right of recovery against a superior surety. *St. Paul Ins. Cos. v. Fireman's Fund Am. Ins.*, 245 N.W.2d 209.

Workers' Compensation. Minn. Stat. Ann. § 176.061 authorizes an employer to intervene or bring a separate action for subrogation. The insurer's recovery is set forth according to a statutory formula. An employee has a right to settle his claim against tortfeasor for damages not cognizable under workers' compensation act without workers' compensation insurer's consent but workers' compensation insurer is free to pursue subsequent subrogation claim against the tortfeasor. *Naig v. Bloomington Sanitation*, 258 N.W.2d 891.

### UNINSURED MOTORIST

See "NO-FAULT INSURANCE."

### WAIVER AND ESTOPPEL

In General. Waiver is an intentional relinquishment of a known right. Waiver of terms of a contract of insurance may consist in doing of some act which is inconsistent with intention to insist on strict performance or course of conduct inconsistent with and in disregard of terms of contract. *Seavey v. Erickson*, 69 N.W.2d 889. Estoppel is an equitable doctrine that the court may apply to prevent a party from taking advantage of his own wrong by asserting his strict legal rights. *Northern Petro-Chem. Co. v. United States Fire Ins.*, 277 N.W.2d 408.

Waiver by Agent. As a general rule, an agent may waive a breach of condition. An agent having the power to execute insurance contracts may waive a condition of

payment. *Wieland v. St. Louis County Farmers' Mut. Fire*, 178 N.W. 499. An insurance broker has no implied authority to waive a condition as to the time within which to bring an action. *Segal v. Bart*, 167 N.W. 481. A local agent has no authority to waive notice and proof of loss. *Rein v. New York Life Ins.*, 299 N.W. 385. An ordinary soliciting agent has no authority to waive a condition against other insurance. *Golden v. Northern Assur.*, 49 N.W. 246.

Non-Waiver Agreements. Stipulation and policy that no officer, agent, or representative shall be deemed to have waived any conditions therein unless such waiver is endorsed thereon is not binding. *Seavey v. Erickson*, 69 N.W.2d 889.

Premiums. Mere acceptance of a late premium does not alone create a waiver of a default or forfeiture. The acceptance must be consistent with the insurer's intent to regard the contract as still subsisting and in force. *Kielkucki v. American Family Ins.*, 402 N.W.2d 835.

Proof of Loss. The purpose of requiring proof of loss is to provide the insurer with information for investigating the facts and determining whether there is liability. The requirement is liberally construed in favor of the insured. *Kundiger v. Metropolitan Life*, 15 N.W.2d 487. In absence of statute to the contrary, insurance contract may limit the time within which an action may be brought to a period less than that fixed by general statute of limitation provided limitation is not unreasonably short. *Henning v. Fireman's Fund*, 383 N.W.2d 645. Where insured fails to provide timely notice to no-fault insurer, insured is ineligible to recover no-fault benefits only to the extent that insurer was prejudiced. *Andros v. American Family*, 359 N.W.2d 46.

### WORKERS' COMPENSATION

Statutory Reference. The Minnesota Workers' Compensation Act is set forth in Minn. Stat. Ann. § 176.001, *et seq.*

Original Jurisdiction. Disputes concerning primary liability and most claims for benefits are determined at a hearing by a compensation judge with the Office of Administrative Hearings. If primary liability is established, other disputes, including those related to medical expenses, rehabilitation benefits, and the discontinuance of weekly benefits, may be originally determined at an administrative conference by a medical and rehabilitation specialist with the Workers' Compensation Division.

Appellate Jurisdiction. Determinations of the medical and rehabilitation specialist are subject to de novo review by a compensation judge. Decisions of a compensation judge are appealed to the Workers' Compensation Court of Appeals. Minn. Stat. Ann. § 176.421.

Determinations of the Workers' Compensation Court of Appeals are reviewable by the Minnesota Supreme Court on petition for certiorari. Minn. Stat. Ann. § 176.471. Supreme Court is not bound to follow conclusion of Workers' Compensation Court of Appeals. *Sunday v. City of St. Peter*, 693 N.W.2d 206.

**Benefits - Wages.** Compensation for temporary total disability equals 66 2/3 percent of the difference between the weekly wage at the time of injury and the amount the employee is able to earn. This rate is subject to fixed minimum and maximum rates. Benefits for temporary total disability may cease 90 days after maximum medical improvement or end of an approved retraining program. Permanent total disability benefits are payable at the same rate as benefits for temporary total disability. Permanent total disability benefits have no durational limits. *Behren's v. City of Fairmont*, 533 N.W.2d 854. Compensation for temporary partial disability equals 66-2/3 percent of the difference between the weekly wage at the time of injury and the amount a partially disabled employee is able to earn. Minn. Stat. Ann. § 176.101.

**Medical.** Medical expenses are payable subject to general requirements of reasonableness and necessity. Minn. Stat. Ann. § 176.135. Medical bills may not exceed fixed amounts set forth in Minn. Rule 5221.

**Disability.** Extent of permanent partial disability is determined as percentage impairment of the whole body with reference to specific categories contained in permanency schedule. Minn. Rule 5223.

**Death.** Dependency benefits are payable weekly to the surviving spouse and dependents at a specific percentage of the employer's weekly wage which varies depending upon the number of children. The burial expense allowance is \$15,000. Minn. Stat. Ann. § 176.111.

**Employment Defined.** Casual. Casual workers are not covered under the Act if both the type of employment is casual and the services are not in the course of the employers' trade, business or occupation. Minn. Stat. Ann. § 176.041; *Altermatt v. Altermatt*, 58 N.W.2d 256; *Farnam v. Linden Hills Congregational Church*, 149 N.W.2d 689.

**Dual Capacity.** The Minnesota Supreme Court has refused to recognize the "dual capacity" doctrine as an exception to the rule that the Workers' Compensation Act provides the exclusive remedy to an injured employee. *Egeland v. State*, 408 N.W.2d 848. The court has not as yet ruled upon the applicability of the "dual persona" doctrine. *Kaess v. Armstrong Cork Co.*, 403 N.W.2d 643.

**Exclusive Remedy.** An employer's liability is limited under Minn. Stat. Ann. § 176.031 to paying work-

ers' compensation benefits. If an employer is neither insured nor self-insured, however, an employee may elect to either seek civil damages or claim workers' compensation benefits. Minn. Stat. Ann. § 176.031.

**Arising Out Of and In the Course Of.** This phrase actually states two separate requirements for liability to attach. The "arising out of" requirement refers to the causal connection between the employment and the injury. *Nelson v. City of St. Paul*, 81 N.W.2d 272. The "in the course of" requirement refers to the time, place and circumstances of the accident causing the injury. *Swenson v. Zacher*, 118 N.W.2d 786.

**Occupational Disease.** An occupational disease is regarded as a personal injury under the Act. In the event the employer had multiple insurers during the employee's employment, the insurer who was on the risk during the employee's last significant exposure to the hazard of the occupational disease is the liable party. Minn. Stat. Ann. § 176.66.

**Mental Injury.** A claim of mental stress allegedly causing mental disability without any accompanying physical injury is not compensable. *Lockwood v. Independent Sch. Dist. No. 877*, 312 N.W.2d 924. Physical injury resulting from mental stress, however, is compensable. *Egeland v. City of Minneapolis*, 344 N.W.2d 597. Suicide can also be compensable if it can be proven that work-related stress was the medical and legal cause of the suicide. *Middleton v. Northwest Airlines*, 600 N.W.2d 707.

**Pre-Existing Injury.** Apart from limited exception applicable to claims for permanent partial disability, employer is responsible for all benefits including that part attributable to a pre-existing condition where a work-related injury has permanently aggravated that pre-existing condition. *Wallace v. Hanson Silo Co.*, 235 N.W.2d 363. *But see Fleener v. CBM*, 564 N.W.2d 215. Compensation for permanent partial disability shall be reduced for pre-existing disability attributable to a congenital condition or trauma if the pre-existing disability is clearly evidenced in a medical record made prior to the current personal injury. Minn. Stat. Ann. § 176.101, subd. 4a.

**Fellow Employee Rule.** A co-employee working for the same employer is not liable for personal injuries incurred by another employee unless the injury resulted from the gross negligence of a co-employee or was intentionally inflicted. Minn. Stat. Ann. § 176.061, subd. 5(c).

**Liens.** Ordinarily, the income of an employee derived from workers' compensation benefits is exempt from garnishment or attachment. However, these benefits are not exempt from wage withholding and remit-

tance to the public authority charged with collection of child support and spousal maintenance. Minn. Stat. Ann. §§ 176.175, 518A.26.

**Attorney's Fees.** Attorney's fees are set by statute unless the attorney should petition for excess fees. Minn. Stat. Ann. § 176.081. Attorney's fees are also allowable to the employee's attorney on an hourly basis for collection of medical expenses or provision of rehabilitation services. *Roraff v. State*, 288 N.W.2d 15; *Heaton v. State*, 36 WCD 316. Attorney's fees may also be awarded to employee's attorney out of amounts awarded reimbursed to an intervenor. *Edquist v. Browning-Ferris*, 380 N.W.2d 787.

**Subrogation.** Generally, subrogation rights are defined by statute. Minn. Stat. Ann. § 176.061. Subrogation rights may be limited if injured employee has not

received full compensation. *Hewitt v. Apollo Group*, 490 N.W.2d 898. *But see, in Re Next of Kin Markuson*, 685 N.W.2d 697 (questioning whether *Hewitt* is still good law).

**Guaranty Association.** Minnesota Guaranty Association is not subject to claims for contribution or reimbursement brought by a solvent carrier. *Anderson Trucking v. M.I.G.A.*, 492 N.W.2d 281. Minnesota Guaranty Association may settle employee's worker's compensation claim without insured's consent. *Minn. Ins. Guaranty Assoc. v. Integra Telecom*, 697 N.W.2d 223.

**Collection of Premiums.** Absent clear policy provision or election of coverage under Minn. Stat. Ann. § 176.041, subd. 1a, workers' compensation insurer cannot collect premium for employee excluded by Minn. Stat. Ann. § 176.041, subd. 1g. *Paradigm Enters., Inc. v. Westfield Nat'l Ins. Co.*, 738 N.W.2d 416.