

# DIGEST OF INSURANCE LAW

## MISSOURI

Courtesy of  
**Carson & Coil, P.C.**  
Jefferson City, Missouri

### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

Article V, §27 of Missouri Constitution, effective January 2, 1979, terminated existence of all inferior courts of limited original jurisdiction and transferred jurisdiction of these inferior courts to circuit court, making these courts division of circuit court. In cases involving less than \$5,000, appeals lie from these Associate Division Courts to Circuit Court. §512.180 RSMo (2001).

See RSMo Chapter 478 - Circuit Courts, Chapter 479 - Municipal and Traffic Courts, Chapter 482 - Small Claims Courts.

Section 482.300 *et seq.*, effective January 2, 1979, established small claims courts with jurisdiction for claims up to \$3,000, by which parties may prosecute their cases without attorney within each Associate Circuit Court.

#### Appellate Courts

Courts of Common Pleas also were terminated effective January 2, 1979, their jurisdiction transferred to circuit courts, making them division of circuit court.

Method of Selecting Certain Judges. All vacancies in offices of Judges of Supreme Court, Court of Appeals and Circuit and Probate Courts of the City of St. Louis, County of St. Louis and Jackson County are filled by appointment of Governor from list of three lawyers furnished by committee designated as non-partisan judicial commission, composed of equal number of lawyers selected by Bar of State, and equal number of laymen appointed by Governor, with Chief Justice of Supreme Court as Chairman of Commission for selection of Appellate Judges and Presiding Judges of various Courts of Appeals as Chairmen of Commissions for selection of Judges of St. Louis and Jackson County Courts. Judges so appointed hold office until next general election. Judges so appointed and desiring to continue in office, and those whose terms expire and who desire to run for re-election, may do so without opposition, and their names are submitted on separate ballot, without party

designation, and voters determine whether or not they are to be retained in office. Article V, §§25 & 27.

### LAW

#### Abbreviations

Mo. – Missouri Reports.

Mo. App. – Missouri Appeal Reports.

RSMo (2001) – Revised Statutes of Missouri, 2001.

V.A.M.S. – Vernon's Annotated Missouri Statutes.

S.W. – South Western Reporter.

S.W.2d – South Western Reporter, Second Series.

M.A.I. – Missouri Approved Jury Instructions.

Note. Effective April 1, 1960, Rules of Civil Procedure similar to Federal Rules were adopted.

### ACCIDENT AND HEALTH INSURANCE

See "ACCIDENTAL MEANS" and "DISABILITY."

Cancellation. Generally, an accident policy cannot be cancelled without the presenting of unearned premium. *Dent v. Monarch*, 98 S.W.2d 123 (Mo. App. 1936).

Disability. Policy insuring against accidental injuries which immediately and continuously disabled insured did not cover disability which did not evidence itself until four days after accident. *Markel v. Mutual*, 121 S.W.2d 176 (Mo. App. 1938).

Disease Induced by Accident. Where insured suffered injury by fall which brought on disease which caused death, insurer was held liable on policy for accidental death. *Greenlee v. Kansas City Casualty*, 182 S.W.138 (Mo. App. 1916); *Anderson v. Mutual Benefit*, 231 S.W. 75 (Mo. App. 1921).

Injuries to employee riding to work in employer's bus not covered by accident and health policy exempting accidents arising out of and in course of employment. *Gage v. Connecticut*, 273 S.W.2d 761 (Mo. App. 1954). Accident need only be "proximate cause" of the injury,



not the sole cause. *Cone v. Beneficial Standard*, 388 F.2d 456 (8th Cir. 1968).

Large percentage of Missouri policies provide for double indemnity in case of death by accidental means. Policy provision that double indemnity would not be payable if death resulted "directly or indirectly from bodily or mental infirmity or disease of any sort" held to refer to cause of accident, not to its effect. *Rieger v. Mutual*, 110 S.W.2d 878 (Mo. App. 1937).

In action to recover under double indemnity provision for death allegedly occurring as result of "accident," evidence is inadequate to make submissible case where insurer's evidence indicated insured died while participating in, or in consequence of having participated in, commission of assault or felony. *Connizzo v. General American*, 520 S.W.2d 661 (Mo. App. 1975).

### ACCIDENTAL MEANS

See "SUICIDE."

In determining accidental cause of an injury, test is whether plaintiff "reasonably should have anticipated or foreseen injury as natural and probable consequence of his voluntary conduct." *Ball v. Benefit Trust*, 704 S.W.2d 677 (Mo. App. 1986). To recover accidental death benefit, beneficiary must prove that insured died from accidental bodily injury, independent of all other causes. *Cappo v. Allstate*, 809 S.W.2d 131 (Mo. App. 1991).

If, in act which precedes injury, something unforeseen, unexpected or unusual occurs which produces injury, then said injury is held to result through accidental means. *Caldwell v. Travelers*, 267 S.W. 907 (Mo. banc 1924); *State Farm v. Underwood*, 377 S.W.2d 459 (Mo. banc 1964). Tooth extraction resulting in death is not an accident within policy. *Zach v. Fidelity & Cas.*, 272 S.W. 995 (Mo. App. 1925). Death from consequences of intentional act not accident. *Curry v. Federal Life*, 287 S.W. 1053 (Mo. App. 1926).

Suicide while insane is accident, whereas suicide while sane is not accident. *Garmon v. General America*, 624 S.W.2d 42 (Mo. App. 1981).

Insured was aggressor in fight resulting in his death. There was no liability of insurer under accident insurance policy which provided for payment for death resulting from external, violent, and accidental means. *Robinson v. Benefit Ass'n*, 183 S.W.2d 407 (Mo. App. 1944). If insured assaults another and as a consequence is killed, his death is accidental unless it was the natural and probable result of insured's actions, reasonably foreseeable by a reasonably prudent man in his position.

*Herbst v. J.C. Penney Ins.*, 679 S.W.2d 381 (Mo. App. 1984).

Insured was last seen alive at work as railroad switchman, was later found dead on tracks with his chest crushed. Court held it was jury question whether his death was through accidental means within his accident insurance policy. *King v. Benefit Ass'n*, 184 S.W.2d 793 (Mo. App. 1945).

To recover accidental death benefits under life policy, burden to establish that death resulted from accidental means on plaintiff. *Boring v. Kansas City Life*, 274 S.W.2d 233 (Mo. 1955).

"Violation of Law Exception." Must be clear violation of some criminal law and exception does not prevail if insured was violating merely civil right, law or ordinance not criminal in its nature. *Chamberlain v. Mutual Benefit Health & Acc. Ass'n*, 260 S.W.2d 790 (Mo. App. 1953). Violation of law exception applies where insured admits elements of a felony but is convicted of only misdemeanor. *St. Louis University v. Glass*, 864 F. Supp. 110 (E.D. Mo. 1994). To bar recovery, the violation must have been causally connected to the insured's injury, death. *Richardson v. Colonial Life*, 723 S.W.2d 912 (Mo. App. 1987).

Taking overdose of paraldehyde not accidental means because plaintiff failed to show element of unexpectedness. *Murphy v. Western & Southern*, 262 S.W.2d 340 (Mo. App. 1953).

"Accidental Means." A jury question where intoxicated driver remained in auto during freezing weather, died of tetanus infection in frostbitten feet. *Callahan v. Connecticut Gen.*, 207 S.W.2d 279 (Mo. 1947).

Recovery not precluded where accident hastened or accelerated some hidden or previously concealed disease so as to cause death, or if accident superinduced or generated disease which caused death. *Young v. New York Life*, 221 S.W.2d 843 (Mo. App. 1949).

Evidence combined with presumption against suicide held sufficient to support finding that death resulting from physical reaction induced by cumulative effect of alcohol and butabarbital in insured's blood was direct and independent result of accidental bodily injury. *Kearbey v. Reliable*, 526 S.W.2d 866 (Mo. App. 1975). *But see Wolf v. Old Republic*, 588 S.W.2d 117 (Mo. App. 1979) (declining to extend the rule in *Kearbey* to a case involving the cancerous weakening of bone).

### ADJUSTERS

Extent to which insurers may employ laymen as claims adjusters without engaging in unauthorized prac-

tice of law defined. *Liberty Mut. v. Jones*, 130 S.W.2d 945 (Mo. banc 1939).

Adjuster for fire insurer is representative of company for settlement of losses, and his acts within actual or apparent scope of authority are binding on the company. *Curtis v. Indemnity*, 37 S.W.2d 616 (Mo. 1931); *Galemore v. State Farm*, 513 S.W.2d 161 (Mo. App. 1974).

Proof of actual authority necessary to hold insurer to adjuster's settlement above or outside policy. *Booker v. Motors*, 228 S.W.2d 694 (Mo. App. 1950).

Adjuster has no authority to impose liability on insurance company for damages not covered by insured's policy. *Stahly Cartage Co. v. State Farm*, 475 S.W.2d 438 (Mo. App. 1971); *Booker v. Motors*, 228 S.W.2d 694 (Mo. App. 1950).

### AGE

See "AUTOMOBILE"; "LIABILITY INSURANCE"; "NEGLIGENCE"

"The legal age at which person becomes competent to contract in Missouri is eighteen." §431.055 RSMo (2001). Requirements to bind a person under eighteen to contract. §431.060 RSMo (2001).

### AGENTS AND BROKERS

Definitions. See §375.012 RSMo (2001).

License required. See §375.076 RSMo (2001), fee \$100; agents, §375.022 RSMo (2001), appointments and terminations generally.

Soliciting agent of fire insurance company is independent contractor whose negligence in operation of his automobile is not imputable to company, though agent was required to inspect premises to be insured and to send a report of the inspection with the insurance application. *Glynn v. M.F.A.*, 254 S.W.2d 623 (Mo. banc 1953).

An insurance agent has prima facie fiduciary responsibility when he is authorized to collect premiums but has no authority to use premium funds personally. *Twin City Fire v. Green*, 176 F.2d 532, modified, 177 F.2d 626 (8th Cir. 1949).

Practice by agent of applying premiums paid by one policyholder to credit of delinquent policyholder, in violation of company rules, not binding on company, notwithstanding general manager's knowledge of practice. *Trice v. Lancaster*, 270 S.W.2d 519 (Mo. App. 1954); cf. *Southwest Bank v. Hughes*, 883 S.W.2d 518 (Mo. App. 1994).

Normally, broker is not agent of insurer, nor will he become one absent some action of insurer or some set of facts from which broker's authority to bind insurer may reasonably be inferred. *H & H Mfg. v. Cimarron Ins.*, 302 S.W.2d 39 (Mo. App. 1957). Absent showing that agent was authorized in the particular instance to represent the insurer as its agent, insurance broker is agent for insured. *Harper v. Business Men's Assur.*, 872 S.W.2d 486 (Mo. App. 1994). Acts, not what the person calls himself, determine if person is broker or agent. *Electro v. Commercial Union*, 762 F. Supp. 844 (E.D. Mo. 1991). Person who solicits insurance for only one company as opposed to many is agent, not broker. *Kelley v. Shelter Mut.*, 748 S.W.2d 54 (Mo. App. 1988). Independent insurance agent contacted by manufacturer to obtain products liability insurance and who solicited bids from multiple carriers was agent of manufacturer, not of insurer or broker. *Universal Reins. v. Greenleaf*, 824 S.W.2d 80 (Mo. App. 1992). Evidence sustained finding that insurance agent could waive requirement of timely filing of proof of loss. *Niehaus v. Central Mfrs.*, 293 S.W.2d 355 (Mo. 1956).

Agent or broker who undertakes to procure insurance, with view to compensation for his services, impliedly contracts to notify owner of failure to procure such insurance. *Zeff Dist. v. Aetna*, 389 S.W.2d 789 (Mo. 1965); *Pittman v. Great American*, 512 S.W.2d 857 (Mo. App. 1974); *Hecker v. Missouri Property Ins.*, 891 S.W.2d 813 (Mo. banc 1995). Insurance broker's duty to exercise reasonable skill and diligence in procuring insurance applies only where broker intends to earn a commission. *Townes v. Jerome L. Howe*, 852 S.W.2d 359 (Mo. App. 1993). Agent has no duty, once policy has been obtained and delivered, to notify insureds of decision not to submit renewal, and no duty to submit renewal. *Hecker v. Missouri Property Ins.*, 891 S.W.2d 813 (Mo. banc 1995). Insurer not liable for agent's failure to notify insured of cancellation because such was not within the scope of agency relationship. *Kelley v. Shelter Mut.*, 748 S.W.2d 54 (Mo. App. 1988). Insurer not civilly liable for injuries to third party resulting from insured's negligent operation of motor vehicle; insurer has no duty to refrain from selling policy to obviously unfit operator of motor vehicle. *Hammers v. Farm Bureau*, 792 S.W.2d 19 (Mo. App. 1990).

Fraud of Agent. Conspiracy or collusion to defraud insurer between agent and applicant voids policy. *Emery v. New York Life*, 295 S.W. 571 (Mo. 1927). See also *Mallen v. National Life*, 153 S.W. 1065 (Mo. App. 1912).

Insurer bound by information gained by agent in taking application and constructively knows what agent knows. *Bledsoe v. Farm Bureau*, 341 S.W.2d 626 (Mo.

App. 1960). *But see Rooks v. Lincoln Cty. Farmers Fire*, 830 S.W.2d 507 (Mo. App. 1992) (distinguishing *Bledsoe* on the grounds of lack of information). Applicant is bound to know contents of application when he signs it, and incorrect answers are treated as misrepresentations rather than mistakes, even where agent filled out the application for applicant. *Schnatzmeyer v. National Life*, 791 S.W.2d 815 (Mo. App. 1990). *But see Priesmeyer v. Shelter Mut.*, 995 S.W.2d 41 (Mo. App. 1999) (distinguishing *Schnatzmeyer* on the basis of evidence of insured's knowledge). When erroneous information on application supplied by other than applicant, without applicant's knowledge, general rule is insurer waives or is estopped to rely on false information to void policy. *Russell v. Farmers & Merchants Ins.*, 834 S.W.2d 209 (Mo. App. 1992). Applicant may have valid claim if agent completed application without asking the questions and applicant was unaware that application was incomplete when signed. *Priesmeyer v. Shelter Mut.*, 995 S.W.2d 41 (Mo. App. 1999) (appeal after remand). Knowledge is not to be imputed to insurer where there is collusion between agent and insured. *Zeilman v. Central*, 22 S.W.2d 88 (Mo. App. 1929). Agent acting within scope of actual or apparent authority may bind company by oral contract of insurance. *Voss v. American Mut.*, 341 S.W.2d 270 (Mo. App. 1960).

Authority of insurance broker to deliver policy and receive premiums on behalf of insurer did not give him implied authority to receive notice of title controversy respecting property and thereby bind insurer by such knowledge so acquired and so as to establish a waiver of sole ownership clause in policy. *Knight v. Merchants*, 188 S.W.2d 77 (Mo. App. 1945).

Insurer is bound by acts and contracts of its agent within apparent scope of authority of agent; that is, authority which although not actually granted, insurer knowingly permits agent to exercise. *Travelers v. Beaty*, 523 S.W.2d 534 (Mo. App. 1975).

### ARBITRATION

Authorization of both arbitrators and appraisers is binding as contract. *St. Paul Fire & Marine v. Eldracher*, 33 F.2d 675 (8th Cir. 1929), *cert. denied*, 50 S. Ct. 86, 280 U.S. 604.

Insurer's failure to utilize policy provision for resort to medical referees does not excuse insured from proving disability under terms of airline pilot occupational disability policy. *Simmons v. Orion*, 366 F.2d 572 (8th Cir. 1966).

### ATTORNEYS

Fees. "Our statutes authorizing damages for vexatious delay and attorneys' fees are highly penal and must be strictly construed." *State ex rel. U.S. Fidelity & Guaranty v. Walsh*, 540 S.W.2d 137, 141 (Mo. App. 1976). Existence of litigable issue does not preclude imposition of liability upon insurer for vexatious failure to promptly pay claim where evidence exists to show insurer was vexatious. *Pace Properties v. American Mfrs.*, 918 S.W.2d 883 (Mo. App. 1996). State law action for vexatious refusal to pay preempted by ERISA. *Kelly v. Pan-Am*, 765 F. Supp. 1406 (W.D. Mo. 1991). Must show refusal is willful and without reasonable cause as it would look to a reasonable prudent person. §§375.296 & 375.420 RSMo (2001), *interpreted in Overcast v. Billings Mut.*, 11 S.W.3d 62, 66 (Mo. 2000); *Howard v. Teddy Woods*, 817 S.W.2d 556 (Mo. App. 1991); *Russell v. Farmers & Merchants Ins.*, 834 S.W.2d 209 (Mo. App. 1992). Trial judgment adverse to insurer is insufficient reason to impose penalty. *Id.* Situation presented to insurer at time asked to pay determines whether refusal to pay was vexatious. *Id.* Direct and specific evidence of vex. refusal not required to award attorney fees; jury can award upon survey of testimony, facts, and circumstances of case. *Howard v. Teddy Woods, supra.* Award of attorneys' fees for vexatious refusal was unsupported by evidence where there is no evidence concerning attorneys' fees, amount of work done, or reasonable value of services. *Hester v. American Family Mut.*, 733 S.W.2d 1 (Mo. App. 1987). "Plaintiff has the burden to prove the reasonable value of attorney's services." *Dildine v. Frichtel*, 890 S.W.2d 683, 687 (Mo. App. 1994). *See also Howard v. Teddy Woods, supra.* Insurer's refusal to pay original judgment was not vexatious where company merely proceeded as it was allowed under law. *Frost v. Liberty Mut.*, 828 S.W.2d 915 (Mo. App. 1992). Insurance company liable for vexatious delay when it persists in refusal after it is aware that there is no meritorious defense. *Hopkins v. American Economy*, 896 S.W.2d 933 (Mo. App. 1995).

### AUTOMOBILES

See Law Digest Tables.

See "LIABILITY INSURANCE"; "NEGLIGENCE"; "NO-FAULT."

Age. No person under age of sixteen years shall operate motor vehicle on highways or street. §302.250 RSMo (2001). Chauffeur's license 18 years. §302.060 RSMo (2001). For temporary instruction permit, *see* §302.130 RSMo (2001).

Agency. Owner of automobile permitted employee to use it, giving him freedom of action respecting man-



ner, method, time and place of performing his work. Held, relationship of master and servant did not exist to extent of making owner employer responsible for employee's negligence which occurred after a complete departure from scope of employment. *Becker v. Donahue*, 168 S.W.2d 960 (Mo. App. 1943). Employer not liable for torts of servant under "going and coming" rule because employee is not acting in the course or scope of his employment. *Curtis v. Juengel*, 297 S.W.2d 598 (Mo. App. 1957); *Logan v. Phillips*, 891 S.W.2d 542 (Mo. App. 1995).

Negligence of bailee using automobile not imputed to bailor unless there is in the contract some element of agency, master/servant or partnership, and bailor can recover from one who has negligently damaged vehicle. *Jones v. Taylor*, 401 S.W.2d 183 (Mo. App. 1966); *Rafter v. Riggs*, 792 S.W.2d 68 (Mo. App. 1990).

If title not transferred, sale void under §301.210 RSMo (2001). Hence auto dealers policy covered liability loss when dealer gave permission and implied permission to use and operate to buyer. *Allstate v. Hartford*, 311 S.W.2d 41 (Mo. App. 1958).

Comparative Negligence. Supreme Court replaced doctrines of contributory negligence, last clear chance and humanitarian negligence with comprehensive system of comparative fault, but only applicable to cases after this opinion. *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. banc 1983). The Uniform Comparative Fault Act serves as a guide, but does not carry weight of state statute. *Chicago Title Ins. v. Mertens*, 878 S.W.2d 899, 902 (Mo. App. 1994). See "NEGLIGENCE."

Highest degree of care required in operation of motor vehicle. *Martin v. Turner*, 306 S.W.2d 473 (Mo. 1957). Highest degree of care means that degree of care which a very careful and prudent person would exercise under similar circumstances. *Martin v. Turner*, 306 S.W.2d 473 (Mo. 1957). Standard applies to civil actions for damages resulting from operation. *Countryman v. Seymour R-II Sch. Dist.*, 823 S.W.2d 515 (Mo. App. 1992). Ordinary care must be exercised by passengers and is not required to keep a constant lookout or to make suggestions to the driver, *Jenkins v. Wabash R.R.*, 322 S.W.2d 788 (Mo. 1959); *Hendricks v. Missouri K.T.R. Co.*, 709 S.W.2d 483 (Mo. App. 1986), and pedestrians, *Romandel v. Kansas City Public Service Co.*, 254 S.W.2d 585 (Mo. 1953).

Violation of statute is usually negligence per se. *MacArthur v. Gendron*, 312 S.W.2d 146 (Mo. App. 1958). *But see Bentley v. Crews*, 630 S.W.2d 99 (Mo. App. 1981), *overruled on other grounds by Rodriguez v. Suzuki*, 936 S.W.2d 104 (Mo. 1996) (en banc) (holding that where violation of statute considered "per se negli-

gence," violator has chance to present justification or excuse for violating). Verdict-directing jury instruction which withheld negligence element from jury invalidated where negligence per se theory not pleaded and not tried by consent. *Myers v. Morrison*, 822 S.W.2d 906 (Mo. App. 1991).

Compulsory Insurance Coverage. No owner of a motor vehicle registered in Missouri shall operate the vehicle, or authorize any other person to operate the vehicle, unless the owner maintains financial responsibility. §303.025 RSMo (2001). Does not apply to motor vehicle that is inoperable or being stored and not in operation. *Id.* Proof of financial responsibility may be given by filing a certificate of insurance, a bond, a certificate of deposit of money or securities, or a certificate of self-insurance. §303.160 RSMo (2001).

DWI. A person commits the crime of "driving while intoxicated" if he operates a motor vehicle while in an intoxicated or drugged condition. §577.010 RSMo (2001). A person commits the crime of "driving with excessive blood alcohol content" if he operates a motor vehicle with .08% or more by weight of alcohol in his blood. §577.012 RSMo (2001). Intoxication can be established in absence of blood alcohol test results. *State v. Hopper*, 735 S.W.2d 429 (Mo. App. 1987); *State v. West*, 825 S.W.2d 402 (Mo. App. 1992). Under the DWI Statute, evidence that defendant staggered when he walked, smelled of alcohol and could not recite the alphabet, can establish that defendant is "under the influence of alcohol." *State v. O'Toole*, 673 S.W.2d 25 (Mo. banc 1984) (superseded by statute on other grounds). *See also State v. Hill*, 812 S.W.2d 204 (Mo. App. 1991).

Damages. Automobile collision insurance is a contract of indemnity and insurer's sole obligation is to indemnify insured for actual loss and damage sustained, so far as the vehicle is concerned. *Myers v. American Indem.*, 457 S.W.2d 468 (Mo. App. 1970).

"Wanton and reckless" in the context of acts of drivers of motor vehicles means that there was conscious intent to do the act, with knowledge of its wrongfulness, but no conscious intent to cause the harm that followed; "wanton and reckless conduct" may include negligence. *Crull v. Gleb*, 382 S.W.2d 17 (Mo. App. 1964).

Family car doctrine does not apply in Missouri. *Bolman v. Bullene*, 200 S.W. 1068 (Mo. 1918).

Guest Cases. "In absence of visible lack of caution by driver or known imminence of danger on his part, guest may ordinarily rely upon a driver who has exclusive control of the vehicle." *Flint v. Chicago, B. & Q. R.*, 207 S.W.2d 474, 479 (Mo. 1948). Guest is required to exercise ordinary care for his own safety. *Hagedorn v. Adams*, 854 S.W.2d 470 (Mo. App. 1993). Doctrine of



res ipsa loquitur held applicable in guest case. *Vesper v. Ashton*, 118 S.W.2d 84 (Mo. App. 1938); *Lindsey v. Williams*, 260 S.W.2d 472 (Mo. 1953). Driver must exercise highest degree of care for safety of passenger at intersection. *Thompson v. Gipson*, 277 S.W.2d 527 (Mo. 1955). Invited guest in car must protest driving that is plainly negligent or violative of the law, if allowed reasonable opportunity to do so. *Hieber v. Thompson*, 252 S.W.2d 116 (Mo. App. 1952); *Hagedorn v. Adams*, 854 S.W.2d 470 (Mo. App. 1993).

Passenger. Insured driving pick-up truck home from work, killed in collision. Held not "riding as passenger or driver in private pleasure type" automobile, within meaning of those words in his policy. *La Fon v. Continental*, 259 S.W.2d 425 (Mo. App. 1953). *But see Detmer v. United Security Co.*, 309 S.W.2d 713 (Mo. App. 1958).

Imputed negligence. Joint ownership of automobile insufficient basis for imputing negligence of driver-spouse to passenger-spouse. *Stover v. Patrick*, 459 S.W.2d 393 (Mo. 1970).

Common law doctrine of entrustment of a dangerous instrumentality is deeply affected by public interest, and it is for that reason that the strict rules of ownership, agency, imputed negligence and respondeat superior as to a driver do not apply in that type of action. *Stafford v. Far-Go Van Lines, Inc.*, 485 S.W.2d 481 (Mo. App. 1972).

Last Clear Chance. Doctrine of "last clear chance" replaced by comprehensive system of comparative fault. *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. banc 1984).

Ownership. False representation that mother was sole owner of insured automobile owned by son, even if material, merely rendered automobile liability policy voidable, not void ab initio. *Western Cas. v. Herman*, 318 F.2d 50 (8th Cir. 1963). Proof of ownership not necessary where issue was uncontested at trial. *Rivas v. Killins*, 346 S.W.2d 698 (Mo. App. 1961).

Pedestrians. Motorist who struck pedestrian, under duty to use degree of care that a very careful and prudent person would use, but pedestrian held only to duty of ordinary care. *Rickman v. Sauerwein*, 470 S.W.2d 487 (Mo. 1971). In absence of a statute or ordinance providing otherwise, duties of motorists and pedestrians using public roadways and crosswalks at intersections are mutual and reciprocal with neither having superior or exclusive right. *Timmons v. Kilpatrick*, 332 S.W.2d 918 (Mo. 1960). Failure of pedestrian to look before entering traveled roadway or see what is plainly visible is negligence. *Sherpy v. Bilyeu*, 608 S.W.2d 521 (Mo. App. 1980). Driver's obligation to maintain lookout extends to pedestrian regardless of whether pedestrian is standing

upon shoulder or traveled part of roadway. *Foster v. Farmers Ins.*, 775 S.W.2d 143 (Mo. 1989).

Motorized Bicycles. Moped operator's speed of 20 miles per hour, even if negligently excessive, failed to supply the element of causation necessary to support submission of excessive speed as an assignment of contributory negligence, where accident would have been unavoidable anyway. *Roper v. Archibald*, 680 S.W.2d 743 (Mo. App. 1984).

Seat Belts. §307.178 RSMo (2001), requires use of seat belts by drivers and front seat passengers of passenger car manufactured after January 1, 1968, except employees of U.S. Postal Service when performing duties for that federal agency. "Passenger Car" includes trucks with a licensed gross weight of less than twelve thousand pounds. §307.178 RSMo (2001); §307.179 RSMo (2006) establishes required restraint systems for children under four years of age.

Service of Process upon Non-Resident Motorists. Missouri Supreme Court Rule 54.08. May be made by serving Secretary of State. Missouri Supreme Court Rule 54.15. Substituted service upon Secretary of State insufficient where accident occurred on private parking lot. *State ex rel Boyer v. Weinstein*, 384 S.W.2d 275 (Mo. App. 1964).

Speed Limit. Operating motor vehicle at dangerous speeds may be negligent regardless of posted speed limit. *Schneider v. Finley*, 553 S.W.2d 727 (Mo. App. 1977), repudiated on other grounds by *Morgan v. Toomey*, 719 S.W.2d 129 (Mo. App. 1986). Whether speed is excessive depends on condition of road as well as surrounding circumstances. *Hill v. Boling*, 523 S.W.2d 867 (Mo. App. 1975). §304.010 RSMo (2001) provides that the maximum speed limit upon roads and highways in Missouri shall be 70 m.p.h.

Step Down Provision. Lesser coverage for unrelated permissive driver, at minimum required by Motor Vehicle Financial Responsibility Law, does not violate public policy. *Windsor Ins. v. Lucas*, 24 S.W.3d 151 (Mo. App. 2000).

Trailers/Weight Limits. §304.180 RSMo (2001) addresses weight limits in Missouri.

Uninsured and Underinsured. §379.203 RSMo (2001) provides that no automobile liability insurance covering liability arising out of ownership or use of motor vehicle shall be delivered or issued in Missouri unless coverage is provided therein for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured vehicles. For purposes of uninsured motorist protection statute, §379.203 RSMo (2001), underinsured motorist

should be considered “uninsured” motorist. *Cook v. Pedigo*, 714 S.W.2d 949 (Mo. App. 1986). *But see Brake v. M.F.A. Mut.*, 525 S.W.2d 109 (Mo. App. 1975). Uninsured motorist statute does not apply where tort-feasor has policy which complies with requirements of Motor Vehicle Safety Responsibility Law (Ch. 303 RSMo 2001). *Bergtholdt v. Farmers Ins.*, 691 S.W.2d 357 (Mo. App. 1985); *cf. Zelman v. Equity Mut.*, 935 S.W.2d 673 (Mo. App. 1996). Where policy clearly distinguished and defined the term “underinsured” as separate from “uninsured.” *Trapf v. Commercial Union*, 886 S.W.2d 144 (Mo. App. 1994). When policy is clear and unambiguous, provision mandating reduction of amount payable under underinsured motorist coverage by amount received from tort-feasor is valid, as is provision disallowing stacking of underinsured motorist coverage. *Rodriguez v. General Accident*, 808 S.W.2d 379 (Mo. banc 1991). Language in policy is ambiguous if reasonably open to multiple constructions, and will be examined from the viewpoint of the layperson insured, and construed against insurer. *O’Connor v. State Farm*, 831 S.W.2d 748 (Mo. App. 1992); *Haggard Hauling & Rigging v. Stonewall*, 852 S.W.2d 396 (Mo. App. 1993).

Denial of coverage by tort-feasor’s insurer creates obligation upon victim’s uninsured motorist insurer, regardless of whether denial of liability coverage was legally valid. *Omaha Indem. v. Pall*, 817 S.W.2d 491 (Mo. App. 1991).

Underinsured Motorist. No Missouri statute or case law makes underinsured motorist coverage a matter of public policy but anti-stacking provisions in policies treating underinsured coverage as synonymous with uninsured coverage have been invalidated as against public policy. *See Rodriguez v. General Accident*, 808 S.W.2d 379 (Mo. banc 1991).

Ambiguity in set-off provisions of underinsured motorist policy construed against insurer such that amounts paid by tort-feasor would be set off against total damages rather than underinsured motorist policy limits. *Krombach v. Mayflower*, 827 S.W.2d 208 (Mo. banc 1992). *But see Tapley v. Shelter*, 91 S.W.3d 755 (Mo. App. 2002). Anti-stacking provisions in policy treating uninsured and underinsured motorist coverage as the same were invalid when applied to premium-paying insureds, but not passengers in the automobile covered under the policy. *Id.* *But see American Standard v. Forsythe*, 915 F.2d 1212 (8th Cir. 1990), where granddaughter was covered. But, underinsured motorist anti-stacking policy provisions were enforceable where the provisions were unambiguous and no public policy mandated underinsured motorist coverage. *Rodriguez v. General Acc.*, 808 S.W.2d 379 (Mo. banc 1991). *See also Earl v. State Farm*, 820 S.W.2d 623 (Mo. App.

1991), ambiguity exists only where there is doubt about meaning or policy contents are uncertain. *See also Gillette v. O’Dell*, 828 S.W.2d 909 (Mo. App. 1992); *Frost v. Liberty Mut.*, 828 S.W.2d 915 (Mo. App. 1992); *Fred Weber, Inc. v. Granite State Ins.*, 829 S.W.2d 589 (Mo. App. 1992); *Learfield Communications v. Hartford*, 837 S.W.2d 299 (Mo. App. 1992); *O’Connor v. State Farm*, 831 S.W.2d 748 (Mo. App. 1992). Uninsured motorist insurer entitled to full credit against judgment under policy for all settlements paid by other carriers despite fact that insurer would then pay less than pro rata share, when failing to do so would mean insured would recover more than total loss. *Moreland v. Columbia Mut.*, 842 S.W.2d 215 (Mo. App. 1992), *overruled on other grounds by Bennett v. Owens-Corning Fiberglas*, 896 S.W.2d 464 (Mo. 1995).

When there is no language present specifically prohibiting such result, each premium paid for specified medical payments coverage for each of two cars insured under one policy allowed for insured that much supplemental protection from medical expenses incurred in covered accident. *Cameron Mut. v. Madden*, 533 S.W.2d 538 (Mo. banc 1976). *See also Hempen v. State Farm*, 687 S.W.2d 894 (Mo. banc 1985); *Spotts v. Kansas City*, 728 S.W.2d 242 (Mo. App. 1987) where policy provisions limiting stacking upheld. Missouri Public Policy prohibits anti-stacking clause limiting uninsured motorist coverage. *Bergtholdt v. Farmers Ins.*, 691 S.W.2d 357 (Mo. App. 1985); *Estle v. Country Mut.*, 970 F.2d 476 (8th Cir. 1992). *See also Husch v. Nationwide*, 772 S.W.2d 692 (Mo. App. 1989). Kansas antistacking provisions upheld in Missouri where contract was entered into in Kansas but renewal notices were posted in Missouri and premium payments received in Missouri. *Markway v. State Farm*, 799 S.W.2d 146 (Mo. App. 1990). *But see Brown v. Home Ins.*, 176 F.3d 1102 (8th Cir. 1999). Antistacking provision given effect where policy treated uninsured and underinsured coverages separately. *Krenski v. Aubuchon*, 841 S.W.2d 721 (Mo. App. 1992), *overruled on other grounds by Rodriguez v. Suzuki*, 936 S.W.2d 104 (Mo. banc 1996).

To enforce rights against insurer under uninsured motorist coverage, insured need not obtain judgment or sue uninsured motorist, but must only show that motorist would have been liable to insured. *Edwards v. State Farm*, 574 S.W.2d 505 (Mo. App. 1978). *See also Omaha Indem. v. Pall*, 817 S.W.2d 491. (Mo. App. 1991); Failure to pay suffices for denial of liability; no formal denial is required.

Parents could maintain wrongful death action for child under uninsured motorist provision since father was insured and mother had right to recover as legal rep-

representative of deceased child. *Cobb v. State Security Ins.*, 576 S.W.2d 726 (Mo. banc 1979).

Adult son, having lived with decedent in family home prior to automobile accident, was an "insured" under the uninsured motorist policy of decedent's parents. *Ashcraft v. Ashcraft*, 689 S.W.2d 693 (Mo. App. 1985). Whether a person is a resident of a household is determined on a case by case basis but the court should consider whether the arrangement is permanent or temporary and if the household acts as a unified family unit. *American Standard v. Forsythe*, 915 F.2d 1212 (8th Cir. 1990). See also *Gulf Ins. v. American Family*, 768 F. Supp. 272 (E.D. Mo. 1991), insured's daughter was entitled to same coverage when she lived with her father. Unemancipated college student was "relative" under meaning of policy, which defined "relative" as including unmarried and unemancipated children "away at school," even though he was enrolled at a local university, and lived at location other than mother's home. *Crump v. State Farm*, 961 F.2d 725 (8th Cir. 1992).

Auto policy provision excluding coverage for injuries sustained by named insured in a vehicle owned by the named insured but not covered by the uninsured motorist policy was contrary to public policy in uninsured motorist statute and was thus invalid. *Shepherd v. American States Ins.*, 671 S.W.2d 777 (Mo. banc 1984); *Ezel v. Columbia Ins.*, 942 S.W.2d 913 (Mo. App. 1996). Rental car held not a "temporary substitute vehicle" as to policy's uninsured motorist coverage such that non-insureds/occupants would be "covered persons," where vehicle covered in policy was taken out of use for reasons other than breakdown, repair, servicing, loss, or destruction. *Frost v. Liberty Mut.*, 828 S.W.2d 915 (Mo. App. 1992). Policy defining uninsured auto to include auto denied coverage by insurer was enforced as written after insurer denied coverage for personal injury benefits under household exclusion, and policy had no exclusion denying coverage under uninsured motorist provision. *Viessman v. Allstate*, 825 S.W.2d 349 (Mo. App. 1992). Statute requiring minimum uninsured motorist coverage did not establish a public policy prohibiting uninsured motorist coverage for relatives who own cars. *Lair v. American Family Mut.*, 789 S.W.2d 30 (Mo. banc 1990).

## AVIATION

"Engaged in aviation" constitutes excepted risk in most policies. No statutes in regard thereto. Insured on free ride in airplane for pleasure held not "engaged in aeronautics." *Flanders v. Benefit*, 42 S.W.2d 973 (Mo. App. 1931).

Res ipsa loquitur applicable if defendant had either "exclusive control" or "right to control" airplane. *Collins v. Stroh*, 426 S.W.2d 681 (Mo. App. 1968).

Sudden lurching or dropping of commercial airplane for some distance while in flight, injuring passenger, does not make res ipsa loquitur case of negligence, since such motion could in common experience be attributable to cause other than negligence, such as down-drafts. *Cudney v. Midcontinent*, 254 S.W.2d 662 (Mo. banc 1953).

Violation of air traffic rules promulgated by C. A. B. not negligence as matter of law. Common law principles of care applicable. §§305.040 & 305.050 RSMo (2001); *Hough v. Rapidair*, 298 S.W.2d 378 (Mo. 1957).

## BROKERS

See "AGENTS AND BROKERS."

## BURGLARY INSURANCE

Terms and Conditions. Room used for storage purposes and living quarters of proprietor of store held part of premises within burglary insurance policy. *Aronson v. Maryland Cas.*, 280 S.W. 724 (Mo. App. 1926).

When diamond ring was stolen from cabin where insured stayed while on vacation, court held for insurer because policy unambiguously stated that it only covered items stolen from insured's residence. *Grover v. Hartford*, 51 S.W.2d 210 (Mo. App. 1932).

## CANCELLATION

Cancellation of liability insurance prohibited after loss. §379.195 RSMo (2001). Burden of proving a cancellation is on party asserting cancellation. *Farrar v. Mayabb*, 326 S.W.2d 337 (Mo. App. 1959); *Brumbaugh v. Travelers*, 396 S.W.2d 740 (Mo. App. 1965); *O'Connor v. State Farm*, 831 S.W.2d 748 (Mo. App. 1992).

Where policy is wrongfully cancelled, insured may elect to recover premium. *Ray v. Mutual Benefit*, 220 S.W.2d 622 (Mo. App. 1949).

Cancellation provision must be strictly complied with, even though unreasonable. *Farmers v. Minton*, 279 S.W.2d 523 (Mo. App. 1955). Whether return of unearned premium is to be regarded as condition precedent to valid cancellation depends upon terms of contract. *Ireland v. Manufacturers & Merchants*, 298 S.W.2d 529 (Mo. App. 1957).

"Treaty of re-insurance" made for benefit of policyholder, and judgment cannot be avoided by cancellation of treaty. *Landers v. Mayfield*, 336 S.W.2d 653 (Mo. 1960).

Notice of cancellation provided in fire policy may be waived by insured. *Hanks v. Camden*, 74 S.W.2d 873

(Mo. App. 1934). Use of mail and evidence thereof did not, as matter of law, establish cancellation of policy. *Ireland v. Manufacturers & Merchants*, 298 S.W.2d 529 (Mo. App. 1957).

Accident policy was cancelled pursuant to its terms, by written notice from company mailed to last address of insured, as shown by company records, accompanied by its check for unearned premium; notwithstanding cancellation date in notice was prior to date of mailing notice and subsequent to refusal of insured to sign rider limiting coverage. *McCoy v. Guarantee*, 240 S.W.2d 172 (Mo. App. 1951); *but see O'Connor v. State Farm*, 831 S.W.2d 748, 751 (Mo. App. 1992). For discussion of when the notice of cancellation becomes effective, *see First Missouri Bank v. Bayly*, 739 F.2d 348 (8th Cir. 1984).

§§375.001, 375.003, and 375.005 RSMo governing effective date of insurance cancellation do not apply to mobile home policies. *Kelley v. Shelter Mut.*, 748 S.W.2d 54 (Mo. App. 1988).

### CHATTEL MORTGAGE

See "FIRE INSURANCE."

### COLLISION INSURANCE

Repairs. In action for proceeds of automobile upset policy where insurer elected to repair damage to automobile, held that measure of damages was difference in value of automobile prior to upset and its value as repaired at insurer's expense. *Barton v. Farmers*, 255 S.W.2d 451 (Mo. App. 1953).

When soft shoulder caused sudden stop damaging trailer, the court held it was a collision under terms of policy. *Payne v. Western Cas.*, 379 S.W.2d 209 (Mo. App. 1964).

Collision proximate cause of loss where motorist made effort to extricate car and damaged same, although original impact caused no damage. *Boecker v. Aetna*, 281 S.W.2d 561 (Mo. App. 1955).

Collision insurance on non-owned private passenger automobile covered pickup truck. *Detmer v. United Security Ins.*, 309 S.W.2d 713 (Mo. App. 1958).

### CONSTRUCTION OF POLICY

Insurance contracts are interpreted using the general rules that apply to other contracts. *Peters v. Employers Mut.*, 853 S.W.2d 300 (Mo. banc 1993).

Ambiguity of Terms. "Duplicity, indistinctness, or uncertainty in the meaning of words" found in an insurance contract are indicative of the existence of an ambi-

guity. *Id.* at 302. Ambiguous language will be construed against the insurer. *Id.* at 302. Unambiguous insurance policies will be enforced as written unless a statute or public policy requires coverage. *Id.* at 302. Lay person's definition of technical term applies when there is a conflict between the insurance contract and meaning understood by the average lay person unless the technical meaning is plainly intended. *Id.* at 303.

Conditional Receipt of Application. Insurance application is an offer and only becomes a contract when accepted by the insurer and conditions precedent have been met. *Kopff v. Economy Radiator Svc.*, 838 S.W.2d 449 (Mo. App. 1992). Terms of the conditional receipt must be met before coverage takes effect despite premium having been paid. *Wareham v. American Family*, 922 S.W.2d 97 (Mo. App. 1996).

Inconsistent Policy Terms and Endorsements. When the language of the general provisions of the policy conflict with that of an endorsement, the endorsement will prevail. *Shields v. Farmers*, 948 S.W.2d 247 (Mo. App. 1997).

Oral Binders. Oral contracts for insurance are valid. Elements must prove include: 1) subject matter; 2) risk insured against; 3) amount of coverage; 4) duration or risk, and 5) premium amount. *Poepelmeyer v. Shelter*, 688 S.W.2d 48 (Mo. App. 1985).

### CONTRIBUTION

Liability of joint tort-feasors may be determined by jury and apportioned based upon jury's finding of relative fault. *Missouri Pac. R. v. Whitehead & Kales*, 566 S.W.2d 466 (Mo. banc 1978). No right of indemnity if indemnitee is at fault. *See Purk v. Purk*, 817 S.W.2d 915 (Mo. App. 1991).

Contribution between joint tort-feasors. §537.060 RSMo (2001) provides that unreleased defendants in judgment found on action for redress of private wrong shall be subject to contribution and all other consequences of judgment in same manner and extent as defendants in judgment in action found upon contracts.

However, under §537.060 RSMo (2001), settling tort-feasor is immune from action or liability in contribution by nonsettling tort-feasor. *Hampton v. Safeway Sanitation*, 725 S.W.2d 605 (Mo. App. 1987); *Lowe v. Norfolk & Western Ry.*, 753 S.W.2d 891 (Mo. 1988). *But see Associated Elec. v. Mid-America*, 931 F.2d 1266 (8th Cir. 1991), where the 8th Circuit adopted a proportional fault approach which adjusts the admiralty plaintiff's claim by a pro rata share of settling tort-feasor's liability. No distinction between products liability and negligence claims in determining whether settlement discharges

defendant in claim for contribution or indemnity. *Bostic v. Bill Dillard Shows*, 828 S.W.2d 922 (Mo. App. 1992).

### DAMAGES

Punitive damages can be recovered in products liability actions. *Rinker v. Ford Motor Co.*, 567 S.W.2d 655 (Mo. App. 1978). Punitive damages not reduced by plaintiff's comparative fault. MAI 10.02 (1983 Revision); MAI 10.04 (1983 Revision). *Friley v. International Playtex*, 604 F. Supp. 126 (W.D. Mo. 1984). Defendant may plead and prove fault of plaintiff as affirmative defense to diminish compensatory damages. "Fault" defined. §537.765 RSMo (2001). Pure comparative fault applies to strict products liability cases. §537.765 RSMo (2001).

Remittitur and additur allowed if verdict is inadequate or excessive, if loss occurs after July 1, 1987. §537.068 RSMo (2001).

If settling tort-feasor does not proceed to trial, amount paid by settling tort-feasor is deducted from plaintiff's total damages and then plaintiff's percentage of fault is deducted from the balance, leaving net judgment against remaining non-settling tort-feasors. *Jensen v. ARA Svcs.*, 736 S.W.2d 374 (Mo. banc 1987). When settling tort-feasor proceeds to trial, amount said by settling tort-feasor is deducted after percentage of comparative fault is deducted from total amount of compensatory damages. *Cole v. Goodyear*, 967 S.W.2d 176 (Mo. App. 1998).

"Malice in law" no longer sufficient to support punitive damage award in malicious prosecution cases, actual malice necessary. *Sanders v. Daniel Int'l Corp.*, 682 S.W.2d 803 (Mo. banc 1984); *Langdon v. Wight*, 861 S.W.2d 723 (Mo. App. 1993). *But see Brown v. New Plaza Pontiac*, where actual malice was not required to sustain punitive damages for fraud. 719 S.W.2d 468 (Mo. App. 1986).

### DEATH

See also "ACCIDENTAL MEANS."

See Law Digest Tables.

Presumption of arising from five years unexplained absence. §§473.697 & 490.620 RSMo (2001).

Seven years absence of insured from state without proof he was alive creates common law presumption of death, but absent other circumstances, does not create presumption of date of death. *White v. Metropolitan*, 218 S.W.2d 795 (Mo. App. 1949).

To trigger common law presumption of death, there must be showing of diligent search of last known place

of residence and among those persons who are likely to hear from insured if alive. *Magers v. Western & Southern Life*, 335 S.W.2d 355 (Mo. App. 1960). Reasonable search and inquiry are essential elements of presumption rule. *Id.*

Bond required by insurer on payment of life insurance policy upon presumption of death of insured entitled insurer to recover against surety when insured was proved to be alive. *State ex rel. Prudential v. Bland*, 185 S.W.2d 654 (Mo. 1945).

Fact that insured was insane when he escaped from hospital and had disappeared for more than one year did not raise inference that he was dead nor that he had recovered his sanity sufficiently to make a living. *Sanderson v. New York Life*, 194 S.W.2d 221 (Mo. App. 1946).

Carrier takes applicant as he is when accepted for insurance, and protects him and beneficiary against all risks of death, both natural and arising out of human failings. *Bird v. John Hancock*, 320 S.W.2d 955, 958 (Mo. App. 1959).

Under law of state, proceeds of life policy should not go to beneficiary who has conspired or participated in death of insured. *General American v. Cole*, 195 F. Supp. 867 (E.D. Mo. 1961).

No presumption of survivorship at common law. *Stewart v. Russell*, 227 S.W.2d 1011 (Mo. 1950).

Where insured and beneficiary died without evidence of who died first, proceeds of policy payable "as if insured had survived beneficiary." §471.040 RSMo (2001).

Double Indemnity. Beneficiary made prima facie case of death by accidental means by showing violent death. *Ward v. Pennsylvania Mut.*, 352 S.W.2d 413 (Mo. App. 1961).

Administrator for estate of guest passenger could maintain wrongful death action against administrator for estate of host motorist despite fact host's death preceded death of guest, and suit had not yet been filed at time of host's death. *Harrison v. Weisbrod*, 358 S.W.2d 277 (Mo. App. 1962).

### DISABILITY

See "ACCIDENT AND HEALTH INSURANCE."

Where policy holder suffered loss of hand and other injuries causing total disability for several months and partial disability thereafter for considerable length of time, held not restricted to specific indemnity for loss of hand but entitled to receive indemnity for both total and partial disability, which exceeded indemnity for loss of hand. *Lemaitre v. National Cas.*, 186 S.W. 964 (Mo.

App. 1916). “Wholly disabled,” as used in accident policy, does not mean that insured must be rendered absolutely and literally unable to perform any part of occupation, but rather, insured was disabled from performing substantially the occupation listed in the policy. *James v. U.S. Casualty*, 88 S.W. 125 (Mo. App. 1905). See *Heald v. Aetna*, 104 S.W.2d 379 (Mo. 1937); *Gladney v. Mutual Life*, 186 S.W.2d 538 (Mo. App. 1945); *Tenkhoﬀ v. New York Life*, 191 S.W.2d 1005 (Mo. App. 1946).

“Inability to carry on any occupation” given broad and liberal interpretation by Missouri cases. *Kern v. Prudential*, 293 F.2d 251 (8th Cir. 1961).

Although policy provides that disability benefits shall cease if insured recovers before all installments have been paid, insured, to establish right to receive benefits, need not prove with reasonable certainty that total disability will continue all his life, but only occurrence of total disability while policy in force. *Rogers v. Metropolitan*, 122 S.W.2d 5 (Mo. App. 1938).

Receipt of proof, not beginning of disability, marks beginning of benefit period. *Rowan v. New York Life*, 124 S.W.2d 577 (Mo. App. 1939).

In disability policy, “total disability” exists if shown that infirmity renders person unable to substantially perform all material acts of any occupation commensurate with his age, education, training, physical condition and experience. *Stout v. Central Nat’l Life*, 522 S.W.2d 124 (Mo. App. 1975). Insured need not be helpless, bed-ridden or inert. *Id.*

## FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables.

§303.020 (10) RSMo (2001) sets the minimum policy requirements at \$25,000/\$50,000/\$10,000. The Motor Vehicle Safety Responsibility Law is only one of many statutes and regulations applicable to minimum insurance levels and does not preempt the field. *Meyer v. St. Louis Co.*, 602 S.W.2d 728 (Mo. App. 1980).

Automobile policy purporting to comply with Safety Responsibility Law is to be construed liberally to cover any person operating, insured owner’s automobile, with express or implied permission. *Winterton v. Van Zandt*, 351 S.W.2d 696 (Mo. 1961). See also *Weathers v. Royal Indem.*, 577 S.W.2d 623 (Mo. banc 1979). Duty to report. §303.040 RSMo (2001). *McGee v. North-West Ins.*, 592 F. Supp. 661 (E.D. Mo. 1984).

Motorcycle liability policy’s passenger exclusion clause contrary to public policy. *American Standard v. Dolphin*, 801 S.W.2d 413 (Mo. App. 1990), criticized in *Dairyland Ins. v. Morse*, 771 F. Supp. 297 (E.D. Mo. 1991).

Implied permission is not proved by the fact that driver was given possession of automobile from owner’s son, absent knowledge by owner. *Helmkamp v. American Family Mut.*, 407 S.W.2d 559 (Mo. App. 1966).

Courts applying the “minor deviation” rule must take into account extent of deviation, actual time and distance, purpose vehicle was given for, and other factors that indicate whether deviation was material or minor. *Cameron v. Chitwood*, 609 S.W.2d 492 (Mo. App. 1980), overruled on other grounds by *Aviation Supply Corp. v. R.S.B.I. Aerospace*, 868 S.W.2d 118 (Mo. App. 1993).

## FIRE INSURANCE

Assignment. Before or after loss—the mortgagee and vendee governed largely by policy provisions. See *Key v. Continental*, 74 S.W. 162 (Mo. App. 1903); *Jecko v. St. Louis Fire & Marine*, 7 Mo. App. 308 (1879).

Cancellation. See “CANCELLATION.”

Chattel Mortgage. No statutory provisions. Governed by provisions contained in policy. See *Dougherty v. German-American Ins.*, 67 Mo. App. 526 (1896). Mortgage of part of insured property does not render entire contract void. *Loehner v. Home Mut.*, 17 Mo. 247 (1852).

Undeclared chattel mortgage voided automobile fire policy. *Smith v. Motors Ins.*, 270 S.W.2d 128 (Mo. App. 1954); But see *Galati v. New Amsterdam*, 381 S.W.2d 5 (Mo. App. 1964).

Co-Insurance. 90% co-insurance clause valid. Proportional recovery allowed. *Templeton v. Ins. Co.*, 201 S.W.2d 784. (Mo. App. 1947).

Coverage. Two-car garage held private structure within meaning of fire policies despite limited sales activity therein. *Dyer v. Standard*, 227 S.W.2d 520 (Mo. App. 1950). Tool shed, attached to barn, held excluded structure used for farm purposes, despite its use as private automobile garage. *Winston v. Hartford*, 317 S.W.2d 23 (Mo. App. 1958). Jury question whether barn containing business equipment in storage was in use for mercantile purposes within policy exception. *Farmer v. London & Lancashire*, 274 S.W.2d 517 (Mo. App. 1955). Automobile fire policy covers only for cost of repair and replacement of damaged motor parts with parts of equal kind and quality. *Watkins v. Motors*, 271 S.W.2d 584 (Mo. App. 1954). Fire policy provision covering only losses sustained more than 3 days after reinstatement of policy (allowed to lapse for nonpayment of premiums) held valid. *Billings v. Independent*, 251 S.W.2d 393 (Mo. App. 1952). See also *Grassham v. Farm Bureau*, 684 S.W.2d 892 (Mo. App. 1984); *Hang-*

*ley v. American Family Mut.*, 872 S.W.2d 544 (Mo. App. 1994). Where policy covers loss of insured vehicle caused by fire but not when caused by bottled gas, insurer has burden of proving that explosion on vehicle is “caused” by bottled gas rather than by fire or sparks igniting escaping fumes from gas. *Smith v. M.F.A. Mut.*, 337 S.W.2d 537 (Mo. App. 1960). *See also Nixon v. Life Investors*, 675 S.W.2d 676 (Mo. App. 1984).

**Damage.** May include damages by water and chemicals used to extinguish fire, or explosions caused by fire. *Delametter v. Home Ins.*, 126 S.W.2d 262 (Mo. App. 1939).

**Excess Insurance.** Provision that policy shall apply only as excess insurance, operated to exclude that policy in calculating pro rata liability. *Spink v. Mercury*, 260 S.W.2d 757 (Mo. App. 1953). *But see Lutsky v. Blue Cross*, 695 S.W.2d 870 (Mo. banc 1985).

**Insurable Interest.** Holding of title to obtain agreed purchase price held to be valuable and substantial insurable interest. *American Central v. Kirby*, 294 S.W.2d 556 (Mo. App. 1956). Individual has insurable interest in property if person will derive benefit from its preservation or will suffer damage from the destruction by occurrence of event insured against. *DeWitt v. American Family*, 667 S.W.2d 700 (Mo. banc 1984); *G.M. Battery & Boat v. L.K.N. Corp.*, 747 S.W.2d 624 (Mo. banc 1988). Good faith payment of contract price and of insurance premiums gives rise to individual’s right to collect insurance coverage for an actual loss even absent strict compliance with statute governing sale of motor vehicle or trailer (§301.210 RSMo (2001)). *Dimmit v. Progressive*, 92 S.W.3d 789, 792-93 (Mo. banc 2003).

**Landlord and Tenant.** Where Tenant paid increased rental to landlord as premiums on fire policy covering premises, in consideration for exempting tenant from liability for fire, tenant was not liable to landlord for fire caused by tenant’s negligence; but insurer was liable, so long as negligence did not amount to fraud. *K.C. Stock Yards v. A. Reich*, 250 S.W.2d 692 (Mo. 1952), *overruled on other grounds by Gateway Chemical v. Groves*, 338 S.W.2d 83 (Mo. 1960). Mere occurrence of fire does not raise presumption of negligence. *Id.* (though distinguished on this point by *Gateway Chemical*). Landlord’s fire insurer can sue tenants for negligence in causing fire, even though lease required premises to be insured by landlord to full insurable value. *Poslosky v. Firestone*, 349 S.W.2d 847 (Mo. 1961), *distinguished by Rock Springs Realty v. Waid*, 392 S.W.2d 270 (Mo. 1965).

**Mortgage Clause.** Although property is mortgaged to full amount of insurance thereon, owner has insurable interest therein. *Florea v. Iowa*, 32 S.W.2d 111 (Mo.

App. 1930); *See also Kilpatrick v. Hartford*, 701 S.W.2d 755 (Mo. App. 1985). Insurer’s obligation to mortgagee no greater than to insured except as by contract. *Waynesville Security Bank v. Stuyvesant Ins.*, 499 S.W.2d 218 (Mo. App. 1973). Mortgagor held to have interest in fire policies although not named therein, where policies ran to trustee in trust deed “as his interest may appear,” and mortgagor had acquired policies and paid premiums. *City of New York Ins. v. Stephens*, 248 S.W.2d 648 (Mo. 1952).

**Oral Agreement.** Binder issued by agent that changed effective date of policy held valid against insurance company. *Ewing v. Dubuque Fire & Marine*, 237 S.W.2d 498 (Mo. App. 1951). *But see Henry v. Cervantes*, 700 S.W.2d 89 (Mo. App. 1985). *See also Poepelmeyer v. Shelter Life*, 688 S.W.2d 48 (Mo. App. 1985).

**Other Insurance.** Defense that coverage suspended while other insurance in force, held valid, though unearned assessments not tendered. *Kirchner v. Farmers*, 267 S.W.2d 390 (Mo. App. 1954). *See also Farmers v. LaVallee*, 501 S.W.2d 69 (Mo. App. 1973).

**Ownership.** Where property insured against fire was transferred but not policy, transferees could not recover loss because policies do not run with the land; and if no special provisions to the contrary, loss recovered, if any, must be loss to person insured. *Estes v. Great American*, 112 S.W.2d 153 (Mo. App. 1938). *But see Leopold v. Leopold*, 552 S.W.2d 276 (Mo. App. 1977).

**Risk of Loss.** Where building was destroyed by fire during executory period, purchaser was entitled to specific performance and reduction in price by amount seller had received under fire policy. *Skelly Oil v. Ashmore*, 365 S.W.2d 582 (Mo. banc 1963). *See also Dalton v. Rainwater*, 901 S.W.2d 316 (Mo. App. 1995). Fire insurance policy taken out by life tenant in dwelling, for her own benefit, does not give remainderman any rights therein, absent agreement requiring life tenant to insure remainder interest. *Farmers v. Crowley*, 190 S.W.2d 250 (Mo. 1945). *See also Carlton v. Wilson*, 665 S.W.2d 356 (Mo. App. 1984). Widow beneficiary of \$5,000 fire insurance policy on \$7,200 house, entitled to full amount of policy, regardless of interest in property of her minor children. *Michigan v. Magee*, 218 S.W.2d 151 (Mo. App. 1949).

**Proof of Loss.** Insured shall give notice of loss within reasonable time and upon failure to furnish blank forms for statement and proof to insured, company shall be deemed to have waived filing of such statements or proofs. *See* §§379.185 & 379.190 RSMo (2001). Failure to file proof of loss considered material breach of policy where amount claimed 1000% higher than initial loss as

reported to police. *Valiant v. American Family*, 698 S.W.2d 584 (Mo. App. 1985).

Res Ipsa Loquitur Doctrine. Does not apply to fire of unknown origin in warehouse. *Cook v. Sloan's*, 267 S.W.2d 362 (Mo. App. 1954). *But see Royster v. Pittman*, 691 S.W.2d 305 (Mo. App. 1985).

Standard Policy Provisions. Every fire insurance company doing business in Missouri is required to file policy form that sets forth the responsibilities of the company and those of the insured. §379.160 RSMo (2001). Such form is to be known as the "standard fire insurance policy," which must be approved by the director of insurance. *Id.*

Subrogation. Rights of subrogee are not greater than those of insured. *Monsanto Chem. v. American Bitumuls*, 249 S.W.2d 428 (Mo. 1952). Subrogation rights of homeowner's insurer not destroyed by settlement agreement with third party tort-feasor where latter had knowledge of interest of insurer. *Dickhans v. Missouri Property Ins.*, 705 S.W.2d 104 (Mo. App. 1986); *Marshall v. Northern Assur.*, 854 S.W.2d 608 (Mo. App. 1993). But where insured released tort-feasor, insurer's right to subrogation destroyed, which bars insured from recovering under policy as matter of law. *Community Title v. Safeco*, 795 S.W.2d 453 (Mo. App. 1990). Where a nonsettling insurer refuses to admit any liability, such uninsured motorist insurer is not relieved from liability as part of settlement between insured and another uninsured motorist. *Gulf Ins. v. American Family*, 768 F. Supp. 272 (E.D. Mo. 1991).

Vacancy Clause. Defense waived if insurer's agent knows insured building is not likely to be occupied, or will not be occupied within prescribed time, yet still issues policy. *Heindselman v. Home Ins.*, 282 S.W.2d 191 (Mo. App. 1955); *Bledsoe v. Farm Bureau*, 341 S.W.2d 626 (Mo. App. 1960). *But see Rooks v. Lincoln County Farmers*, 830 S.W.2d 507 (Mo. App. 1992).

## FRAUD

See "AGENTS AND BROKERS"; "REPRESENTATIONS AND WARRANTIES."

## GUEST CASES

See "AUTOMOBILES, Guest Cases."

## HOSPITALS

Evidence/Records. Properly authenticated medical records are generally admissible to prove history, diagnosis, treatment, and prognosis. *Friese v. Mallon*, 940 S.W.2d 37 (Mo. App. 1997). Specific and legally proper objections made to parts of the records on other grounds

may result in the exclusion of those parts of the records. *Allen v. St. Louis Public Serv.*, 285 S.W.2d 663 (Mo. 1956).

Liens. Hospital liens are provided for by statute at §430.230 RSMo (2001).

Hospital must come forth with sufficient evidence to show that care, treatment and services were necessary, when seeking to enforce hospital lien. *Frankum v. Hensley*, 884 S.W.2d 688 (Mo. App. 1994).

Immunity. §537.600 RSMo (2001) addresses sovereign immunity in Missouri.

City Hospital comes within the protection of sovereign immunity statute and City is immune from liability for operations of the hospital. *State ex rel., Board of Trustees v. Russell*, 843 S.W.2d 353 (Mo. banc 1992).

## HUSBAND AND WIFE

See Law Digest Tables.

See "AUTOMOBILES, Husband and Wife."

Common-law doctrine of interspousal immunity does not bar claims for personal injuries arising from intentional tort inflicted by one spouse against the other. *Townsend v. Townsend*, 708 S.W.2d 646 (Mo. banc 1986), *but see Garner v. Strauss*, 121 B.R. 356 (W.D. Mo. 1990)(overturned).

Spouse may bring action against other spouse for damages resulting from negligent tort prior to marriage. *Huff v. LaSieur*, 571 S.W.2d 654 (Mo. App. 1978). Spousal immunity doctrine no longer bars negligence actions against spouse. *S.A.V. v. K.G.V.*, 708 S.W.2d 651 (Mo. banc 1986), distinguished by *Horowitz v. Horowitz*, 16 S.W.3d 599 (Mo. App. E.D. 2000).

Husband has no cause of action as a matter of law for loss of consortium absent success of wife's claim. *Stephen v. Lindell Hosp.*, 681 S.W.2d 503 (Mo. App. 1984); *Kamerick v. Dorman*, 907 S.W.2d 264 (Mo. App. 1995). Wife's action for loss of consortium allowed even though wife had no such right under common law. *Novak v. Kansas City Transit*, 365 S.W.2d 539 (Mo. banc 1963). Wife not entitled to loss of consortium merely because husband is found to be injured. *Lear v. Norfolk & Western Ry.*, 815 S.W.2d 12 (Mo. App. 1991). Spouse's cause of action for loss of consortium is separate and distinct from spouse receiving personal injury and must show damages arising out of other's injuries. *Johnson v. Anheuser Busch*, 876 F.2d 620 (8th Cir. 1989). If there is evidence that an individual suffered loss of his or her spouse's society or consortium and individual's spouse succeeds on main cause of action, individual is entitled to a new trial if jury fails to return a

verdict for the individual but instead finds for the defendant. *Carnell v. Dairyman's Supply*, 421 S.W.2d 775 (Mo. 1967).

In personal injury action brought by laundress in private home against her employers, husband and wife, home is not operated as joint enterprise or adventure and husband was not liable for condition of premises (a mop placed by wife on stairway), causing injury to plaintiff, absent any knowledge thereof on his part. *State ex. rel. McCrory v. Bland*, 197 S.W.2d 669 (Mo. banc 1946). Wife held not liable for husband's automobile driving negligence, notwithstanding they jointly owned automobile and their farm, since elements of a joint business enterprise were lacking. *Wood v. Claussen*, 207 S.W.2d 802 (Mo. App. 1948). *But see Hamilton v. Slover*, 440 S.W.2d 947 (Mo. 1969) (overturned).

Court may order examination of wife in husband's suit for consequential damages for personal injuries to wife under its inherent powers. *State ex. rel. St. Louis Public Service v. McMullan*, 297 S.W.2d 431 (Mo. banc 1956).

Where minor child injured as result of deceased wife's alleged negligence, husband allowed to sue administrator of wife's estate for medical and hospital bills and impaired value of services of child; Court found that intra-family immunity does not extend to personal representative of wife's estate. *Brennecke v. Kilpatrick*, 336 S.W.2d 68 (Mo. banc 1960). *See also M.F.A. v. Howard Constr.*, 608 S.W.2d 535 (Mo. App. 1980).

Husband and wife's joint recovery for damage to automobile did not bar their separate causes of action for wife's injuries and husband's loss of services arising out of same accident where vehicle was jointly owned. *Lee v. Guettler*, 391 S.W.2d 311 (Mo. 1965); *but see McCrary v. Truman Med. Ctr.*, 943 S.W.2d 695 (Mo. App. 1997).

## INFANTS

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

## INLAND MARINE

Policy covering trailer did not cover damage to trailer resulting from collision of vehicle being transported on trailer with overpass. Policy only covered damage resulting from collision between trailer and another vehicle. *Western Cas. v. D&J Enterprises*, 720 S.W.2d 944 (Mo. banc 1986).

## LIABILITY INSURANCE

Compromise of claims. Insurer has option to settle or litigate, but must exercise due care and good faith,

which requires that insurance company do nothing that prejudices insured which does not benefit insurer; but, when their interests conflict, only expressly contracted duties are owed to insured. *St. Joseph v. Employers*, 23 S.W.2d 215 (Mo. App. 1930). Insured who contributes to settlement to avoid contingent liability in excess of amount of policy may not recover contribution on ground that insurer's refusal to settle constituted negligence. *Id.* Where insurer refused injured third party's offer to settle for face amount of policy, court ruled there was sufficient evidence to send question of whether insurer acted in good faith and dealt fairly with insured to jury. *McCombs v. Fidelity*, 89 S.W.2d 114 (Mo. App. 1935). Other cases dealing with bad faith. *See Landie v. Century Indem.*, 390 S.W.2d 558 (Mo. App. 1965); *Ganaway v. Shelter*, 795 S.W.2d 554 (Mo. App. 1990). *But see Quick v. National Auto Credit*, 65 F.3d 741 (8th Cir. 1995).

Co-operation of insured in defense of action. Insured's unexcused failure to cooperate with insurer in defense of negligence action where such failure is material, allows insurer to deny coverage. *Riffe v. Peeler*, 684 S.W.2d 539 (Mo. App. 1984). Insurer must exercise reasonable diligence to obtain insured's cooperation before there can be breach of cooperation clause. *Id.* Even though insured did not disclose pertinent facts respecting operation of automobile until just before trial, insurer held not justified in withdrawing from defense of suit. *Cowell v. Employers*, 34 S.W.2d 705 (Mo. 1930), *overruled by Quisenberry v. Kartsonis*, 297 S.W.2d 450 (Mo. 1957). Where insurer had actual knowledge of accident and suit, failure of partner using vehicle with permission of named insured to report accident, forward suit paper, etc., did not relieve insurer from liability to indemnify partners for their loss as result of suit against them by third party. *Halferty v. National Mut.*, 296 S.W.2d 130 (Mo. App. 1956); *Omaha Indem. v. Pall*, 817 S.W.2d 491 (Mo. App. 1991).

Coverage. Garage liability policy held not to cover garage employee using assured's car for his own pleasure where policy explicitly covered only two named corporations. *Forir v. Toman*, 202 S.W.2d 32 (Mo. 1947).

Duty to Defend. Actual facts which insurer knows or has reason to know determine insurers duty to defend, rather than facts as they are ultimately found to be. *Hawkeye-Security Ins. v. Iowa Nat'l Mut.*, 567 S.W.2d 719 (Mo. App. 1978). *See also Missouri Terrazzo Co. v. Iowa Nat'l Mut.*, 740 F.2d 647 (8th Cir. 1984); *National Union v. Structural Sys. Technology*, 964 F.2d 759 (8th Cir. 1992).

Duty of insurance company to defend is contractual, and if there is no contract to defend, there is no duty to defend. *Crown Ctr. Redevelopment Corp. v. Occiden-*

tal, 716 S.W.2d 348 (Mo. App. 1986). Once insurer disclaimed coverage for shooting, it was not entitled to participate in widow's wrongful death action for a limited purpose. *Cologna v. Farmers*, 785 S.W.2d 691 (Mo. App. 1990). Therefore, insured's failure to give notice of settlement did not relieve insurer of liability after insured prevailed in declaratory judgment to determine whether shooting death was covered by policy. *Id.* at 701. See also *Community Title Co. v. Safeco*, 795 S.W.2d 453 (Mo. App. 1990). Insurer may not reserve the right to disclaim coverage and insist upon controlling the defense. *Whitehead v. Lakeside Hosp.*, 844 S.W.2d 475 (Mo. App. 1992). But see *Lodigensky v. American States*, 898 S.W.2d 661 (Mo. App. W.D. 1995).

Purchaser of automobile held to be insured under seller's Garage Liability Policy where certificate of title to automobile was not received by purchaser until after purchaser was involved in accident. *Sabella v. American Indem.*, 372 S.W.2d 36 (Mo. banc 1963). Overruled by *Dimmit v. Progressive*, 92 S.W.3d 789 (Mo. banc 2003) and see *Nat'l Indem. v. Liberty Mut.*, 513 S.W.2d 461 (Mo. 1974).

See also "WAIVER AND ESTOPPEL."

Omnibus clause construction, holding that employee's material deviation from usual route for personal pleasure precludes coverage where a minor deviation would have been insufficient to preclude coverage. *Speidel v. Kellum*, 340 S.W.2d 200 (Mo. App. 1960), distinguished by *Winterton v. Van Zandt*, 351 S.W.2d 696 (Mo. 1961). Burden on party seeking coverage. *Auto-Owners Ins. v. McGaugh*, 617 S.W.2d 436 (Mo. App. 1981); *State Farm v. D.T.S.*, 867 S.W.2d 642 (Mo. App. 1993). Omnibus clause construction holding that it is general rule that first permittee has no authority to delegate or grant permission to another so as to make latter additional insured, but conduct by insured, or nature and scope of permission may indicate permission to the second permittee, or indicate first permittee's ability to extend coverage through authorization. *M.F.A. Mut. v. Alexander*, 361 S.W.2d 171 (Mo. App. 1962); See also *State Farm v. Foley*, 624 S.W.2d 853 (Mo. App. 1981).

Liability apportioned between insurers since "other insurance" provisions were mutually repugnant. *Arditi v. Massachusetts Bonding*, 315 S.W.2d 736 (Mo. 1958). See also *Crown Center v. Occidental*, 716 S.W.2d 348 (Mo. App. 1986), but see *Planet Ins. Co. v. Ertz*, 920 S.W.2d 591 (Mo. App. WD 1996). Insurer may be estopped to deny broader or different coverage than that specified by terms of policy. *Graham v. Gardner*, 233 S.W.2d 797 (Mo. App. 1950).

Insurance company may be liable for plaintiff's injury when delay in acting on an application was unex-

plained and unwarranted, where premium was retained, and applicant was misled. *Voss v. American Mut.*, 341 S.W.2d 270 (Mo. App. 1960).

Policy that expressly expired June 30, 1950, at 12:01 A.M., auto accident injuring passengers in insured's car at 6:30 P.M. of that day was not covered by automobile liability policy, notwithstanding insured did not obtain full 6 months of insurance because corrected policy was not issued until February 3, 1950. *Stevens v. Farm Bureau*, 253 S.W.2d 538 (Mo. App. 1952). But see *Stone v. M.F.A.*, 663 S.W.2d 774 (Mo. App. 1983). To defeat liability on insurance contract, termination of policy must be in effect before liability attaches. *Behr v. Blue Cross Hosp. Svc.*, 715 S.W.2d 251 (Mo. 1986), but see *Todd v. Missouri United School*, 223 S.W.3d 156 (Mo. 2007).

Insurer held liable for limits of its policy together with attorney fees, expenses and other damages where it refused to defend insured who was in fact covered, even though insurer acted in good faith and had reasonable ground to believe there was no coverage under policy. *Landie v. Century Indem.*, 390 S.W.2d 558 (Mo. App. 1965); See also *Missouri Terrazzo v. Iowa Nat'l*, 740 F.2d 647 (8th Cir. 1984); *Aetna v. General Dynamics*, 968 F.2d 707 (8th Cir. 1992); *Ballmer v. Ballmer*, 923 S.W.2d 365 (Mo. App. 1996). Fees for appeal in principal action also recoverable. *Heshion Motors v. Western Int'l*, 600 S.W.2d 526 (Mo. App. 1980). See also, with regard to insurance coverage, the award of attorney's fees as part of settlement in federal class action was indistinguishable from damages. *Hyatt v. Occidental*, 801 S.W.2d 382, 393 (Mo. App. 1990).

Coverage afforded by policy issued to owner of vehicle was primary, and coverage of driver's policy was available only in amount by which judgments exceeded coverage limits of owner's policy. *U.S. Fidelity v. Safeco*, 555 S.W.2d 848 (Mo. App. 1977). Coverage of policy for one automobile held not to extend to second automobile owned by insured. *Wise v. Strong*, 341 S.W.2d 633 (Mo. App. 1960). If an excess insurer is required to pay damages in excess of primary insurer's coverage, insolvency of primary insurer should not create a lower threshold to trigger excess insurer's liability. *Interco v. National Sur.*, 900 F.2d 1264 (8th Cir. 1990).

Insolvency of insured—as affecting rights of injured person. See §379.195 RSMo (2001) and §379.200 RSMo (2001). Held constitutional, *Schott v. Continental*, 31 S.W.2d 7 (Mo. 1930).

Charitable immunity doctrine abolished. *Abernathy v. Sisters St. Mary's*, 446 S.W.2d 599 (Mo. banc 1969). But see §354.125 RSMo (2001), which gives immunity to health services corporations for injuries resulting from



the rendering of health services to members and beneficiaries. *See generally Harrell v. Total Health Care*, 781 S.W.2d 58 (Mo. banc 1989) (holding that §354.125 is constitutional).

Sovereign immunity in effect; exceptions thereto. *See* §537.600 RSMo (2001). Purchase of liability insurance and limits of liability. §537.610 RSMo (2001). Court holding §§537.600 & 537.610 RSMo (2001) constitutional. *Fantasma v. Kansas City Bd. Of Police*, 913 S.W.2d 388 (Mo. App. 1996). §537.610 does not violate equal protection. *Winston v. Reorganized School*, 636 S.W.2d 324 (Mo. banc 1982); *Richardson v. State Hwy. & Transp. Comm.*, 863 S.W.2d 876 (Mo. banc 1993).

All-risk personal property floater policy covered damage to carpeting caused by anti-moth spray; not within "refinishing, renovating or repairing" exclusion. *Harvey v. Switzerland*, 260 S.W.2d 342 (Mo. App. 1953).

Regarding standard automobile policies, primary liability is on owner's insurer not operator's insurer. *USF&G v. Safeco*, 522 S.W.2d 809 (Mo. banc 1975). *But see Electro Battery Mfg. v. Commercial Union*, 762 F. Supp. 844 (E.D. Mo. 1991).

#### LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Actions against Health Care Providers. All actions against physicians, hospitals, dentists, registered or licensed practical nurses, optometrists, podiatrists, pharmacists, chiropractors, professional physical therapists, and any other entity providing health care services and their employees for error, mistake, malpractice shall be brought within two years of the date of occurrence, except that a minor under the age of 18 has until age twenty to bring action. §516.105 RSMo (2001).

Action for foreign object left in patient to be brought within two years of discovery of alleged negligence. *Id.*

Statutory limitation period for actions against health care providers not applicable to minors. *Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7 (Mo. banc 1986); *cf. Hodges v. Southeast Missouri Hosp.*, 963 S.W.2d 354 (Mo. App. 1998). *But see Bregant v. Fink*, 724 S.W.2d 337 (Mo. App. 1987), statute of limitations not tolled for minor's wrongful death action, because wrongful death action is limited by its own statute. *See* §§537.080 & 537.100 RSMo (2001). Filing application for wrongful death settlement by decedent's legitimate son commenced action and tolled statute of limitations with re-

gard to claims by decedent's putative children. *Snead v. Zephyr Transport*, 819 S.W.2d 776 (Mo. App. 1991).

Passenger's action against estate of host held "demand" within probate law and barred after one year. *Helliker v. Bram*, 277 S.W.2d 556 (Mo. 1955). *See* §473.444 RSMo (2001).

Wrongful death action commenced within one year after voluntary nonsuit not barred. *Tice v. Milner*, 308 S.W.2d 697 (Mo. 1957).

Wrongful death action for medical malpractice governed by three year wrongful death statute, not two year medical malpractice statute, *Gramlich v. Travelers*, 640 S.W.2d 180 (Mo. App. 1982).

Where spouse and minor child of decedent fail to bring cause of action for wrongful death within one year, due to fact defendant was nonresident of Missouri and could not be served, statute of limitations tolled and did not deprive spouse and child of cause of action. §§537.080 & 537.100 RSMo (2001).

Where spouse settled with driver and owner of car that killed her husband without having filed suit, then made claim against liability insurance company five years later, she was not "legally entitled to recover" from the tort-feasors because three-year wrongful death statute of limitations had passed and she could not satisfy condition to coverage under insurance contract even though suit with insurance company was within ten-year statute of limitations. *Baumgartel v. American Family*, 29 S.W.3d 416 (Mo. App. 2000).

Third party action in contribution not barred where statute of limitations had expired on underlying claim. *General Electric v. Gaertner*, 666 S.W.2d 764 (Mo. banc 1984). *See also State Ex. Rel. Hilker v. Sweeney*, 877 S.W.2d 624 (Mo. banc 1994).

Where Missouri insured entered into Ohio contract of insurance with Ohio fraternal beneficiary association insurer, where provision provided suit must be brought within six months after rejection of claim, court held six month limitation void as against Missouri public policy where Ohio had no such limitation. *Asel v. Order of United Comm'l Travelers*, 197 S.W.2d 639 (Mo. banc 1946); *but see Hayde v. Womach*, 707 S.W.2d 839 (Mo. App. 1986); *Frost v. Liberty Mut.*, 828 S.W.2d 915 (Mo. App. 1992).

In case of continuing tort, e.g. failure of employer to provide employee with adequate respirator while sandblasting and painting, was held that statute of limitations begins to run when disease is discovered, when unsafe conditions are removed, or when employee quits work, whichever is earliest. *Farrar v. St. Louis-San Francisco Ry.*, 235 S.W.2d 391 (Mo. 1950). *But see EL-*

*more v. Owens-Illinois*, 673 S.W.2d 434 (Mo. banc 1984); *see generally* §516.100 RSMo (2001).

### MALPRACTICE

*See* §516.105 RSMo (2001) for applicable statute of limitations period.

Testimony by one of two physicians that failure of resident doctor employed by partnership to examine two-year-old x-ray in order to identify location of rib lesion was not good medical practice; question whether or not this constituted negligence was for jury in medical malpractice action. *Smith v. Courter*, 575 S.W.2d 199 (Mo. App. 1978).

Standard of care for determination of negligence is national standard, rejecting "locality rule." *Gridley v. Johnson*, 476 S.W.2d 475 (Mo. 1972); *see also* *Hurlock v. Park Lane*, 709 S.W.2d 872 (Mo. App. 1985).

Chapter 538 RSMo, enacted in 1986, caps non-economic loss at \$350,000 (adjusted for cost of living), structures future awards above \$100,000, and requires expert affidavit. Constitutionality upheld. *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. banc 1992).

### NEGLIGENCE

*See* Law Digest Tables.

*See* "AUTOMOBILES" and "CONTRIBUTION."

Attractive Nuisance. Liability based on foreseeability rather than allurements. *Glastris v. Union Electric Co.*, 542 S.W.2d 65 (Mo. App. 1976); *Miller v. River Hills Development*, 831 S.W.2d 756 (Mo. App. 1992).

Comparative Negligence. Pure comparative negligence, in accordance with Uniform Comparative Fault Act, is adopted to determine respective liability of parties for damages arising from collision. *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. banc 1983). Doctrines of contributory negligence, last clear chance and humanitarian negligence are supplanted with comprehensive system of comparative fault and application of comparative fault is effective in cases where trial begins after 1-31-84. *Id.* Comparative fault does not apply to strict products liability cases. *Id. cf. Egelhoff v. Holt*, 875 S.W.2d 543 (Mo. banc 1994); §537.765 RSMo (2001).

Imputed Negligence. Negligence of operator not imputed to passenger. *Semar v. Kelly*, 176 S.W.2d 289 (Mo. 1943); nor husband to wife. *Sloan v. Farmer*, 168 S.W.2d 467 (Mo. App. 1943); nor parent to child. *Grab v. Davis*, 109 S.W.2d 882 (Mo. App. 1937). In suit by bailor of personal property against third party for damages to that property while in possession of bailee, neg-

ligence of bailee is not imputed to bailor to form basis of contributory negligence defense, absent some element of agency or partnership. *Rafter v. Riggs*, 792 S.W.2d 68 (Mo. App. 1990). Negligence of driver of automobile will be imputed to owner where latter had right of control over automobile. *James v. Berry*, 301 S.W.2d 530 (Mo. App. 1957).

Landlord and Tenant. Landlord not liable for injury to tenant or tenant's invitee unless dangerous condition was known to landlord, unknown to tenant and not discoverable by tenant through ordinary care. *Davidson v. Allen*, 798 S.W.2d 224 (Mo. App. 1990). Landlord owes duty to tenant to make common areas reasonably safe. *Jackson v. Ray Kruse Constr.*, 708 S.W.2d 664 (Mo. banc 1986), *overruled on other grounds by Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852 (Mo. banc 1993). Landlord not strictly liable for latent defects absent actual or constructive knowledge but does have a duty to make leased areas under landlord's control reasonably safe. *Kilmer v. Browning*, 806 S.W.2d 75 (Mo. App. 1991). Comparative fault modifies common law relationship between retailer and business invitees in that invitee no longer required to show that she did not know and by using ordinary care could not have known of unsafe condition. *Cox v. J.C. Penney*, 741 S.W.2d 28 (Mo. banc 1987); *See also* M.A.I. 22.07 (1991 Revision); *cf. Harris v. Niehaus*, 857 S.W.2d 222 (Mo. banc 1993); *Seymour v. Lakewood Hills Ass'n*, 927 S.W.2d 405 (Mo. App. 1996). Neither owner nor occupant of land is insurer of business invitee's safety. *Moran v. Hartenbach*, 423 S.W.2d 53 (Mo. App. 1967). Possessor of land owes duty of reasonable care to invitee including duty to warn of dangerous conditions not likely discoverable by invitee; *Nickerson v. Moberly Foods*, 781 S.W.2d 87 (Mo. App. 1989), or duty to eliminate the condition. *Duren v. Kunkel*, 814 S.W.2d 935 (Mo. banc 1991). Owner or occupier has duty to warn firemen fighting fire of hidden danger. *Bartels v. Continental Oil*, 384 S.W.2d 667 (Mo. banc 1964).

Parental immunity upheld. *Stevens v. Scott*, 706 S.W.2d 278 (Mo. App. 1986).

Unemancipated minor child's tort suit against mother's estate allowed. *Brennecke v. Kilpatrick*, 336 S.W.2d 68 (Mo. banc 1960). Doctrine of intra-family immunity expires upon death of person protected and does not extend to decedent's estate. *Id.*

Liquor Liability/Dram Shop. Liability only in limited circumstances for sale to minors or obviously intoxicated persons. §537.053 RSMo (2001). *See also* *Andres v. Alpha Kappa*, 730 S.W.2d 547 (Mo. banc 1987). *But see* *Nisbet v. Bucher*, 949 S.W.2d 111 (Mo. App. 1997). Statutory restriction authorizing a claim only where liquor license has been convicted or suspended



violated Missouri constitution. *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000). Employer which provided free drinks at company party had no liability for death which occurred when an intoxicated employee's automobile struck a pedestrian. *McClure v. McIntosh*, 770 S.W.2d 406 (Mo. App. 1989).

Proximate Cause. See *Thebeau v. Thebeau*, 324 S.W.2d 674 (Mo. banc 1959); *Love v. Deere*, 684 S.W.2d 70 (Mo. App. 1985); *Vann v. Town Topic*, 780 S.W.2d 659 (Mo. App. 1989); *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852 (Mo. banc 1993); *Van Vacter v. Hierholzer*, 865 S.W.2d 355 (Mo. App. 1993). Intervening cause. *Plummer v. Dace*, 818 S.W.2d 317 (Mo. App. 1991); *Dale v. Edmonds*, 819 S.W.2d 388 (Mo. App. 1991).

Res Ipsa Loquitur Doctrine. See *Leisure v. J. A. Bruening*, 315 S.W.2d 705 (Mo. 1958). Fact that seller had superior knowledge of method of repair and control at time of repair of tractor and tractor continued to malfunction did not satisfy the requirements of res ipsa loquitur and allow an inference of negligent repair. *Grus v. Patton*, 790 S.W.2d 936 (Mo. App. 1990). But see *Eversole v. Woods Acquisition*, 135 S.W.3d 425 (Mo App. 2004).

Rescue Doctrine Recognized. *National Dairy Products Corp. v. Freschi*, 393 S.W.2d 48 (Mo. App. 1965) (overruled on other grounds); *Lowrey v. Horvath*, 689 S.W.2d 625 (Mo. banc 1985). Superseded by statute in *Allison v. Sverdrup & Parcel*, 738 S.W.2d 440 (Mo. App. 1987).

Privity of contract between plaintiff lessee of truck and defendant repair company, not requisite in negligence recovery. *Central v. Westfall G.M.C.*, 317 S.W.2d 841 (Mo. App. 1958).

Sudden Emergency. Emergency may be considered in determining reasonableness of action. *Cowell v. Thompson*, 713 S.W.2d 52 (Mo. App. 1986).

## NO-FAULT INSURANCE

Missouri does not recognize "no-fault" insurance.

## PENALTY AND ATTORNEYS' FEES

§375.420 RSMo (2001) provides for penalty of 20% of first \$1,500 of loss and 10% of amount of loss in excess of \$1,500 and reasonable attorney's fee for vexatious refusal to pay claim.

Insurer has right to defend suit with all weapons at its command (without incurring liability under §375.420 RSMo (2001)), so long as it has reasonable ground to believe its defense is meritorious. *Loulos v. United Security*, 350 S.W.2d 87 (Mo. App. 1961). To support im-

position of an award for vexatious refusal to pay, an insured must show that insurer's refusal to pay was willful and without reasonable cause, as facts would appear to a reasonable, prudent person. *DeWitt v. American Family*, 667 S.W.2d 700 (Mo. banc 1984); *Howard Constr. v. Teddy Woods Constr.*, 817 S.W.2d 556 (Mo. App. 1991); *Russell v. Farmers*, 834 S.W.2d 209 (Mo. App. 1992).

Recovery of attorneys' fees from adverse party as part of costs or expenses provided for an indemnity bond is not allowed, absent statute or provision in bond expressly authorizing such recovery. *Prudential v. Goldsmith*, 192 S.W.2d 1 (Mo. App. 1945); *David Ranken Institute v. Boykins*, 816 S.W.2d 189 (Mo. banc 1991), overruled on other grounds by *Alumex Foils v. St. Louis*, 939 S.W.2d 907 (Mo. banc 1997); but see *Springfield v. Events Pub*, 951 S.W.2d 366 (Mo. App. 1997).

Statute providing damages and attorneys' fees for vexatious refusal to pay loss is only for benefit of insured, not his judgment creditors. *Corder v. Morgan*, 195 S.W.2d 441 (Mo. 1946).

Statutory penalty for vexatious refusal to pay is limited to actions ex contractu. *Zumwalt v. Utilities*, 228 S.W.2d 750 (Mo. 1950). See also *Rigby v. Boatmen's Bank*, 713 S.W.2d 517 (Mo. App. 1986).

§375.420 RSMo (2001), providing penalty for insurer's unreasonable refusal to pay is constitutional. *Callahan v. Connecticut General*, 207 S.W.2d 279 (Mo. 1947).

Insurer's refusal to pay is or is not vexatious according to situation as presented to insurer at time it was called upon to pay; merely because judgment after trial is adverse to insurer's contention is no reason for inflicting penalty. *Adams v. State Auto*, 265 S.W.2d 738 (Mo. App. 1954).

§375.420 RSMo (2001) is applicable to suits on surety bonds on public works contracts, but not to declaratory judgment actions. *Phoenix v. Appleton*, 296 F.2d 787 (8th Cir. 1961); *Hawkeye v. Davis*, 277 F.2d 765 (8th Cir. 1960).

Where insured assigned his interest in truck and insurance to mortgagee after collision and thereafter settled with insurer, settlement was not binding on mortgagee who was allowed his attorneys' fees for vexatious refusal to pay. *Brown v. State Auto*, 265 S.W.2d 741 (Mo. App. 1954), but see *Semo Motor Co. v. National Mut. Ins. Co.*, 383 S.W.2d 158 (Mo. App. 1964). Where insured claims more than is due, insurer need not tender amount due and is not liable for vexatious refusal to pay. *Boenzle v. USF&G*, 258 S.W.2d 938 (Mo. App. 1953),

distinguished by *Yankoff v. Allied Mut. Ins. Co.*, 289 S.W.2d 471 (Mo. App. 1956).

Attorney's fees restricted under §375.420 RSMo (2001) to such services performed after vexatious refusal and up to and including time tender was made by insurance company. *Willis v. American Nat'l*, 287 S.W.2d 98 (Mo. App. 1956).

Legitimate refusal to pay by insurer may be based not only on fact of liability but also on extent of liability. *Bechtolt v. Home*, 322 S.W.2d 872 (Mo. 1959).

If insurer was vexatious and recalcitrant, the existence of litigable issue will not preclude insurer's liability for vexatious refusal to pay. *Mears v. Columbia*, 855 S.W.2d 389 (Mo. App. 1993). Refusal to pay insurance claim, based on suspicion without substantial fact to support suspicion is vexatious. *Laster v. State Farm*, 693 S.W.2d 195 (Mo. App. 1985).

### PRIVILEGED COMMUNICATIONS

Attorney/Client. Codified at §491.060 (3) RSMo (2001). The privilege operates to protect confidential communications between client and attorney regarding representation. *In re Marriage of Hershewe*, 931 S.W.2d 198 (Mo. App. 1996).

Insurer/Insured. Certain communications between insurer and insured are protected from disclosure by privilege. See *Cain v. Barker*, 540 S.W.2d 50 (Mo. banc 1976); but see *Brantley v. Sears*, 959 S.W.2d 927 (Mo. App. 1998).

Clergy/Penitent. Codified at §491.060 (4) RSMo (2001).

Doctor/Patient. Codified at §491.060 (5) RSMo (2001).

Waiver. Waiver must be voluntary. *Smith v. Smith*, 839 S.W.2d 382 (Mo. App. 1992).

### PRODUCTS LIABILITY

See Missouri Tort Reform Act - §537.760 *et seq.* RSMo (2001) - effective July 1, 1987.

Negligence, strict liability, or breach of an express or implied warranty are viable theories in product liability cases. *Ragland Mills v. General Motors*, 763 S.W.2d 357 (Mo. App. 1989); *Linegar v. Armour of America*, 909 F.2d 1150 (8th Cir. 1990).

A bystander who did not purchase or use defective product, may recover under strict liability in products liability. *Giberson v. Ford Motor*, 504 S.W.2d 8 (Mo. 1974), see also *Jeannelle v. Thompson Medical*, 613 F. Supp. 346 (E.D. Mo. 1985).

For products liability case to be properly submitted to jury under Missouri law, "there must be proof which would warrant a finding that the product was defective and therefore dangerous when put to a use reasonably anticipated. Such proof may be circumstantial as well as direct. However, a verdict may not rest entirely on guess or speculation." *Maryland Cas. v. Dondlinger & Sons*, 420 F.2d 1368, 1371 (8th Cir. 1970).

Strict liability imposes on the manufacturer a duty not to introduce defective products into commerce. *Peters v. Johnson & Johnson*, 783 S.W.2d 442 (Mo. App. 1990). Introduction of a defective product into commerce is the only conduct relevant to the manufacturer's breach of duty. *Id.*

In strict liability case, term "use reasonably anticipated" connotes objectivity and more accurately announces the foreseeability principle than "use intended." *Rogers v. Toro*, 522 S.W.2d 632 (Mo. App. 1975); See also *Earll v. Consolidated*, 714 S.W.2d 932 (Mo. App. 1986).

To recover under products liability, plaintiff must establish the defendant's product directly contributed to the injury and that the product of each manufacturer sought to be held liable was a substantial factor in the harm. *Hagen v. Celotex*, 816 S.W.2d 667 (Mo. banc 1991). Comparative fault applicable to action in strict liability. See §537.765 RSMo (2001).

"State of Art" shall be a complete defense and relevant evidence only in an action based upon strict liability for failure to warn of the dangerous condition of a product. §537.764 RSMo (2001).

No recovery in strict liability in tort where only damage is to product itself. *Sharp Bros. v. American Hoist & Derrick*, 703 S.W.2d 901 (Mo. banc 1986); *Clayton Center v. W.R. Grace*, 861 S.W.2d 686 (Mo. App. 1993).

In products liability lawsuit, school district was entitled to bring action against manufacturer for cost of replacing asbestos ceiling product and other items of personal property contaminated by asbestos-laden ceiling material. *School Dist. of Independence v. U.S. Gypsum*, 750 S.W.2d 442 (Mo. App. 1988).

Discussion of adequacy of warning placed on label of manufacturer's product. See *Bean v. Ross*, 344 S.W.2d 18 (Mo. banc 1961); *Arnold v. Ingersoll-Rand*, 834 S.W.2d 192 (Mo. banc 1992).

### RELEASE

See Law Digest Tables.



Payment of less than amount due insured will not support release in absence of independent consideration. *Noble v. Missouri Ins.*, 204 S.W.2d 446 (Mo. App. 1947). Forbearance to sue or some detriment is sufficient consideration to support release. *Lugena v. Hanna*, 420 S.W.2d 335 (Mo. 1967).

Unless required by statute, release need not be in writing. *Ensminger v. Burton*, 805 S.W.2d 207 (Mo. App. 1991).

There was insufficient evidence of fraud in obtaining release from liability for personal injuries to justify setting aside release; injured person was free to make independent inquiry as to extent of injuries from automobile collision and was not in confidential relationship with defendants warranting reliance on defendant's representations. *Wood v. Robertson*, 245 S.W.2d 80 (Mo. 1952).

No fraud, misrepresentation or duress when release was signed by motorist for damaged automobile after allegedly being told by company spokesperson to sign release and doctor bills would be "taken up at a later date." *Wolf v. St. Louis Public Svc.*, 357 S.W.2d 950 (Mo. App. 1962).

Compromise settlement of disputed worker's compensation claim may not be set aside in absence of proof of misrepresentation. *Trokey v. U.S. Cartridge*, 222 S.W.2d 496 (Mo. App. 1949).

Release of insured's claim for injuries received or illness contracted on or about stated date held not to bar recovery for subsequent illness. *Oonk v. Monarch*, 199 S.W.2d 416 (Mo. App. 1947).

A release obtained by fraudulent representation is either void or voidable, depending on the nature of fraud. *Kestner v. Jakobe*, 412 S.W.2d 205 (Mo. App. 1967).

Release purporting to extend to all claims arising from incident, including claims against unspecified strangers to the agreement, does not necessarily bar suits against an unspecified third party. *Normandy Orthopedics v. Crandall*, 581 S.W.2d 829 (Mo. banc 1979).

"Reimbursement and Trust Agreement" policy provision providing insured holds all rights of recovery against tort-feasor in trust for insurer and which gives insurer lien to extent of its payment under medical payments clause was invalid as violation of rule prohibiting assignment of cause of action for personal injuries. *Jones v. Aetna*, 497 S.W.2d 809 (Mo. App. 1973). Insured's reservation of claim for medical expenses in insured's settlement agreement with tort-feasor did not bar insured's recovery for her medical expenses under medi-

cal payments clause of policy. *Id.*; see also *Bailey v. Aetna*, 497 S.W.2d 816 (Mo. App. 1973).

## REPRESENTATIONS AND WARRANTIES

In action upon automobile insurance policy, proof that car was mortgaged contrary to provision of policy rendered policy void and relieved insurer of liability thereon. *Day v. National Fire*, 264 S.W. 467 (Mo. App. 1924).

Misrepresentation shall not be material or render life insurance policy void unless matter misrepresented actually contributed to contingency or event on which policy became due and payable. §376.580 RSMo (2001); see *O'Maley v. Northwestern*, 95 S.W.2d 852 (Mo. App. 1936). Statute applies whether misrepresentations are fraudulent or innocent. *Bohm v. Fidelity*, 399 S.W.2d 450 (Mo. App. 1966). See §376.800 RSMo (2001) for individual accident and health policies. Warranty of any fact or condition made in application for insurance against loss by fire, tornado or cyclone shall be construed as representations only if not material to risk insured against. §§379.165 & 379.170 RSMo (2001).

Test for a material misrepresentation is whether or not the truthful answer would cause insurer to reject risk or charge higher premium. *American Standard v. Forsythe*, 915 F.2d 1212 (8th Cir. 1990). See also *Coots v. United Employers Federation*, 865 F. Supp. 596 (E.D. Mo. 1994). Insurer may avoid policy if application contains material misrepresentation which is incorporated by reference into policy. *State Farm v. Car/Bil*, 842 S.W.2d 128 (Mo. App. 1992).

Provision in policy insuring against loss of ring to effect that no other insurance was permitted, was express warranty by insured so that policy was voidable upon its breach. *Kossmehl v. Millers*, 185 S.W.2d 293 (Mo. App. 1945).

False representations void insurance policy conditioned on truth of material declarations contained therein even if innocently made. *Cass Bank v. National*, 326 F.2d 308 (8th Cir. 1964). Proof of fraudulent misrepresentation by insured in application requires insurer to demonstrate that insured knowingly made false statement with intent to deceive. *State Farm v. Car/Bil*, 842 S.W.2d 128 (Mo. App. 1992).

Material misrepresentations, although made intentionally, mistakenly, or in good faith, make automobile policy voidable. *Coots v. United Employers Federation*, 865 F. Supp. 596 (E.D. Mo. 1994). See also *Folk v. Countryside*, 686 S.W.2d 882 (Mo. App. 1985).

Where insured made false representations through agent concerning absence of prior cancellations and ab-

sence of physical defects in automobile liability insurance policy application, policy was rendered void ab initio, regardless of whether applicant had actual knowledge of false representations. *Minich v. M.F.A. Mut.*, 325 S.W.2d 56 (Mo. App. 1959). *But see Folk v. Countryside*, 686 S.W.2d 882 (Mo. App. 1985), where insurer was required to show insured knew his representation was false in insurer's fraudulent misrepresentation defense.

### SERVICE OF PROCESS

Upon Non-Resident Motorists. See "AUTOMOBILES."

Process may be served on foreign insurance companies by delivering summons to director of the division of Insurance. §375.906 RSMo (2001).

Statute requiring foreign insurance company to designate director of division of insurance as agent for service of process held constitutional. *Saunders v. London*, 76 F.2d 926 (8th Cir. 1935).

Statute providing service of process on foreign insurers by serving director of division of insurance does not authorize such service in causes of action accruing to and instituted by citizens of other states on policies issued in such states. *Crabtree v. Aetna*, 111 S.W.2d 103 (Mo. 1937).

### SUBROGATION

Except with an uninsured motorist, an insurer may not acquire the insured's right against a tort-feasor either by subrogation or assignment upon payment of medical bills. *Jones v. Aetna*, 497 S.W.2d 809 (Mo. App. 1973). Missouri public policy does not allow assignment or subrogation of personal injury claims to insurer. *Gilmore v. Attebery*, 899 S.W.2d 164 (Mo. App. 1995) distinguished by *Byers v. Auto-Owners Ins. Co.*, 119 S.W.3d 659 (Mo. App. S.D. 2003). Insured, who has released joint tort-feasor, thus defeating insurer's right of subrogation, may not recover under automobile collision policy. *Knight v. Calvert*, 268 S.W.2d 53 (Mo. App. 1954). See also *Community Title v. Safeco*, 795 S.W.2d 453 (Mo. App. 1990). Rule does not apply where third-party tort-feasor is aware of interest of insurer and settles with insured for amount which insurer is obligated to pay. *Dickhans v. Missouri Property*, 705 S.W.2d 104 (Mo. App. 1986); *Marshall v. Northern Assur.*, 854 S.W.2d 608 (Mo. App. 1993). Accident victim's automobile insurer was not prejudiced by insured's settlement with tort-feasor's insurer because victims obtained absolute policy limits. *Tegtmeyer v. Snellen*, 791 S.W.2d 737 (Mo. App. 1990). See also *Gulf v. American Family*, 768 F. Supp. 272 (E.D. Mo. 1991), *aff'd*, 962 F.2d 834 (8th Cir. 1992).

Insured who assigned entire claim to insurer upon being paid all but \$25 deductible could not maintain independent action for \$25. *General v. Young*, 212 S.W.2d 396 (Mo. 1948); *Steele v. Goosen*, 329 S.W.2d 703 (Mo. 1959). But in absence of assignment of entire claim or satisfaction and release of claim insured can bring independent action as real party in interest despite prior full payment to him for damages by insurer. *Hayes v. Jenkins*, 337 S.W.2d 259 (Mo. App. 1960).

Conversation between insured's attorney and insurer that related to insurer pursuing litigation in own name after insured's suit was complete was not an assignment. *Farmers v. Effertz*, 795 S.W.2d 424 (Mo. App. 1990).

Insurer, who has been assigned entire property damage claim by insured, can sue third party tort-feasor for amount it paid insured if third party settled with insured knowing of insurer's subrogation right and without first obtaining insurer's consent to settlement; but if third party has no knowledge or notice of insurer's subrogation right, and its release with insured purports to cover all damages, insurer cannot recover from third party, and insured should repay insurer amount of collision payment. *Farm Bureau v. Anderson*, 360 S.W.2d 314 (Mo. App. 1962).

Under Workmen's Compensation Act, employer receives indemnity, not right of subrogation, where employee suffers injuries and is entitled to recover workmen's compensation. *O'Hanlon Reports v. Needles*, 360 S.W.2d 382 (Mo. App. 1962). See also *Consolidated Freightways v. Batton*, 673 S.W.2d 96 (Mo. App. 1984); *Rogers v. Home Indem.*, 851 S.W.2d 672 (Mo. App. 1993). Under worker's compensation statute which subrogates to employer the rights employee has against a third person who is liable to employee for the injury, an uninsured motorist carrier obligated to pay benefits to an employee is not a third person. *Barker v. Palmarin*, 799 S.W.2d 117 (Mo. App. 1990).

### SUICIDE

Presumption against suicide where there is evidence of violent death but only circumstantial or no evidence at all that the death was accidental or intentional, but no presumption when facts show death by suicide and there are no facts to show death was accidental. *Per-ringer v. Metropolitan Life*, 244 S.W.2d 607 (Mo. App. 1951). Presumption against suicide does not raise presumption that death was accidental. *Id.*

Missouri law provides, suicide by insured while insane constitutes "accidental death" within meaning of double indemnity provisions of life policy. *Sturm v. Washington Nat'l Ins.*, 208 F.2d 97 (8th Cir. 1953).



Suicide committed by insured while insane comes within accidental death provision in policies that exclude death resulting from or by contribution of disease or bodily or mental infirmity. *Sommer v. Metropolitan Life*, 449 S.W.2d 644 (Mo. banc 1970). See also *Garmon v. General American*, 624 S.W.2d 42 (Mo. App. 1981). Suicide is no defense to life insurance policy unless it can be shown that insured contemplated suicide at time he made application for policy. §376.620 RSMo (2001).

### THEFT

To recover for a "theft" under automobile theft policy, the criminal intent to permanently deprive the owner of his property must be present. *Eiswirth v. Glenn Falls*, 240 S.W.2d 973 (Mo. App. 1951). See also *Turnbough v. Farmers*, 720 S.W.2d 752 (Mo. App. 1986); *Spell v. Farm Bureau*, 871 S.W.2d 57 (Mo. App. 1994).

An insurer has the duty to prove an exception to a general liability clause. *Walters v. State Farm*, 793 S.W.2d 217 (Mo. App. 1990).

Provisions of theft policy providing limited coverage for unscheduled personal property routinely kept "at residences other than principal residence of insured" does not cover such property when kept at residence of third party. *Cole v. Kansas City Fire Ins.*, 254 S.W.2d 304 (Mo. App. 1953).

Purchase of auto by forged check not theft within meaning of policy covering loss of automobiles through "theft." *Cox v. World Fire*, 239 S.W.2d 538 (Mo. App. 1951). See also *Hughes v. Great Am. Ins. Co.*, 427 S.W.2d 266 (Mo. App. 1968).

### WAIVER AND ESTOPPEL

Waiver and estoppel cannot be used to create coverage for rights that are not found in the insurance contract. *Young v. Ray America*, 673 S.W.2d 74 (Mo. App. 1984); But waiver and estoppel may bar a defense to a right the insured once had. *Allstate v. Northwestern*, 581 S.W.2d 596 (Mo. App. 1979).

Insurer must act promptly upon discovery of facts which give rise to right to rescind or cancel policy otherwise right may be waived. *Walters v. Farmers*, 829 S.W.2d 637 (Mo. App. 1992).

Insurer may waive defenses by its conduct. *Farm Bureau v. Crain*, 731 S.W.2d 866 (Mo. App. 1987). But see *Safeco v. Marion*, 676 F. Supp. 197 (E.D. Mo. 1987); *Noll v. Shelter*, 774 S.W.2d 147 (Mo. banc 1989); cf. *Hammond v. Missouri Property*, 731 S.W.2d 360 (Mo. App. 1987). Reliance by insurer on exclusion to policy must be pled as affirmative defense or it will constitute a waiver, subject to trial court's application of

Rule 55.33 allowing leave to amend only "when justice so requires." *Century Fire Sprinklers v. CNA/Transportation*, 23 S.W.3d 874 (Mo. App. 2000). Insurer cannot be prevented from asserting a defense if there is a legitimate reason it did not know and could not know of defense. *American Standard v. Forsythe*, 915 F.2d 1212 (8th Cir. 1990).

Insurer, having denied liability on one ground, is estopped from denying liability on a different ground. *Stone v. Waters*, 483 S.W.2d 639 (Mo. App. 1972); but see *Brown v. State Farm*, 776 S.W.2d 384 (Mo. banc 1989); *Shahan v. Shahan*, 988 S.W.2d 529 (Mo. banc 1999); see e.g., *Hounihan v. Farm Bureau*, 523 S.W.2d 173 (Mo. App. 1975) where the court held insurer was foreclosed from later stating other grounds for denying liability on fire policy when it first denied liability on the ground that insured had committed arson.

Applicant for policy may rely on agent's apparent and ostensible powers through his issuance of binder. *Voss v. American Mut.*, 341 S.W.2d 270 (Mo. App. 1960). But see *Summers v. Prudential*, 337 S.W.2d 562 (Mo. App. 1960). Broker with authority to issue binder does not mean he ceased to be solely the property owner's agent. *Secura v. Saunders*, 227 F.3d 1077 (8th Cir. 2000).

Insured's right under policy to have personal notice of cancellation may be waived by impliedly appointing an agent to receive notice for insured upon showing of strong evidence which clearly demonstrates such is the intention of the insured. *Farrar v. Mayabb*, 326 S.W.2d 337 (Mo. App. 1959).

Insurer in accident insurance policy waived strict notice and proof of death requirements in policy by sending wrong blanks and denying liability on ground proof did not establish any claim. *King v. Benefit*, 184 S.W.2d 793 (Mo. App. 1945).

Insurance company was estopped from denying liability for a breach of contract where insurance company had learned of the breach, but failed to return unearned premium. *Cox v. Owensville*, 185 S.W.2d 28 (Mo. App. 1945).

Return of premium is condition precedent to assertion of defense of forfeiture or invalidity of policy, but not to defense that insurer actually insured other property situated at another location, rather than property claimed to be insured. *H. & H. v. Cimarron*, 302 S.W.2d 39 (Mo. App. 1957).

Insurer did not waive defense of forfeiture for not providing proof in time when the insurer furnished blanks or received proof of claim without objection after expiration date set for proving claim. *Asel v. Order of*

*United Commercial Travelers*, 193 S.W.2d 74 (Mo. App. 1946), *aff'd*, 197 S.W.2d 639 (Mo. banc 1946).

Where household and personal effects were removed to warehouse with knowledge of insurer, in violation of policy provisions, and insurer did not cancel policy nor offer to return premium, forfeiture was waived. *Lowry v. American Eagle*, 260 S.W.2d 339 (Mo. App. 1953); *see also McKee v. Travelers*, 315 S.W.2d 852 (Mo. App. 1958).

Insurer was not estopped, nor did they waive right to deny coverage by defending action against insured as long as insurer had conflicting information from insured and information withheld amounted to deception; but where insurer has knowledge of non-coverage, insurer must obtain non-waiver or reservation of rights agreement. *Mistele v. Ogle*, 293 S.W.2d 330 (Mo. 1956).

Where liability insurer agreed that jury could return general verdict upon which monetary judgment could be entered, it was estopped from later objecting to way in which jury decided personal injury and property damages. *Winterton v. Van Zandt*, 351 S.W.2d 696 (Mo. 1961).

Where insurer had previously accepted premiums after due date, insurer was estopped denying coverage because payment was late. *Farley v. St. Charles Ins.*, 807 S.W.2d 168 (Mo. App. 1991).

Knowledge of insurer of unsound health of life policy applicant may be imputed when insurer is put on notice and inquiry or means of knowledge is known and accessible. *Winger v. General American*, 345 S.W.2d 170 (Mo. 1961).

Company did not waive household exclusion clause by defending action where it promptly notified insured in writing of exclusion and that its defense did not constitute waiver. *Hankins v. State Farm*, 379 S.W.2d 829 (Mo. App. 1964); *State Farm v. Zumwalt*, 825 S.W.2d 906 (Mo. App. 1992).

## WARRANTIES

See "REPRESENTATIONS AND WARRANTIES."

Breach of warranty in marine policy that insured would store yacht on shore, suspended the policy during breach, but did not forfeit policy, and insurer could make defense without returning paid premiums. *Schaefer v. Home*, 194 S.W.2d 718 (Mo. App. 1946).

Misrepresentation as to age in auto liability application was material and when warranty made thereto, recovery barred. *Gooch v. Motors Ins.*, 312 S.W.2d 605 (Mo. App. 1958).

Innocent material misrepresentation relied upon by insurer renders policy voidable. *Haman v. Pyramid Life*, 347 S.W.2d 449 (Mo. App. 1961).

## WORKERS' COMPENSATION

See Law Digest Tables.

In order to be "borrowed servant" employee must consent to work for special employer and actually enter and begin work of and for special employer under express or implied contract subject to control of special employer. *Crain v. Webster Elec.*, 568 S.W.2d 781 (Mo. App. 1978). *See also Erwin v. Polar Exp.*, 776 S.W.2d 458 (Mo. App. 1989).

Employer has right to choose treating physician, but may waive that right by failing to provide necessary medical aid upon notice of injury; employee may then choose the doctor. *Hendricks v. Motor Freight*, 570 S.W.2d 702 (Mo. App. 1978). *See also Smiley v. Foremost-McKesson*, 708 S.W.2d 330 (Mo. App. 1986).

Term "accident" as used in Missouri Worker's Compensation law is not limited to strains accompanied by slip or fall or where strain is unexpected or abnormal; injury must be "job related." *Wolfgeher v. Wagner Cartage*, 646 S.W.2d 781 (Mo. banc 1983). *See also Westergold v. Unitog-Holden*, 707 S.W.2d 456 (Mo. App. 1986); *Alexander v. D.L. Sitton Motor Lines*, 851 S.W.2d 525 (Mo. banc 1993).

"Accident" defined. *See* §287.020 RSMo (2001). *See also Kasl v. Bristol Care*, 984 S.W.2d 852 (Mo. banc 1999).

Intentional infliction of emotional distress claims against employer arising from coworkers acts are barred by Missouri's Workers' Compensation Law if they occur within scope of employee's employment. *See Miller v. Wackenhut*, 808 F. Supp. 697 (W.D. Mo. 1992). *But see Killian v. J&J Installers*, 802 S.W.2d 158 (Mo. banc 1991), employee may proceed with claim if injury is result of employer's intentional act.

