

# DIGEST OF INSURANCE LAW

## MONTANA

Courtesy of  
[Corette Pohlman & Kebe](#)  
Butte, Montana

### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

Courts of inferior or limited civil jurisdiction are justices', municipal, city, small claims, and water courts.

There must be at least one justice court in each county. M.C.A. §3-10-101. However, a Board of County Commissioners may create additional justice courts. *Id.* Have civil jurisdiction where amount in controversy does not exceed \$7000. M.C.A. §3-10-301.

Any city may have a city court. M.C.A. §3-11-101. Cities with population of 4,000 or more may have municipal court. M.C.A. §3-6-101. Municipal and city courts have exclusive jurisdiction of offenses involving City Ordinances (*See*, M.C.A. §§3-6-103, 3-11-103) and concurrent jurisdiction in some criminal matters with Justices of Peace. M.C.A. §3-11-102.

Small claims courts may be created by a Board of County Commissioners (see M.C.A. §3-12-103) and have original jurisdiction over certain actions not exceeding \$3000. M.C.A. §25-35-502.

Water courts adjudicate existing water rights. M.C.A. §3-7-101. "Water divisions" are presided over by a water judge. *Id.*

District Courts have civil, criminal and probate jurisdiction. M.C.A. §3-5-302. In civil matters they have original jurisdiction in all cases at law and in equity. *Id.* In criminal actions, they have jurisdiction in all cases amounting to felony and in misdemeanors not otherwise provided for. *Id.* They have appellate jurisdiction from all inferior courts within County. M.C.A. §3-5-303. State is divided into twenty-two judicial districts (see M.C.A. §3-5-101) with one or more Judge in each district. M.C.A. §3-5-102.

There are no separate Probate Courts. Probate jurisdiction is exercised by district court while sitting in probate. M.C.A. §3-5-302.

#### Appellate Court

Supreme Court is only Court of Appeals in this State (save and except appeals from Justice of Peace Courts and Police Courts to District Court), and Supreme Court is Court of last resort. Supreme Court has appellate jurisdiction extending to all cases in law and equity. M.C.A. §3-2-203. It has original jurisdiction to issue writs of mandamus, certiorari, prohibition, injunction, and habeas corpus; also has power to issue all other writs necessary and proper to complete exercise of its appellate jurisdiction. M.C.A. §3-2-202. Court is composed of seven Judges. M.C.A. §3-2-101.

Appeals are taken directly from District Courts to Supreme Court.

### LAW

#### Abbreviations

A.L.R. – American Law Reports.  
L.R.A. – Lawyers' Reports Annotated.  
M.C.A. – Montana Code Annotated, effective January 10, 1979.  
Mont. – Montana Reports.  
P. – Pacific Reporter.  
P.2d – Pacific Reporter, Second Series.  
P.3d – Pacific Reporter, Third Series.  
St. Rptr. – State Reporter.

### ACCIDENT AND HEALTH INSURANCE

See "DISABILITY"; "SUICIDE."

Definition Of Accident. *Dalbey v. Equitable*, 105 Mont. 587, 74 P.2d 432 (1937); *Terry v. National Farmers Union Life Ins. Co.*, 138 Mont. 333, 356 P.2d 975 (1960); *Riefflin v. Hartford Steam Boiler Inspection & Ins. Co.*, 164 Mont. 287, 521 P.2d 675 (1974); *Ike v. Jefferson Nat'l Life Ins. Co.*, 267 Mont. 396, 884 P.2d 471 (1994).

Double Indemnity. Governed by provisions of contract.



Notice and Proof of Loss. Compliance with requirements discussed. M.C.A. §§33-22-208 thru 33-22-210.

Test whether injury resulted from accident is “actual foreseeability.” *Dahl v. National Health & Life*, 148 Mont. 330, 420 P.2d 318 (1966) accident includes unintended results of intentional acts. *Northwestern v. Phalen et al.*, 182 Mont. 448, 597 P.2d 720 (1979); *Safeco Ins. Co. v. Tunkle*, 997 F. Supp. 1356 (D. Mont. 1998). Intentional acts are not excluded under an insurance policy unless the intentional act results in injuries which would be expected or intended. *Kinniburgh v. Safeco Ins. Co.*, 164 F. Supp. 2d 1213 (D. Mont. 2001); *Swanson v. Trinity Universal Ins. Co.*, 2006 Mont. Dist. LEXIS 447.

### ACCIDENTAL MEANS

Accidental deaths presumed in certain instances. *Dalbey v. Equitable*, 105 Mont. 587, 74 P.2d 432 (1937). See also, *New York Life v. Gamer*, 303 U.S. 161 (1938) (case arose out of Montana contract and is here mentioned because it states different rule than Montana court follows on presumptions). *Lewis v. New York Life*, 113 Mont. 151, 124 P.2d 579 (1942).

Death may be accident even if cause is unknown. *Ike v. Jefferson Nat'l Life Ins.*, 267 Mont. 396, 884 P.2d 471 (1994).

Mere presence of pre-existing disease no longer relieves insurer from liability. Recovery allowed if accident sets in motion chain of events leading to death, *Life Ins. Co. of North America v. Evans*, 195 Mont. 242, 637 P.2d 806 (1981), even if disease contributes to cause of death. Death by freezing. *Wills v. Midland*, 108 Mont. 536, 91 P.2d 695 (1939).

No distinction between “accident” and “accidental means.” *Dahl v. National Health & Life Ins.*, 148 Mont. 330, 420 P.2d 318 (1966).

### ADJUSTERS

“Adjuster” means a person who, on behalf of insurer, for compensation as independent contractor or as employee of independent contractor or for fee or commission, investigates and negotiates settlements of claims arising under insurance contracts or otherwise acts on behalf of insurer. M.C.A. §33-17-102.

Allowed to testify as expert in unfair claims settlement actions. *Fode v. Farmers Ins.*, 221 Mont. 282, 719 P.2d 414 (1986) (superseded by statute on other grounds).

Bound by agreements and representations made by adjusters acting within scope of their authority or colorable authority. Adjuster acts as agent of company and not insured. However adjuster held to represent insured as well as company in negotiating settlement of third party claim. *Selby v. Victoria*, 124 Mont. 321, 221 P.2d 423 (1950).

Adjusters are required to be licensed. M.C.A. §§33-17-301, 33-17-401, 33-17-1001, 33-17-1002. Licensing Requirements, M.C.A. §33-17-301.

### AGE

Age of majority is 18. M.C.A. §41-1-101.

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

### AGENTS AND BROKERS

Insurance broker is usually regarded as agent of insured. *Nautilus Ins. v. First Nat'l Ins. Inc.*, 254 Mont. 296, 837 P.2d 409 (1992). But see *Goit v. Aetna Life*, 300 Mont. 142, 2 P.3d 841 (2000); *Deonier v. Paul Revere*, 301 Mont. 347, 9 P.3d 622 (2000).

Knowledge of Agents. Any knowledge possessed by agent is imputed to company represented, including oral notice of loss. *Tynes v. Bankers Life*, 224 Mont. 350, 730 P.2d 1115 (1986), *overruled on other grounds by Sampson v. Nat'l Farmers Union & Prop. & Cas. Co.*, 333 Mont. 541, 144 P.3d 797 (2006).

Liability of Agent. Montana law requires client's request to procure insurance followed by agent's commitment to procure to put agent under “duty” to procure. *R.H. Grover, Inc. v. Flynn Ins. Co.*, 238 Mont. 278, 777 P.2d 338 (1989). Broker indemnified for negligent misrepresentation since agent of insurer. *Deonier v. Paul Revere*, 301 Mont. 347, 9 P.3d 622 (2000).

License and Regulations. Agents and solicitors of insurance are required to be licensed. M.C.A. §33-17-201. Agent liable to insured on contract only as provided in M.C.A. §28-10-702; *Budget v. Leighty*, 186 Mont. 368, 607 P.2d 1125 (1980).

### ARBITRATION

Montana has adopted Uniform Arbitration Act. Title 27, Chapter 5. Written agreement to submit existing controversy to arbitration is valid and enforceable except upon grounds existing at law or in equity for revocation of contract. M.C.A. §27-5-114 (1). Written agreement to submit to arbitration controversy arising between parties after agreement is made valid and enforceable except upon grounds existing at law or in equity for revocation



of contract. M.C.A. §27-5-114 (2). However M.C.A. §27-5-114 (2) does not apply to claims arising out of personal injury, whether tort or contract; or any agreement concerning or relating to insurance policies except those contracts between insurance companies; or any claims for workers' compensation. M.C.A. §27-5-114 (2).

Automobile insurance policy may require parties to submit to appraisal process to determine value of totaled vehicle in event of disagreement. *Garretson v. Mountain West*, 234 Mont. 103, 761 P.2d 1288 (1988); *Dunn v. Way*, 241 Mont. 208, 786 P.2d 649 (1990).

## ASSIGNMENT

See "FIRE INSURANCE."

## ATTORNEYS

Appointment and Authority is set out in M.C.A. §§37-61-201 thru 37-61-215.

Conflict of Interest. Defined by code M.C.A. §§37-61-412 thru 37-61-415. Rules of Professional Conduct, Rules 1.7-1.13.

Legal Malpractice. Cause of action for attorney malpractice, which is professional negligence action; there must be showing that attorney owed client a duty of care, that there was a breach of this duty by failure to use reasonable care and skill, and the breach was proximate cause of client's injury resulting in damages. *Mills v. Mather*, 270 Mont. 188, 890 P.2d 1277 (1995).

Fees. Circumstances to be considered in determining compensation to be recovered by attorney are amount and character of services rendered, labor, time and trouble involved, character and importance of litigation in which services were rendered. Amount of money or value of property to be affected, professional skills and experience called for, character and standing in prof. of attorney and results secured. *Talmage v. Gruss*, 202 Mont. 410, 658 P.2d 419 (1983); *Campbell v. Bozeman Investors*, 290 Mont. 374, 964 P.2d 41 (1998).

Client. The insured is the sole client of defense counsel and any prior approval of insurer before litigation decisions are made is a breach of rules of professional conduct. *In the Matter of the Rules of Professional Conduct and Insurer Billing Rules and Procedures*, 299 Mont. 321, 2 P.3d 806 (2000). Also, any third party audits without consent from insured violates client confidentiality. *Id.*

## AUTOMOBILES

See Law Digest Tables.

See "NEGLIGENCE."

Age. 16; 15 with driver's education. M.C.A. §61-5-105. Responsibility for minor operator. M.C.A. §61-5-108.

Agency. Operation by independent contractor, what constitutes. *Greening v. Gazette*, 108 Mont. 158, 88 P.2d 862, (1939) 53 A.L.R.2d 183; *Hartford Acc. & Indem. Co. v. Hodges*, 261 F. Supp. 614 (D. Mont. 1966). Failure of Finance Company to insure as promised. Liability. *Early Wine v. C.I.T. Corp.*, 110 Mont. 295, 101 P.2d 59 (1940). Corporate owner of car liable for negligence of servant in permitting inexperienced person to operate auto. *Kelly v. Lowney*, 113 Mont. 385, 126 P.2d 486, (1942) 31 A.L.R.2d 1445, 1457.

Comparative Negligence. See Law Digest Tables.

Motor vehicle insurance required. M.C.A. §61-6-301. See Law Digest Tables.

Driving Under Influence. Person's ability to operate vehicle diminished by taking alcohol, drugs or combination. Blood alcohol level of .04 or less - infer not under influence; Blood alcohol level in excess of .04 but less than .08 - no inference; level of .08 or higher - infer under the influence. M.C.A. §61-8-401. The inference is rebuttable. *Id.*

Family Purpose Doctrine. Montana has rejected the family purpose doctrine. *Clawson v. Schroeder*, 63 Mont. 488, 208 P.2d 924 (1922); *Smith v. Babcock*, 157 Mont. 81, 482 P.2d 1014 (1971).

Guest Statute Repealed. Operator of automobile is liable for injuries to all passengers caused by his ordinary negligence.

Negligent entrustment is liability theory applicable to vehicle owner. *Bahm v. Dormanen*, 168 Mont. 408, 543 P.2d 379 (1975); *McGinnis v. Hand*, 293 Mont. 72, 972 P.2d 1126 (1999).

Last Clear Chance. Montana Supreme Court has not approved or disapproved of validity of doctrine under comparative negligence statute. *Payne v. Sorenson*, 183 Mont. 323, 599 P.2d 362 (1979).

Certificates of Ownership. M.C.A. §61-3-201.

Motorized Bicycle defined, M.C.A. §61-1-101. Bicycle defined, M.C.A. §61-8-102. License required when, M.C.A. §61-5-102.

Seat Belts. Seat belts required but failure to use is not evidence of negligence. M.C.A. §§61-13-103 and 106. *Califato v. Gerke*, 258 Mont. 68, 885 P.2d 121 (1992).



Service of Process Upon Non-Resident Motorists. Use of highways by non-resident constitutes appointment by him of Secretary of State as process agent. M.C.A. §§25-3-601 and 25-3-602.

Occupancy of vehicle determined by "reasonable connection" test. *Sayers v. SAFECO Ins. Co. of America*, 192 Mont. 336, 628 P.2d 659 (1981); *Dakota Fire Ins. Co. v. Oie*, 291 Mont. 486, 968 P.2d 1126 (1998).

"Sudden Emergency" doctrine and its limited application discussed in *Eslinger v. Ringsby Truck Lines, Inc.*, 195 Mont. 292, 636 P.2d 254 (1981); *Craig v. Schell*, 293 Mont. 323, 975 P.2d 820 (1999).

Family member exclusion valid. M.C.A. §61-6-301.

Speed Limit. M.C.A. §61-8-303. Effective May 28, 1999: interstate highways 75 mph outside urban area, 65 mph within urban area of 50,000 plus people; all other highways, 70 mph daytime, 65 mph nighttime. Highway 93 between Idaho and Canadian border is always 65 mph. Special restrictions on trucks and truck tractors, M.C.A. §61-8-312.

Trailers/Weight Limits. Maximum weight allowed established in M.C.A. §61-10-107.

Uninsured coverage must be offered but can be waived by insured. M.C.A. §33-23-201. Underinsured offset provision may be held ambiguous, and as such, invalid and against public policy. *Hardy v. Progressive Specialty Ins.*, 315 Mont. 107, 67 P.3d 892 (2003). Purpose and construction of underinsured discussed in *Hardy v. Progressive Specialty Ins.*, *Supra*.

Stacking. By definition, underinsured motorist coverage is personal and portable. *Id.* Therefore, one can reasonably expect coverage up to the aggregate limit of the separate policies when a separate premium for underinsured motorist coverage was charged for each. *Id.* Anti-stacking provisions in an insurance policy that permit an insurer to receive valuable consideration for coverage that is not provided violates Montana public policy. *Id.*

## BROKERS

See "AGENTS AND BROKERS."

## CANCELLATION

Cancellation defined. M.C.A. §§33-15-1102 thru 1104. *State Farm v. White*, 563 F.2d 971 (9th Cir. 1977). Contract or policy may be cancelled for fraud, misrepresentation, if action be instituted by company promptly upon discovery of same. Also policy subject to reforma-

tion by Court of Equity, if contract fails to state intent of parties.

Attempted cancellation after liability has accrued. *Curtis v. Zurich*, 108 Mont. 275, 89 P.2d 1038 (1939); *Robb v. State Farm.*, 2006 U.S. Dist. LEXIS 86106 (Dist. Mont. 2006).

Issuance of Replacement policy cancels previously issued policy. *Great American Ins. v. Royal Globe*, 197 Mont. 331, 643 P.2d 562 (1982).

Cancellation that does not comply for compulsory auto coverage will still cancel noncompulsory. *Home Indem. v. Empire Fire & Marine Ins.*, 537 F. Supp. 222 (1982).

Expiration of binder upon issuance of policy is not cancellation requiring notification. M.C.A. §33-15-411. *Watts v. Westland Farm Mut. Ins.*, 271 Mont. 256, 895 P.2d 626 (1995).

## CONSTRUCTION OF POLICY

Insurance policy clause is ambiguous when different persons looking at clause in light of its purpose cannot agree upon its meaning. *Infinity Ins. Co. v. Dodson*, 302 Mont. 209, 14 P.3d 487 (2000). If language is unambiguous, and subject to only one meaning, there is no basis for the interpretation of policy under the guise of ambiguity. *Bauer Ranch v. Mountain W. Farm Bureau Mut. Ins. Co.*, 215 Mont. 153, 695 P.2d 1307 (1985).

Ambiguity in insurance policy will be strictly construed against insurer. *Infinity Ins. Co. v. Dodson*, 302 Mont. 209, 14 P.3d 487 (2000). Insurance policy given liberal construction in favor of insured. *Wolff v. Standard Life & Accid. Ins. Co.*, 147 Mont. 460, 416 P.2d 11 (1966). Liberal construction, however, should not abrogate or ignore critical provisions of contract. *Hildebrandt v. Washington Nat'l Ins. Co.*, 181 Mont. 231, 593 P.2d 37 (1979). Exclusions or words of limitation to be strictly construed against insurer. *Leibrand v. National Farmers Union Prop. & Cas.*, 272 Mont. 1, 898 P.2d 1220 (1995).

## CONTRIBUTION

See "LIABILITY INSURANCE"; "NEGLIGENCE."

Between joint tortfeasors: M.C.A. §27-1-703 as amended, 1997: *State Farm Fire & Cas. Co. v. Bush Hog, LLC*, 353 Mont. 173, 219 P.3d 1249 (2009). Statute of limitations on contribution claims is two years and begins to run upon payment by tortfeasor seeking contribution. *Mohl v. Johnson*, 275 Mont. 167, 911 P.2d 217 (1996).

A joint tortfeasor who settles with the claimant before judgment on the claim is entered in a district court is not subject to claims for contribution or indemnity from the nonsettling joint tortfeasors. *Deere v. District Ct.*, 224 Mont. 384, 730 P.2d 396; *Durden v. Hydro Flame Corp.*, 295 Mont. 318, 983 P.2d 943 (1999). Additionally, the claim of the plaintiff against the remaining tortfeasors is to be reduced by a dollar credit in the amount of consideration paid by the settling tortfeasor, and not by a percentage amount proportional to the degree of fault of the settling tortfeasor. *Deere*, 224 Mont. at 386, 730 P.2d at 398; *Whiting v. State*, 248 Mont. 207, 810 P.2d 1177 (1991).

## DAMAGES

### Appellate Review.

Excessive Verdicts. Excessive damages as grounds for new trial. M.C.A. §25-11-102. Generally, a jury award of damages will not be overturned unless it shocks the conscience of the Court. *Anderson v. Werner Enters., Inc.*, 292 Mont. 284, 972 P.2d 806 (1998). The decision to grant or deny a new trial is in the sound discretion of the district court and will not be disturbed absent a showing of manifest abuse of discretion. *Id.*

Comparative Negligence. See Law Digest Tables.

Indemnification. M.C.A. §27-1-703.

Collateral Source Rule. M.C.A. §27-1-307,308. Collateral source means payment for something that is later included in tort award which is made to plaintiff or otherwise available to plaintiff: for medical expenses and disability payments under social security or other public programs for insurance benefits other than life insurance; for any contract for reimbursement of health care services except for gifts or gratuitous or contributions or assistance: for any continuation wages provided through disability plan by employer; and, for any other source except assets of plaintiff or his immediate family if he is obligated to repay member of his immediate family. When total award against all defendants is in excess of \$50,000 and plaintiff will be fully compensated for his injuries, exclusive of attorney's and costs, plaintiffs recovery must be reduced by any collateral source which does not have subrogation right. Certain offsets apply. Separate hearing is held after verdict for determinations of collateral source off-sets. See *Schuff v. A.T. Klemens & Sons*, 303 Mont. 274, 16 P.3d 1002 (2000).

Emotional or Mental Distress. Not recoverable for breach of contract; allowed when actual physical injury to plaintiff. M.C.A. §27-1-310. Montana recognizes the independent torts of negligent infliction of emotional distress and intentional infliction of emotional distress.

*Sacco v. High Country Independent Press*, 271 Mont. 209, 896 P.2d 411 (1995); *Lorang v. Fortis Ins. Co.*, 345 Mont. 12, 192 P.3d 186 (2008).

Punitive Damages. Punitive damages may be awarded in accordance with M.C.A. §27-1-221; burden of proof is clear and convincing evidence of actual fraud or actual malice. Public policy does not prohibit insurer from providing coverage for punitive damage awards. *First Bank v. Transamerica Ins.*, 209 Mont. 93, 679 P.2d 1217 (1984); *Fitzgerald v. Western Fire Ins.*, 209 Mont. 213, 679 P.2d 790 (1984). However, contract of insurance must expressly include punitive damages. M.C.A. §§27-1-221, 33-15-317. In awarding punitive damages, fact-finder should consider: nature of alleged misconduct of defendant, extent and effect of misconduct on lives of plaintiff and others, probability of future reoccurrence of such misconduct, relationship between parties, wealth of defendant, facts and circumstances surrounding misconduct, and actual damages awarded. Where it appears punitive award resulted from passion or prejudice, rather than from reason and justice, court must not allow award to stand. *SAFECO Ins. Co. v. Ellinghouse*, 223 Mont. 239, 725 P.2d 217 (1986). A district court judge reviews a jury award of punitive damages. M.C.A. §27-1-221. After review, the judge can determine whether punitive damages should be increased or decreased. M.C.A. §27-1-221. In reviewing a jury award of punitive damages, a district court judge must consider: the nature and reprehensibility of the defendant's wrongdoing, the extent of the wrongdoing, the intent of the defendant in committing the wrong, the profitability of the wrongdoing, if applicable, the amount of actual damages awarded, the defendant's net worth, previous awards of punitive damages based on the same wrongful act, potential or prior criminal sanctions against the defendant based on the same wrongful act, and other circumstances that may operate to increase or reduce, without wholly defeating, punitive damages. M.C.A. §27-1-221. *Rocky Mt. Enters. v. Pierce Flooring*, 286 Mont. 282, 951 P.2d 1326 (1997).

Medical malpractice non-economic limitation of \$250,000. M.C.A. §25-9-411.

Dramshop non-economic limitation of \$250,000. M.C.A. §27-1-710(7). Dramshop punitive limitation of \$250,000. M.C.A. §27-1-710(8). Must provide notice of intent to file action to the person who furnished alcohol by certified mail within 180 days from date of sale or service. Civil action must be commenced within 2 years of sale or service. M.C.A. §27-1-710(6).

## DEATH

See Law Digest Tables.



Presumption of, from unexplained absence. Person not heard from in five years is presumed to be dead. M.C.A. §26-1-602 (26).

One cause of action is the “survival” action. It arises from Mont. Code Ann. §27-1-501. By this statute, a cause of action, including tort actions existing during the lifetime of a person survive his death, and the cause may be pursued against the responsible party by his personal representative. M.C.A. §72-3-604. The damages that may be recovered in the survival cause of action for the death of the decedent through tort include his lost earnings from the time of his injury to his death; the present value of his reasonable earnings during his life expectancy, the medical and funeral expenses incurred by him as a result of the tort; reasonable compensation for his pain and suffering, and other special damages. *Swanson v. Champion Int’l Corp.*, 197 Mont. 509, 646 P.2d 1166 (1982); *Payne v. Eighth Judicial Dist. Court*, 313 Mont. 118, 60 P.3d 469 (2002).

The source of the damages recoverable in a survival action are personal to the decedent. *Swanson*, 197 Mont. at 515, 646 P.2d at 1169. They do not include any damages suffered by the decedent’s widow, children or other heirs. *Id.* They are subject to the claims of his creditors and must be included in any computation to determine if inheritance taxes are due from his estate. *Id.* Only the personal representative may sue for the damages suffered by the decedent in survival actions. M.C.A. §27-1-501. Neither the widow nor any other heir has a legal right to pursue such an action unless appointed as a personal representative. *Swanson*, 197 Mont. at 515-516, 646 P.2d at 1169. The distribution by the personal representative of damages recovered in a survival action is controlled by the law of probate. *Swanson*, 197 Mont. at 516, 646 P.2d at 1169. After payment of creditors, expenses of administration and inheritance taxes, if any, the personal representative distributes the damage proceeds as a part of the estate of the decedent, controlled by his will or by the laws of intestate succession. *Swanson*, 197 Mont. at 516, 646 P.2d at 1169-1170.

The other cause of action for the wrongful death of one not a minor is a “wrongful death” action and vests in the heirs of the decedent. M.C.A. §27-1-513. This cause of action may be prosecuted by the personal representative or by the heirs. *Id.* The law is not specific about the source of damages in a wrongful death action, however, it provides that damages may be given as under all the circumstances of the case may be just. M.C.A. §27-1-323. Generally the proof of damages under this cause of action will include loss of consortium by a spouse, the loss of comfort and society of the decedent suffered by the surviving heirs; and the reasonable value of the con-

tributions in money that the decedent would reasonably have made for the support, education, training and care of the heirs during the respective life expectancies of the decedent and the survivors. *Swanson*, 197 Mont. at 517, 646 P.2d at 1170. No specific pecuniary loss need be shown. *Id.*

The sources of the damages recoverable in a wrongful death action are personal to the survivors of the decedent. *Id.* The damages are not those of the decedent, but of the heirs by reason of his death. *Id.* The action may be prosecuted without regard to whether the decedent’s death was instantaneous. *Id.* Such damages do not belong to the decedent’s estate. *Id.* They are not subject to the claims of decedent’s creditors. *Id.* They are not a part of the estate for the determination of inheritance taxes. *Id.* They pertain to the personal loss of the survivors. *Id.* Though the personal representative of the decedent, under the wrongful death statute, may sue the responsible party, any recovery made by the personal representative in the wrongful death claim is not in his capacity as personal representative. *Swanson*, 197 Mont. at 518, 646 P.2d at 1170. He is a trustee of the money for the person entitled. *Id.* When a wrongful death action is prosecuted, the damages are returned by general verdict, covering all of the heirs involved. *Swanson*, 197 Mont. at 518, 646 P.2d at 1171. The jury is not given the duty of ascribing so much to one heir and so much to another. *Id.* The trial court, after the verdict, is given the task of allocating the money damages among the heirs. *Id.* The distribution of the damages to the heirs is not controlled by the decedent’s will or by the laws of intestate succession. *Id.*

## DISABILITY

Exclusions must be approved by Insurance Commission. *Rodli v. American Bankers*, 44 Mont. St. Rptr. 1888 (D.C. Mont. 1987) (unreported opinion).

“Total disability” within meaning of insurance policies does not necessarily mean utter helplessness, nor inability to perform any task, or even in some cases, usual tasks for limited period. *Seaman v. New York Life Ins. Co.*, 112 Mont. 328, 115 P.2d 1005 (1941); *Nelson v. Combined Ins. Co.*, 155 Mont. 105, 467 P.2d 707 (1970).

Partial disability likewise defined according to terms of policy, but only effective when insured is able to attend to one or more of his regular duties of occupation, but still disabled to extent impossible to discharge his usual duties fully.

Forman defense is not recognized in Montana. *Deonier v. Paul Revere*, 301 Mont. 347, 9 P.3d 622 (2000).

**FINANCIAL RESPONSIBILITY LAW**

See Law Digest Tables.

M.C.A. §§61-6-103 and 301.

**FIRE INSURANCE**

Arbitration. Law favors settlement of disputes by arbitration. When award will be interfered with by Courts. *McIntosh v. Hartford Fire Ins.*, 106 Mont. 434, 78 P.2d 82 (1938); *School Dist. v. Globe & Republic Ins.*, 146 Mont. 208, 404 P.2d 889 (1965); *distinguished by May v. First Nat'l Pawn Brokers*, 269 Mont. 19, 887 P.2d 185 (1994).

Arson defense to claim. (Burden of proof on issue of arson rests with insurer). *Silva v. Fire Ins. Exchange*, 647 F. Supp. 1397 (D. Mont. 1986).

Assignment. Any assignment shall entitle insurer to deal with assignee pursuant to terms of assignment until receipt of written notice of termination of assignment. M.C.A. §33-15-414.

Cancellation. See "CANCELLATIONS."

Explosion. Meaning of term in policy. *McDonald v. Royal*, 98 Mont. 572, 40 P.2d 1005 (1934).

Mortgage Clause. Effect of mortgaging property after issuance of policy. Waiver of breach of condition. *McCarthy v. Employers' Fire Ins.*, 97 Mont. 540, 37 P.2d 579 (1934).

Ownership. Misrepresentation of interest in property. *Stevens v. Steck*, 101 Mont. 569, 55 P.2d 7 (1936).

Proof of Loss. Procedure set forth in standard form of policy controls. No statutory special requirements. See *Conlon v. Northern Life*, 108 Mont. 473, 92 P.2d 284 (1939); *Firemen's Fund Indemnity v. Kennedy*, 97 F.2d 882 (9th Cir. 1938).

Reformation of Contract. After loss. Court has authority to reform policy where there is sufficient evidence of mutual mistake. M.C.A. §28-2-1611; *Krpan v. Central Federal Fire Ins.*, 87 Mont. 345, 287 P. 217 (1930). *Hier v. Farmers Mut. Fire Ins.*, 104 Mont. 471, 67 P.2d 831 (1937); *McSweyn v. Musselshell County*, 193 Mont. 525, 632 P.2d 1095 (1981).

Repairs and Replacement. Amount of insurance written deemed to be value of property destroyed—payer of premium presumed owner—fraud in obtaining policy as defense. M.C.A. §33-24-102. Replacement, measure of indemnity if no valuation stated in policy. M.C.A. §33-24-101. *McIntosh v. Hartford Fire Ins.*, 106 Mont. 434, 78 P.2d 82 (1938).

Standard Policy Provisions. Policy forms must be filed with and approved by Insurance Commissioner, M.C.A. §33-1-501.

Stated Value of Property. Real Prop. M.C.A. §33-24-102. Personal Prop. M.C.A. §33-24-103.

**FRAUD**

See "CANCELLATION"; "REPRESENTATIONS AND WARRANTIES."

**GUEST CASES**

See "AUTOMOBILES."

**HOSPITALS**

Liens. Physician, nurse or hospital has lien against claim of person injured through negligence of another for value of services rendered, provided written notice be served on person against whom liability claimed. "Such lien, however, shall be subject to any attorney's lien provided for in M.C.A. §37-61-420." M.C.A. §71-3-1114.

**HUSBAND AND WIFE**

See Law Digest Tables.

Community Property. Community property rights not in effect in Montana. Under M.C.A. §72-2-221, surviving spouse has right of election to take elective share of up to one-half of decedent's augmented estate.

Right to Sue Each Other in Tort. Interspousal tort immunity abolished. *Miller v. Fallon County*, 222 Mont. 214, 721 P.2d 342 (1986). Spouse can sue for intentional torts, e.g. assault, M.C.A. §40-2-109, or for property damage proximately caused by spouse's negligence. *Norick v. Dove Constr.*, 204 Mont. 57, 662 P.2d 1318 (1983).

Loss of Consortium. Both husband and wife have cause of action for loss of consortium. *Hall v. United States*, 266 F. Supp. 671 (Mont. 1967). Loss of consortium claim also applies to children where parent is severely injured. *Pence v. Fox*, 248 Mont. 521, 813 P.2d 429 (1991); *Mountain West Farm Bureau Mut. Ins. Co. v. Brewer*, 315 Mont. 231, 69 P.3d 652 (2003). Loss of consortium for death of adult child. *Hern v. Safeco Ins. Co.*, 329 Mont. 347, 125 P.3d 597 (2005); see also *Bear Medicine v. U.S.*, 192 F. Supp. 2d 1053 (D. Mont. 2002).

**INFANTS**

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



## LIABILITY INSURANCE

Cancellation of motor vehicle liability insurance. M.C.A. §33-23-211 thru 213.

Rules for interpreting agreement of indemnity. M.C.A. §28-11-313: "In interpretation of contract of indemnity, rules prescribed in 28-11-314 thru 28-11-317 are to be applied unless contrary intention appears." 1) Upon indemnity against liability, expressly, or in other equivalent terms, person indemnified is entitled to recover upon becoming liable. M.C.A. §28-11-314. 2) Upon indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, person indemnified is not entitled to recover without payment thereof. M.C.A. §28-11-314. 3) Indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces costs of defense against such claims, demands, or liability incurred in good faith, and in exercise of reasonable discretion. M.C.A. §28-11-315. Person indemnifying is bound, on request of person indemnified, to defend actions or proceedings brought against latter in respect to matters embraced by indemnity, but person indemnified has right to conduct such defenses, if he chooses to do so. If, after request, person indemnifying neglects to defend person indemnified, recovery against latter, suffered by him in good faith, is conclusive in his favor against former. M.C.A. §28-11-316. If person indemnifying, whether he is principal or surety in agreement, does not have reasonable notice of action or proceeding against person indemnified, or is not allowed to control his defense, judgment against latter is only presumptive evidence against former. M.C.A. §28-11-317. Indemnity clauses in contracts should be liberally construed in favor of the party intended to be indemnified. To indemnify a party against his own negligence, the indemnity must be expressed in clear and unequivocal terms. *Lesofski v. Ravalli County Elec. Co-op*, 151 Mont. 104, 439 P.2d 370 (1968), followed in *Slater v. Cent. Plumbing & Heating Co.*, 1999 MT 257, 297 Mont. 7, 993 P.2d 654, 56 St. Rep. 1023 (1999).

No duty to defend unless facts appear which would obligate insurer to indemnify.

The insured is the sole client of the defense counsel and any prior approval of insurer before litigation decisions are made is a breach of the rules of professional conduct. Also, any third party audit without consent from the insured violates client confidentiality. *The Matter of the Rules of Professional Conduct and Insurer Billing Rules and Procedures*, 299 Mont. 321, 2 P.3d 806 (2000).

Automobile liability policy that excluded injury to insured while occupying non-insured car held against public policy. *Jacobson v. Implement Dealers' Mut.*, 196 Mont. 542, 640 P.2d 908 (1982); see also *Farmers Alliance Mut. Ins. Co. v. Miller*, 869 F.2d 509 (9th Cir. 1989).

Compromise of Claims. If insured settles after insurer unjustifiably refuses to defend, insured can recover from insurer amount paid in settlement, defense costs, general and punitive damages. *Independent v. Aetna*, 68 Mont. 152, 216 P. 1109 (1923); *Lee v. USAA Cas. Ins. Co.*, 320 Mont. 174, 86 P.3d 562 (2004).

Claims Handling. Implied obligation of good faith and fair dealing imposes a duty upon insurer to settle within policy limits in appropriate cases. If insurer fails to settle within policy limits in appropriate cases, it may be liable for excess judgment. *Gibson v. Western Fire*, 210 Mont. 267, 682 P.2d 725 (1984).

When an insured's liability for damages is reasonably clear, and those damages indisputably exceed the statutory mandated coverage limits, it is unfair trade practice per se for the insurer to condition the payment on full and final liability release. (*i.e.* No leveraging one part of settlement for total settlement.) *Shilhanek v. D-2 Trucking*, 315 Mont. 519, 70 P.3d 721 (2003).

M.C.A. §33-18-201(6), gives third-party claimants cause of action for failure to settle against defendant's insurer which can be prosecuted jointly with an action against defendant insured; but where third-party claimants may maintain such an action against defendant's insurer, the statutes initial requirement of showing lack of good faith in settlement negotiations, or other unfair trade practices must be met by showing these are the general business practices of that particular insurance company. *Klavo v. Flink*, 202 Mont. 247, 658 P.2d 1065 (1983) (questioned on different issue). Proof of violations evidencing a general business practice, by the company in different cases, can be obtained from other attorneys, claimants, or people having knowledge of the company's general practices. *Id.*

Despite the enactment of M.C.A. §33-18-242, a third-party claimant can bring a common law action for bad faith. Because common law action for third-party beneficiaries is allowed, 3 year tort statute of limitations applies, not 1 year statute of limitations under statute. *Brewington v. Employers*, 297 Mont. 243, 992 P.2d 237 (1999).

Insurer must attempt in good faith to effectuate prompt, fair and equitable settlement where liability is reasonably clear. M.C.A. §33-18-201 (6).

Primary and secondary liability on loaned auto when two contracts for insurance are in force. *Mountain State Cas. v. American Cas.*, 135 Mont. 475, 342 P.2d 748 (1959); *Guaranty Nat'l Ins. Co. v. State Farm Ins. Co.*, 238 Mont. 324, 777 P.2d 353 (1989). Where two or more policies provide only excess coverage, excess clauses are mutually repugnant and must be disregarded, rendering each insurer liable per pro rata share of judgment or settlement. *Bill Atkin Volkswagen v. Wm. McClafferty*, 213 Mont. 99, 689 P.2d 1237 (1984); *Swank v. Chrysler Ins. Corp.*, 282 Mont. 376, 938 P.2d 631 (1997).

Contribution. M.C.A. §27-1-703, creates right of contribution from any other person whose negligence may have contributed as proximate cause to injury, but settlement destroys right of contribution. Employers or co-employees negligence can be considered but cannot be required to contribute. There are procedural changes with regard to adding parties (new legislation with substantial changes). Montana has not recognized Uniform Contribution Among Tortfeasors Act. *Holmberg v. Strong*, 272 Mont. 101, 899 P.2d 1097 (1995).

Cooperation of Insured. Failure of insured to cooperate in defense of action voids policy and stipulation and requirements of policy as to assistance and cooperation are enforceable and statutory laws affecting same not enacted. Fact that loss could have been less had insured taken greater care after loss sustained will bar him from recovering for excess which could have been avoided. *General Ins. Co. of America v. Town Pump*, 214 Mont. 27, 692 P.2d 427 (1984).

Coverage. Court will interpret policy according to contract law, however, if term restricts rights of insured, courts will look to statutes governing insurance law. *Yovish v. United Auto Ass'n*, 243 Mont. 284, 794 P.2d 682 (1990) (overruled on other grounds).

Denial of coverage based on causally unrelated technical breach is unfair. Lack of medical certification on part of pilot must be causally related to crash to exclude coverage. *Bayers v. Omni Aviation Managers, Inc.*, 510 F. Supp. 1204 (D. Mont. 1981).

Duty to Settle/Bad Faith. Insured or third party claimant has an independent cause of action against insurer for actual damages caused by insurers violation of M.C.A. §33-18-201 (1), or (4), (5), (6), (9), or (13). M.C.A. §33-18-242. Punitive damages are recoverable. *Harris v. American General*, 202 Mont. 393, 658 P.2d 1089 (1983). An insurer may not be held liable if it had reasonable basis in law or fact for contesting the claim or amount of claim. M.C.A. §33-18-242 (5). Insured may file actions together but court can bifurcate where justice

so requires. M.C.A. §33-18-242 (6)(a). Third party can not file action under this section until underlying claim has been settled or judgment entered in favor of claimant on underlying claim. M.C.A. §33-18-242 (6)(b). Statute of limitations is two years from date of violation for insured; one year for third party. M.C.A. §33-18-242 (7). Persons, firms or corporations are included as insurers in this section. M.C.A. §33-18-242 (8). An insurer has obligation to pay medicals incurred by third party tort victim when liability of insured is reasonably clear for expense submitted and reasonably clear expense causally related to the accident. *Ridley v. Guarantee Nat'l Ins.*, 286 Mont. 325, 951 P.2d 987 (1997); *Renville v. Farmers Ins. Exch.*, 315 Mont. 295, 69 P.3d 217 (2004).

Nothing in *Ridley* suggests that its scope should be categorically limited to medical expenses. Rather, medical expenses are just one of the obligations incurred by victims that mandatory liability insurance laws were designed to alleviate. Lost wages which are reasonably certain and directly related to an insured's negligence or wrongful act are another example. *Dubray v. Farmers Ins. Exch.*, 307 Mont. 134, 36 P.3d 897 (2001).

Exclusions. Exclusion clause for intentional acts applies if injury not an accident and expected or intended from insured's standpoint. *Smith v. State Farm Ins.*, 264 Mont. 129, 870 P.2d 74 (1994).

Group life insurance: master policy of group employee life insurance together with individual employee certificate of insurance constitutes single contract of insurance. *Martin v. Crown Life Ins.*, 202 Mont. 461, 658 P.2d 1099 (1983).

Parent is not immune from suit brought by minor child in cases involving parental negligence in operation of motor vehicle. Family exclusion clause void and unenforceable under M.C.A. §61-6-301 (1). *Transamerica Ins. v. Royle*, 202 Mont. 173, 656 P.2d 820 (1983).

Immunity. M.C.A. §2-9-111; governmental entity is immune from suit only for legislative acts/omissions.

## LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Medical Malpractice. Action in tort or contract must be commenced within three years from time of injury or from time plaintiff discovers, or reasonably should have discovered injury from negligent treatment. However in no case may such action be commenced after five years from date of injury. M.C.A. §27-2-205(1). For minor injured under age of 4, period of limitation begins to run when minor turns 8 or dies and time limit



is tolled for any time when minor does not live with parent or guardian. M.C.A. §27-2-205(2). No malpractice claim can be filed before application is made to Medical Panel and decision is reached. M.C.A. §27-6-701. Statute of Limitations tolled from application date until 30 days after Panel reaches decision or dismisses application. M.C.A. §27-6-702.

**Legal Malpractice.** Three years after discovery but in no case more than 10 years after act. M.C.A. §27-2-206.

Actions for damages arising out of work on improvements to real property or land surveying limited to maximum of ten years. M.C.A. §27-2-208.

Action on any contract, obligation, or liability, founded upon instrument in writing must be commenced within eight years. M.C.A. §27-2-202 (1). Action upon contract, account or promise not founded on writing must be commenced within five years. M.C.A. §27-2-202 (2). Action upon obligation or liability, other than contract, account or promise not founded upon writing, must be commenced within three years. M.C.A. §27-2-202 (3). Shortening, by contract, of statutory period against public policy, such shortening being contrary to M.C.A. §28-2-708. *Trammel v. Brotherhood*, 126 Mont. 400, 253 P.2d 329 (1953).

Claims solely for the damage to property are subject to a two year statute of limitations. M.C.A. §27-2-207.

When faced with different limiting statutes, or where doubt exists as to the nature of the action, doubt should be resolved in favor of the longer limiting statute. *Demarest v. Broadhurst*, 2004 MT 147, 321 Mont. 470, 92 P.3d 1168 (2004).

**Fraud or Mistake.** Two year limit, cause does not accrue until discovery by aggrieved party of facts constituting fraud or mistake. M.C.A. §27-2-203.

**Tort actions – General and Personal Injury.** Liability not founded upon instrument in writing is three years. M.C.A. §27-2-204 (1). Death caused by wrongful act or neglect of another is three years. 27-2-204 (2).

## MALPRACTICE

Statutory requirements and limitation. Montana Medical Legal Panel Act. See M.C.A. §§27-6-101 thru 106. Procedure. See M.C.A. §27-6-301 thru 308.

**Expert Testimony.** There must be expert testimony to establish negligence in a malpractice action. *Clark v. Norris*, 226 Mont. 43, 734 P.2d 182 (1987). If a foreign object is left in patient's body, no expert testimony is

required since violation of standard of care required is obvious. *Rudeck v. Wright*, 218 Mont. 41, 709 P.2d 621 (1985).

**Informed Consent.** In order for patient to be held to have given an intelligent consent to proposed treatment, the physician must disclose those consequences of treatment which reasonable medical practitioner would disclose under the same or similar circumstances. *Hill v. Squibb & Sons, E. R.*, 181 Mont. 199, 592 P.2d 1383 (1979). The physician who prepares to perform a medical or surgical procedure has the obligation to explain the procedure to the patient. *Llera v. Wisner*, 171 Mont. 254, 557 P.2d 805 (1976).

**Standard of Care.** Generally, physician must possess skill and learning of an average practitioner in good standing and apply it with ordinary care. *Dunn v. Beck*, 80 Mont. 414, 260 P.1047 (1927). Modification of "same locality rule" to reflect "similar locality". *Tallbull v. Whitney*, 172 Mont. 326, 564 P.2d 162 (1977). The standard of care to which a board certified specialist will be held must be that skill and learning possessed by other doctors in good standing practicing in the same specialty and who hold the same national board certification. *Glover v. Ballhagen*, 232 Mont. 427, 756 P.2d 1166 (1988). A non-board certified general practitioner held to standard of care of reasonably competent general practitioner acting in same or similar community in United States in same or similar circumstances. *Chapel v. Allison*, 241 Mont. 83, 785 P.2d 204 (1990).

**Independent Medical Exam.** Doctors have duty to exercise level of care required by training and experience and to make information regarding results available to examinee if findings disclose imminent danger to physical or mental well-being. *Webb v. T.D.*, 287 Mont. 68, 951 P.2d 1008 (1997); *Romans v. Lusin*, 299 Mont. 182, 997 P.2d 114 (2000).

Non-economic medical malpractice cap of \$250,000. M.C.A. §25-9-411.

## NEGLIGENCE

See Law Digest Tables.

See "AUTOMOBILES."

**Age.** Child under seven (7) cannot be contributorily negligent. *Johnson v. Y.M.C.A.*, 201 Mont. 36, 651 P.2d 1245 (1982).

**Assumption of risk** is no longer available as a separate affirmative defense in negligence claims; the affirmative defense of assumption of risk merges into the general scheme of liability assessment in which the conduct of parties must be compared based on evidence of

negligence and contributory negligence. *Lewis v. Puget Sound Power & Light Co.*, 2001 MT 145, 306 Mont. 37, 29 P.3d 1028 (2001). Assumption of risk is analyzed under a subjective standard. *Id.* Implied assumption of risk is not a defense to negligence. *Abernathy v. Eline*, 200 Mont. 205, 650 P.2d 772 (1982); *Zahrte v. Sturm, Ruger & Co.*, 203 Mont. 90, 661 P.2d 17 (1983).

Attractive Nuisance. Doctrine discussed. *Nichols v. Consolidated*, 125 Mont. 460, 239 P.2d 740 (1952). Requirements for an attractive nuisance claim. *Tally Bissell Neighbors, Inc. v. Eyrie Shotgun Ranch, LLC*, 2010 MT 63, 355 Mont. 387, 228 P.3d 1134 (2010); *Harmon v. Billings Bench Water Users Ass'n*, 765 F.2d 1464 (9th Cir. 1985).

Negligence cause of action has four elements: duty, breach of duty, causation and damages. *Wiley v. City of Glendive*, 272 Mont. 213, 900 P.2d 310 (1995); *Meloy v. Speedy Auto Glass, Inc.*, 2008 MT 122, 342 Mont. 530, 182 P.3d 741 (2008). Negligence per se is composed of five elements: 1) defendant violated particular statute, 2) statute enacted to protect specific class of persons, 3) plaintiff member of protected class, 4) plaintiff's injury is of sort statute enacted to prevent, 5) statute intended to regulate a member of defendant's class. *VanLuchene v. State*, 244 Mont. 397, 797 P.2d 932 (1990). Plaintiff still must prove causation. *Schwade v. Custer's Inn Assocs.*, 303 Mont. 15, 15 P.3d 903 (2000) (overruled on other grounds).

Existence of duty of care depends upon foreseeability of risk and upon policy considerations for and against liability. *Hinkle ex. rel Hinkle v. Shepherd Sch. Dist. #37*, 2004 MT 175, 322 Mont. 80, 93 P.3d 1239 (2004).

Owner of premises has duty to exercise ordinary care in management of premises to avoid exposing persons thereon to unreasonable risk of harm regardless of persons status, *i.e.* invitee, licensee and trespasser. *Limberhand v. Big Ditch Co.*, 218 Mont. 132, 706 P.2d 491 (1985); *Brown v. Demaree*, 272 Mont. 479, 901 P.2d 567 (1995).

Involuntary violation of statute in emergency due to circumstances beyond actor's control not negligence per se. *Cameron v. Mercer*, 289 Mont. 172, 960 P.2d 302 (1998). However, "involuntary" does not include reaction to obstacles which should be anticipated, *i.e.* black ice, animals, or potholes. *Craig v. Schell*, 293 Mont. 323, 925 P.2d 820 (1999).

Possessor of premises has a duty to use ordinary care in maintaining the premises in a reasonably safe condition and to warn of any hidden or lurking dangers. What constitutes a reasonably safe premises is generally considered to be a question of fact. Whether a premises

is reasonably safe depends to a large extent on what use the property is put to, its setting, location and other physical characteristics; the type of person who would foreseeably visit, use or occupy the premises; and the specific type of hazard or unsafe condition alleged. The possessor of the premises is not liable to persons foreseeably upon the premises for physical harm caused to them by any activity or condition on the premises whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. *Richardson v. Corvallis Pub. School Dist.*, 286 Mont. 309, 950 P.2d 748 (1997); *Dobrocke v. City of Columbia Falls*, 300 Mont. 348, 8 P.3d 71 (2000) (overruled on other grounds). Government owns and is responsible for maintenance of sidewalks. *Kaiser v. Whitehall*, 221 Mont. 322, 718 P.2d 1341 (1986).

Comparative Negligence. M.C.A. §27-1-702. Joint and Several Liability. M.C.A. §27-1-703. Recovery barred if plaintiff's negligence, assumption of risk exceeds fifty (50) percent.

Governmental Immunity. See M.C.A. Title 2, Chapter 9.

Imputed Negligence. Negligence of driver of vehicle is not imputable to passenger, invitee or guest of driver. *Kudrna v. Comet Corp.*, 175 Mont. 29, 572 P.2d 183 (1977). Passengers may be contributorily negligent in becoming passenger where driver visibly intoxicated. *Buck v. State*, 222 Mont. 423, 723 P.2d 210 (1986) (overruled on another issue).

Negligence or wilful misconduct of person under 18 years is imputed to person signing application for license unless insurance maintained on his behalf. M.C.A. §61-5-108 (2).

Last Clear Chance. Neither approved nor disapproved under comparative negligence regime. *Payne v. Sorenson*, 183 Mont. 323, 599 P.2d 362 (1979). Likely to be treated like any other form of contributory negligence. *Kopischke v. First Continental Corp.*, 187 Mont. 471, 610 P.2d 668 (1980).

Proximate Cause. In cases which do not involve issues of independent intervening cause or multiple causes, proof of causation is satisfied by proof that a party's conduct was a cause-in-fact of the damage alleged. *Busta v. Columbus Hosp. Corp.*, 276 Mont. 342, 916 P.2d 122 (1996).

Good Samaritan doctrine is statutorily defined and adopted, M.C.A. §27-1-714.

Bystander Recovery for Emotional Distress. Spouse may recover for negligent infliction of emotional trauma caused by witnessing collision which causes infliction of

death or serious injury to other spouse. *Verland v. Caron Transport*, 206 Mont. 313, 671 P.2d 583 (1983), questioned by *Treichel v. State Farm*, 280 Mont. 443, 930 P.2d 661 (1997). Emotional or mental distress not recoverable in action for breach of obligation or duty arising solely from contract. M.C.A. §27-1-310.

Unavoidable Accident. Not applicable in Montana. *Graham v. Rolandson*, 150 Mont. 270, 435 P.2d 263 (1967).

Driver of emergency vehicle must act with due care under circumstances. *Steinberger v. Neel*, 188 Mont.333, 613 P.2d 1007 (1980); *Craig v. Schell*, 293 Mont. 323, 975 P.2d 820 (1999).

Rescue doctrine is applicable if defendant's negligence creates situation necessitating rescue. *Kiamas v. Mon-Kota Inc.*, 196 Mont. 357, 639 P.2d 1155 (1982); *Bossard v. Johnson*, 265 Mont. 272, 876 P.2d 627 (1994).

Dram Shop Liability. Person or entity not liable for furnishing an alcoholic beverage for subsequent injuries unless served to underage and known or no attempt to determine age, visibly intoxicated, forced to consume. M.C.A. §27-1-710. Person bringing civil action under M.C.A. §27-1-710 must provide notice of intent to file action to the person who furnished the alcohol by certified mail within 180 days of date of sale or service. Action must commence within 2 years of sale or service. M.C.A. §27-1-710(6).

Immunity of Non-profit Corporation Officers and Directors, M.C.A. §27-1-732.

Res Ipsa Loquitur. Allows inference that injury to plaintiff was caused by negligence of defendant when: 1) event is kind which ordinarily does not occur in absence of negligence, 2) other causes, including conduct of plaintiff and third parties sufficiently eliminated by evidence, 3) indicated negligence is within scope of defendant's duty. *Bonilla v. Univ. of Mont.*, 2005 MT 183, 328 Mont. 41, 116 P.3d 823 (2005).

### PUNITIVE DAMAGES

Not allowed in any action arising from breach of contract. M.C.A. §27-1-220. Allowed where defendant is guilty of actual fraud or malice. M.C.A. §27-1-221. Standard: Clear and convincing evidence. Two step procedure. Jury first determines liability for punitives and then evidence of defendant's value is admitted to determine amount. M.C.A. §27-1-221. Punitive damage must be reasonable and jury award must be reviewed by judge and may be increased or decreased. M.C.A. §27-1-221.

Punitive damages are recoverable against insurer for violation of M.C.A. §33-18-201.

### PRIVILEGED COMMUNICATIONS

Attorney/Client. M.C.A. §26-1-803. Fundamental purpose of privilege is to enable attorney to provide best possible legal advice and encourage client to act within law. *Palmer v. Farmers Ins.*, 261 Mont. 91, 861 P.2d 895 (1993); *Inter-Fluve v. Mont. Eighteenth Judicial Dist. Court*, 2005 MT 103, 327 Mont. 14, 112 P.3d 258 (2005). Privilege applies to all communications from client to attorney and advice given in course of professional relationship, absent voluntary relationship or exception. *Palmer*, 261 Mont. at 106, 861 P.2d at 904.

Clergy/Penitent Privilege. M.C.A. §26-1-804. Clergy cannot be examined as to any confession made to him in his professional character in course of discipline enjoined by church without consent of person making confession.

Doctor/Patient Privilege. M.C.A. §26-1-805. Licensed physician, surgeon or dentist cannot be examined in a civil action as to any information acquired in attending patient which was necessary to enable doctor to prescribe or act for patient without consent of patient or as excepted by Rule 35, M.R. Civ. P.

Spousal Privilege. M.C.A. §26-1-802. Person cannot be examined for or against spouse without spouse's consent; nor can spouse during marriage or afterward, be examined as to any communication made during the marriage without consent of other. This exception does not apply to civil action or proceeding by one against other or to criminal action for crime by one against other.

Waiver of privilege is also provided in Rule 503 of Montana Rules of Evidence.

### PRODUCTS LIABILITY

Doctrine of strict liability in tort as set forth in Restatement of Torts Second, §402A, has been adopted. *Brandenburger v. Toyota*, 162 Mont. 506, 513 P.2d 268 (1973); *Wood v. Old Trapper Taxi*, 286 Mont. 18, 952 P.2d 1375 (1997) and as legislatively enacted. M.C.A. §27-1-719.

Contributory Negligence not defense. Affirmative defenses provided by statute: User or consumer discovered defect or defect was open and obvious and user or consumer unreasonably made use of product and was injured by it; and, product was misused and such misuse caused or contributed to injury. Affirmative defense mitigates or bars recovery and is applied according to

comparative negligence provisions of M.C.A. §27-1-702; M.C.A. §27-1-719.

Montana recognizes strict liability cause of action for injury due to abnormally dangerous activity. *Matkovic v. Shell Oil Co.*, 218 Mont. 156, 707 P.2d 2 (1985).

Misuse. A manufacturer is not responsible for injuries resulting from abnormal or unintended use of a product if such use was not reasonably foreseeable. *Hart-Albin Co. v. McLees, Inc.*, 264 Mont. 1, 870 P.2d 51 (1994); *Lutz v. National Crane Corp.*, 267 Mont. 368, 884 P.2d 455 (1994) (superseded on other grounds). Generally, the defense of misuse refers to a use not foreseen by the manufacturer of the product. *Id.*

Three theories of product liability: manufacturing defect, design defect (where alternate designs existed at manufacturer), *Rix v. General Motors Corp.*, 222 Mont. 318, 723 P.2d 195 (1986), and failure to warn, *Riley v. American Honda Motor Co.*, 259 Mont. 128, 856 P.2d 196 (1993); *Wood v. Old Trapper Taxi*, 286 Mont. 18, 952 P.2d 1375 (1997).

In a products action, no firearm or ammunition maybe considered defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury when discharged. M.C.A. §27-1-720.

Doctrine applicable where only damage is to product itself. Failure to give strict liability instruction was prejudicial error. *Thompson v. Nebraska Mobile Homes Corp.*, 198 Mont. 461, 647 P.2d 334 (1982).

### RELEASE

See Law Digest Tables.

See M.C.A. §27-1-704.

### REPRESENTATIONS AND WARRANTIES

See "CANCELLATION."

Statutory Provisions. M.C.A. §§30-11-209 thru 224.

"Distinction between warranties and representations arises from different effect given to statements. Warranty is statement of fact on literal truth of which validity of contract depends; but in case of representation validity of policy does not depend on literal truth of assertion. In other words, warranty must be literally true, while representation need be only substantially true." *Montana A.F. Corp. v. Federal Surety*, 85 Mont. 149, 278 P.116 (1929).

### SERVICE OF PROCESS

See Rule 4D, M.R. Civ. P.

Upon Non-Resident Motorists. M.C.A. §25-3-601,602,603.

### SUBROGATION

Subrogation is equitable doctrine not dependent on any contractual relationship between parties and is not dependent on privity. *Youngblood v. American States Ins. Co.*, 262 Mont. 391, 866 P.2d 203 (1993). Purpose is to prevent injustice by compelling ultimate payment of debt by one who in justice, equity and good conscience, should pay. *Id.*

Insurer's subrogation right vests upon its payment of claim; no right of subrogation arises until claim has been paid. *Nimmick v. State Farm Mut. Auto Ins.*, 270 Mont. 315, 891 P.2d 1154 (1995).

Defendant may compel joinder of insurer as real party in interest in action for recovery of loss under subrogation right. *State ex. rel. Slovak v. District Court*, 166 Mont. 485, 534 P.2d 850 (1975).

Insured is entitled to be made whole for his entire loss and any costs of recovery, including attorney's fees, before insurer can assert its right of legal subrogation. *Skauge v. Mountain States Tel.*, 172 Mont. 521, 565 P.2d 628 (1977); *Swanson v. Hartford*, 309 Mont. 269, 46 P.3d 584 (2002). Insurer may not subrogate personal injury claims paid under medical payment coverage, but can subrogate for personal injury claims paid under uninsured motorist coverage provisions. *Farmers Ins. Exchange v. Christenson*, 211 Mont. 250, 683 P.2d 1319 (1984); *Allstate v. Reitler*, 192 Mont. 351, 628 P.2d 667 (1981).

### SUICIDE

Presumption against. In favor of accident and against suicide. *Lewis v. New York Life*, 113 Mont. 151, 124 P.2d 579 (1942). Life insurance policy may not exclude coverage for suicide beyond 2 years with rider. M.C.A. §33-20-121.

### WAIVER AND ESTOPPEL

M.C.A. §33-15-503. provides: "...insurer shall not by reason of requirement to furnish forms, have any responsibility for...completion of such proof..." None of following acts by insurer shall constitute waiver of any provision of policy: 1) Acknowledgement of receipt of notice of loss; 2) Furnishing forms for reporting loss; 3) Investigating any loss or claim. M.C.A. §33-15-504.



“Such condition (referring to requirement of notification and itemized statement of claim to be furnished) in bond is condition precedent, and failure to comply therewith will bar recovery under the bond, unless condition has been waived by company. *La Bonte v. Mutual Fire Ins. Co.*, 75 Mont. 1, 241 P. 631 (1925). That insurer may waive this condition is settled beyond question in this jurisdiction. *Conlon v. Northern*, 108 Mont. 473, 92 P.2d 284 (1939).

Denial of existence of valid policy held waiver of requirement that proof of loss be furnished. *Altermatt v. Rocky Mountain Fire Ins.*, 85 Mont. 419, 279 P. 243 (1929).

Same rule applicable where insurer denies liability on policy. *Johnson v. Rocky Mountain Fire Ins.*, 70 Mont. 411, 226 P. 515 (1924).

However, written notice of cancellation after loss does not constitute denial of liability so as to waive requirement of proof of loss. *Id.*

Insurer by failing to inquire as to nature of assured's title to, and encumbrances on, property waived policy conditions in respect thereto. *Id.*

Where insurer knows that insured's title to property is not sole and unconditional ownership, principle applies that where insurer knows at time policy is issued that it would be void and of no effect, insurance of fire property is, per se, waiver of condition. *Rice Oil v. Atlas Assur.*, 102 F.2d 561 (9th Cir. 1939).

Company held to have waived breach of condition where insurer's agent had knowledge of assured's misstatement. *Thielbar v. National*, 91 Mont. 525, 9 P.2d 469 (1932).

Estoppel to Deny Coverage. Where an insurer, without reservation and with actual or assumed knowledge, assumes that exclusive control of the defense of

claims against the insured, it cannot thereafter withdraw and deny coverage on the grounds of non-coverage. *SAFECO v. Ellinghouse*, 223 Mont. 239, 725 P.2d 217 (1986).

Failure of local agent to notify home office of timely notice of loss given by insured does not avoid policy. *Federal Land Bank v. Rocky Mountain Fire*, 85 Mont. 405, 279 P. 239 (1929). Time for notice and proof. *Outlook v. American*, 70 Mont. 8, 223 P. 905 (1926). Estoppel or waiver as to Notice and Proofs, or defects and objections. *Montana Auto Fin. Corp. v. Federal Surety*, 85 Mont. 149, 278 P. 116 (1929). Failure to object or to state ground of objection constitutes waiver. *Altermatt v. Rocky*, 85 Mont. 419, 279 P. 243 (1929).

## WARRANTIES

See “REPRESENTATIONS AND WARRANTIES.”

## WORKERS' COMPENSATION

See Law Digest Tables. Workers' Compensation Act is codified beginning at M.C.A. §39-71-101

Exclusive remedy rule applies only if the injury suffered by the worker is covered by the act. *Stratemeyer v. Lincoln County*, 276 Mont. 67, 915 P.2d 175 (1996).

However, even if covered by the act, if an employee is intentionally injured by an intentional and deliberate act of the employee's employer or by the intentional and deliberate act of a fellow employee while performing the duties of employment, the employee or in case of death the employee's heirs or personal representatives, in addition to the right to receive compensation under the Workers' Compensation Act, have a cause of action for damages against the person whose intentional and deliberate act caused the intentional injury. M.C.A. §39-71-413.