

# DIGEST OF INSURANCE LAW

## NEBRASKA

Courtesy of  
**Lamson, Dugan & Murray, LLP**  
Omaha, Nebraska

### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

County courts in each county have jurisdiction up to \$51,000 through June 30, 2005 and as set by the Supreme Court every fifth year beginning on July 1, 2005. Neb. Rev. Stat. § 24-517; Cty. Ct. R. 62. Appeals therefrom are allowed to district courts. Neb. Rev. Stat. § 25-2728.

Each county court shall have Small Claims Department. Neb. Rev. Stat. § 25-2801. The Small Claims Court shall have jurisdiction over civil matters up to \$2,700 through June 30, 2005 then subject to adjustment by the Supreme Court. Neb. Rev. Stat. § 25-2802. Trial is to court without jury. Neb. Rev. Stat. § 25-2805. Attorneys are not allowed. Neb. Rev. Stat. § 25-2803(2). Appeals are de novo to District Court. Neb. Rev. Stat. § 25-2734. Cases may be transferred to regular County Court docket under stated terms. Neb. Rev. Stat. § 25-2805. District Court in each county has unlimited civil and criminal jurisdiction. Neb. Rev. Stat. § 24-302. Appeals therefrom are to the Nebraska Court of Appeals. Neb. Rev. Stat. § 24-1106. County court has exclusive original jurisdiction in: 1) probate matters, subject to (c) of § 30-2464 and § 30-2486; 2) guardianship matters; 3) conservatorship matters; 4) actions based on violations of city ordinances; 5) juvenile matters where county does not have separate juvenile court; and 6) adoption matters. Neb. Rev. Stat. § 24-517.

#### Appellate Courts

District Courts as above set forth. Nebraska Court of Appeals has jurisdiction in all cases on appeal from District Courts of various counties. Parties may petition to bypass Court of Appeals directly to Supreme Court. Neb. Rev. Stat. § 24-1106 (2). Nebraska Court of Appeals is composed of 6 judges sitting in 3 judge panels. Neb. Rev. Stat. § 24-1101 (1). The Court of Appeals hears all civil and criminal appeals except those involving capital punishment and the constitutionality of statutes, which are appealed directly to Supreme Court, and cases in which life imprisonment has been imposed. Neb. Rev. Stat. § 24-1106.

Published opinions of the Court of Appeals constitute binding precedent. Neb. Ct. R. 2 (E)(5). Decisions of the Court of Appeals may be appealed to the Supreme Court within 30 days. Neb. Rev. Stat. § 24-1107. In some matters provided by statute Supreme Court has original jurisdiction. Neb. Rev. Stat. § 24-204. Court is composed of seven judges. Neb. Rev. Stat. § 24-201.

### LAW

#### Abbreviations

F. – Federal Reporter.  
F. Supp. – Federal Supplement.  
Neb. – Nebraska Reports.  
Neb. Rev. Stat. – Nebraska Revised Statutes Annotated (Michie 1996).  
Neb. U.C.C. – Nebraska Uniform Commercial Code.  
NJI2d – Nebraska Jury Instructions, 2d Edition.  
N.W. – Northwestern Reporter.  
N.W.2d – Northwestern Reporter, Second Series.

### ACCIDENT AND HEALTH INSURANCE

See “ACCIDENTAL MEANS” and “DISABILITY.”

Contract law. A request for cancellation of insurance policy takes effect from time of its receipt by insurer, with tender of policy. *Farmer's Mut. Ins. Co. v. Phenix Ins. Co. of Brooklyn, NY*, 65 Neb. 14, 90 N.W. 1000 (1902). For effective renewal, an accident insurance policy provision requiring payment of premium in advance may be waived when previous course of dealing establishes reasonable expectation that provision will not be enforced. *Owens v. Traveler's Ins. Co. of Hartford, Conn.*, 99 Neb. 560, 156 N.W. 1078 (1916). In month-to-month insurance policy, policy held to be effectively renewed where insurance collector furnished money for policy holder on due date, even when policy holder died before company received money, and before policy holder could reimburse collector. Held to be immaterial who furnished money for effectiveness of renewal.



*Redman v. Fidelity Acc. Ins. Co.*, 91 Neb. 89, 135 N.W. 373 (1912).

Disease Induced by Accident. No statute. Held to include morbid changes in bodily functions following accident. Whether death was caused by accident is a question for the jury, unless evidence as to the cause of such death is so convincing that all reasonable men fairly exercising their judgment would adopt the same conclusion. *Ward v. Aetna Life Ins. Co.*, 82 Neb. 499, 118 N.W. 70 (1908). Insured in poor physical condition submitted to operation, died on table from surgical shock—not accident, not sickness. *Rapp v. Metropolitan Ins. Co.*, 143 Neb. 144, 8 N.W.2d 692 (1943).

Excepted Risks. Where policy excepted “accidental suffocation by illuminating or other gases,” accidental monoxide poison held to be within exception clause. *Stone v. Physicians Cas. Ass’n*, 130 Neb. 769, 266 N.W. 605 (1936). Where disease first manifests itself after fourteen day period, though medical cause antedated policy, recovery was allowed notwithstanding clause specifying no payment for sicknesses within fourteen days from date of policy. *Davidson v. First American Ins. Co.*, 129 Neb. 184, 261 N.W. 144 (1935).

Notice and Proof of Loss. Plaintiff asserted statute of limitations of three years in insurance policy was invalid because Nebraska law maintains five year statutes of limitations period for written contracts. Held that lesser statutes of limitations in insurance policies were allowed if not “less favorable to the insured.” Nebraska law permits contractual limitations prohibiting legal actions more than three years after the time written proof of loss is required to be furnished. Neb. Rev. Stat. § § 44-710.03; *Brodine v. Blue Cross Blue Shield of Nebraska*, 272 Neb. 713, 724 N.W.2d 321 (2006).

Compliance with reasonable condition of insurance policy requiring proof of sickness filed at or within specified time essential to recovery in suit on policy, in absence of waiver or estoppel. *Blunt v. National Fidelity & Cas. Co.*, 93 Neb. 685, 141 N.W. 1033 (1913). Conditions in insurance policy governing notice and proof of loss are not necessarily and in every instance to be complied with in order to prevent forfeiture of policy. Reasonable time frame governing notice regarded as condition precedent to recovery. When cause exists rendering impossible notice given within stipulated time frame, sufficiency of excuse offered and reasonableness of time in which act is performed determined by circumstances of individual case. Beneficiary in all cases must act with due diligence. *Woodmen’s Acc. Ass’n v. Byers*, 62 Neb. 673, 87 N.W. 546 (1901).

Damages. To recover double indemnity under accident insurance policy provision, burden of proof lies

with plaintiff to show that cause for recovery exists due to injury from accidental means. *Cutrell v. John Hancock Mut. Life Ins. Co.*, 145 Neb. 550, 17 N.W.2d 465 (1945).

Accident Defined. Accident, within meaning of contracts here considered, includes any event which takes place without foresight or expectation of person acted or affected thereby, and unless otherwise stipulated, it should be given the construction most favorable to the insured. *City of Kimball v. St. Paul Fire & Marine Ins. Co.*, 190 Neb. 152, 206 N.W.2d 632 (1973). Policy of insurance covering liability arising from accident or from injuries accidentally sustained does not cover injury resulting from willful act of insured, but it does cover claims based on negligence, recklessness, or wanton misconduct where no intent or purpose to injure is shown. *Sullivan v. Great Plains Ins. Co.*, 210 Neb. 846, 317 N.W.2d 375 (1982).

## ACCIDENTAL MEANS

Defined. An effect which is natural and probable consequence of act or course of action is not an “accident,” nor produced by “accidental means,” within accident insurance policy. *Cutrell v. John Hancock Mut. Life Ins. Co.*, 145 Neb. 550, 17 N.W.2d 465 (1945); *City of Kimball v. St. Paul Fire & Marine Ins. Co.*, 190 Neb. 152, 206 N.W.2d 632 (1973).

Suicide. Presumption is against suicide. Presumption disappears when direct or circumstantial evidence introduced shows cause to be suicide. Burden of proof then shifts to plaintiff to show death was accidental. *Mustard v. St. Paul Fire & Marine Ins. Co.*, 183 Neb. 15, 157 N.W.2d 865 (1968); *Cutrell v. John Hancock Mut. Life Ins. Co.*, 145 Neb. 550, 17 N.W.2d 465 (1945).

Assault. If insured’s actions did not bring upon assault, bodily injury or death from assault held as effected by accidental means. If insured’s actions brought about assault and subsequent injury, held as not effected by accidental means. *Bernhard v. Prudential Ins. Co.*, 134 Neb. 402, 278 N.W. 846 (1938).

Particular Cases. Plaintiff, diabetic, who had record of arteriosclerosis and cerebral thrombosis, received cuts on legs from wire while fishing, became infected. Plaintiff began recovering then died from coronary and cerebral thrombosis—held for jury to decide whether death caused by accident. *Long v. Railway Mail Ass’n*, 145 Neb. 623, 17 N.W.2d 675 (1945).

Plaintiff suffered from degenerative disk disease of spine resulting in disk protrusion, underwent surgery to repair. Following successful surgery, plaintiff fell from truck suffering injury resulting in second disk protrusion requiring surgery. Necessity of surgery as result of fall



would not have occurred without preexisting condition. Cause of injury held to be factual question for jury. *Brown v. Inter-Ocean Ins. Co.*, 195 Neb. 189, 237 N.W.2d 146 (1976).

Clause limited recovery for accidental suffocation by illuminating or other gases—death by unintentional monoxide gas poisoning held accidental suffocation within clause. Court accepts viewpoint of average man and not scientist, as to whether accidental or not. *Stone v. Physicians Cas. Ass'n*, 130 Neb. 769, 266 N.W. 605 (1936).

### ADJUSTERS

Adjuster or insurance adjuster shall mean a person, copartnership, or corporation who undertakes to ascertain and report the actual loss or damage to the subject matter of the insurance due to the hazard or peril insured against. Neb. Rev. Stat. § 44-103(11). Adjusters are not required to be licensed.

### AGE

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

Age of majority 19. Neb. Rev. Stat. § 43-245 (1).

### AGENTS AND BROKERS

Definition. Agent or insurance agent shall mean an insurance producer. Neb. Rev. Stat. § 44-103 (8). A corporation is included within the legislative definition of an insurance agent. *O.G. Pierce Co. v. Century Indem. Co.*, 136 Neb. 78, 285 N.W. 91 (1939). Broker or insurance broker shall mean an insurance producer. Neb. Rev. Stat. § 44-103 (9). An insurance producer shall mean a person licensed under the laws of this state including the Insurance Producers Licensing Act, to sell, solicit, or negotiate insurance. Neb. Rev. Stat. § 44-103 (10).

Same agent may act for both insurer and insured unless duties incompatible with each other. *Fadden v. Sun Ins. Co.*, 124 Neb. 712, 248 N.W. 62 (1933). Agent's authority is shown not only by title, commission and credentials, but by business he does in company's name, or its apparent acquiescence and consent. *Whitehall v. Commonwealth Cas. Co.*, 125 Neb. 16, 248 N.W. 692 (1933).

Scope. Statute only defines scope of agency when soliciting application, collecting premium, or making contract of insurance. *Krug Park v. New York Underwriters Ins. Co.*, 129 Neb. 239, 261 N.W. 364 (1935). Insurance company is bound by all acts, contracts, or representations of its agent which are within the scope of

his real or apparent authority so long as insureds have no actual or constructive knowledge of limitations on such agent's authority. *Schnell v. United Hail Ins. Co.*, 145 Neb. 768, 18 N.W.2d 112 (1945).

Fraud by Agent. Collusion between agent and insured to defraud insurer. No statute. In action by medical examiner to recover fees for making medical examinations, insurer alleged and proved that examinations were part of scheme to defraud it by procuring applications from parties who did not intend to and never did make more than first quarterly payment; that scheme was to enable plaintiff to obtain medical fees for examination. Court held that defense insufficient to support finding of fraud, and that fraud to constitute defense must have caused injury and damage to company. *Carrington v. Omaha Life Ass'n*, 59 Neb. 116, 80 N.W. 491 (1899).

In fraudulent misrepresentation action against insurance broker, when insurance company did not cover chiropractic services, although broker stated benefits “as good” as previous plan, and plaintiff did not consider inclusion of chiropractic services in policy when choosing to enroll, no fraudulent misrepresentation, because no proximate cause. *Luscher v. Empey*, 206 Neb. 572, 293 N.W.2d 866 (1980).

Liability of Agent. Insurance agent who agrees to obtain insurance for another but negligently fails to do so is liable for damages proximately caused by such negligence; measure of damages is amount that would have been due under policy had it been obtained. *Dahlke v. John F. Zimmer Ins. Agency Inc.*, 245 Neb. 800, 515 N.W.2d 767 (1994).

When plaintiff deleted liability coverage from primary policy issued by defendant and relied solely upon liability policies of independent contractors, and liability insurer of contractor became insolvent, defendant under no duty to warn of potential insolvency of contractor's insurance because such a duty beyond the scope and obligation owed to plaintiff. *Hobbs v. Midwest Ins., Inc.*, 253 Neb. 278, 570 N.W.2d 525 (1997).

Knowledge of Agent. Knowledge of agent is considered knowledge of company. *Arendt v. North American Life Ins. Co.*, 107 Neb. 716, 187 N.W. 65 (1922); *Zweygardt v. Farmers Mut. Ins. Co.*, 195 Neb. 811, 241 N.W.2d 323 (1976). If agent taking application writes in false answers, company will be bound by agent's knowledge. *Roth v. Employers' Fire Ins. Co.*, 123 Neb. 300, 242 N.W. 612 (1932). General rule is that knowledge of the agent is imputed to principal; exception to general rule where agent engaged in independent fraudulent scheme. *Scottsbluff Nat'l Bank v. Blue J. Feeds, Inc.*, 156 Neb. 65, 54 N.W.2d 392 (1952).



Notice. Notice to insurance agent is notice to company, and revocation of his authority is not effective as to those who deal with him until they receive notice thereof. *Zukaitis v. Aetna Cas. & Surety Co.*, 195 Neb. 59, 236 N.W. 2d 819 (1975).

Insured has duty to advise agent as to insurance he wants, including limits of policy to be issued. *Dahlke v. Zimmer Ins. Agency*, 245 Neb. 800, 515 N.W.2d 767 (1994); *Manzer v. Pentico*, 209 Neb. 364, 307 N.W.2d 812 (1981).

Licensing and Regulation. See generally Neb. Rev. Stat. § 44-4047 *et seq.*

### ARBITRATION

Arbitration agreements governing future disputes were previously unenforceable in Nebraska. *State v. Nebraska Ass'n of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991). A constitutional amendment in 1996 enabled the legislature to approve of binding agreements to arbitrate future disputes to the exclusion of: 1) workers' compensation claims; 2) claims arising out of personal injury based on tort; 3) claims arising under the Nebraska Fair Employment Practice Act; and 4) any agreement relating to an insurance policy other than contracts between insurance companies; and 5) any agreement between parties governed by Neb. Rev. Stat. § 60-1401.01 to 60-1440 dealing with licensing of motor vehicles. Neb. Rev. Stat. § 25-2602.01; Neb. Const. Art. I, § 13.

Agreement to arbitrate after the dispute has arisen and at a time when the parties are aware of the nature of the dispute is valid and enforceable. *Knigge v. Knigge*, 204 Neb. 421, 282 N.W.2d 581 (1979), *modified*, 205 Neb. 149, 286 N.W.2d 444 (1980); *Overland Constructors v. Millard School Dist.*, 220 Neb. 220, 369 N.W.2d 69 (1985). See also Uniform Arbitration Act. Neb. Rev. Stat. § 25-2601 to 25-2622.

### ASSIGNMENT

See "FIRE INSURANCE."

### ATTORNEYS

Appointment and Authority. The relationship between attorney and client is one of agency and is bound by the general agency rules of law. *VRT, Inc. v. Dutton-Lainson Co.*, 247 Neb. 845, 530 N.W.2d 619 (1995). Attorneys may not waive rights which are personal to their clients. *In Re Complaint Against Staley*, 241 Neb. 152, 486 N.W.2d 886 (1992). It is up to the client to decide whether to accept a settlement offer. *Smith v. Ganz*, 219 Neb. 432, 363 N.W.2d 526 (1985). Attorney appearing in action and purporting to represent a party is pre-

sumed to have authority to act for that party. *Lennon v. Kearney*, 132 Neb. 180, 271 N.W. 351 (1937).

Conflicts of Interest. After receiving confidence of client, attorney may not enter the service of others whose interest are adverse to such client's interest in the same subject matter to which the confidence relates, or in matters so closely allied thereto as to be, in effect, a part thereof. *State Ex Rel. First Tier Bank v. Mullen*, 248 Neb. 384, 534 N.W.2d 575 (1995). The subject matter of two causes are "substantially related" if the similarity of the factual and legal issues creates a genuine threat that the affected attorney may have received confidential information in the first cause that could be used against the former client in the present cause. *State Ex Rel. Wal-Mart Stores, Inc. v. Kortum*, 251 Neb. 805, 559 N.W.2d 496 (1997). An attorney is not barred from representing a subsequent client against a former client if the duties required of him do not conflict with those involved in the first employment. *Bellairs v. Dudden*, 194 Neb. 5, 230 N.W.2d 92 (1975).

Legal Malpractice. To succeed in an action for attorney negligence, a plaintiff must prove: 1) attorney's employment, 2) attorney's neglect of reasonable duty, and 3) that such negligence resulted in and was proximate cause of loss to client. *Sports Courts of Omaha, Ltd. v. Brower*, 248 Neb. 272, 534 N.W.2d 317 (1995).

Professional Conduct. The conduct of attorneys admitted to practice in Nebraska is governed by the Nebraska Rules of Professional Responsibility (Rule 1.0 to Rule 8.5).

Fees. Attorney fees are governed generally by Rule 1.5 of the Nebraska Rules of Professional Responsibility. Rule 1.5(a) provides that a lawyer shall not enter into an agreement for, charge, or collect an illegal clearly excessive fee. Rule 1.5(d)(2) prohibits contingent fee arrangements for defendant in criminal cases. An attorney may collect a reasonable attorney fee from a party who benefits from a common fund recovered by attorney. *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994). Negative indirect history. *Called into doubt by statute as stated in Bergan Mercy Health System v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000); *Parnel v. Good Samaritan Health Sys., Inc.*, 260 Neb. 877, 620 N.W.2d 354 (2000). *Declined to extend by Kindred v. City of Omaha*, 252 Neb. 658, 564 N.W.2d 592 (1997).

### AUTOMOBILES

See Law Digest Tables.

See "NEGLIGENCE."

Age. Minimum age is 16, although limited permits are available to minors younger than 16 but over 13 who reside on a farm or over 14 if employed upon a farm, to operate farm tractors or other motorized farm equipment. Neb. Rev. Stat. § 60-4, 126.

Minors from age 15 may obtain learner's permit to operate motor vehicle if a licensed operator, who is at least 21, occupies seat beside driver. Neb. Rev. Stat. § 60-4, 123.

Agency. To hold employer liable for accident when car driven by employee, it must be shown that employee was engaged in employer's business with his knowledge and consent. Employer not liable where employee's activities have remote possibility of resulting in benefit to employer. *Johnson v. Evers*, 195 Neb. 426, 238 N.W.2d 474 (1976), distinguished by *Andrysik v. Kroupa*, 1 Neb. C.A. 218, 1992 WL 78377 (Neb. App. 1992).

One who has authority to allow or prohibit use of a vehicle is negligent when he or she knowingly entrusts the vehicle to an underage, unlicensed minor in violation of statute. The owner will then be liable for damages which proximately result in the negligent use of the vehicle. *Dewester v. Watkins*, 275 Neb. 173, 745 N.W.2d 330 (2008). Where owner entrusts automobile to one so lacking in competency and skill as to convert vehicle into dangerous instrumentality, liability may arise. *Deck v. Sherlock*, 162 Neb. 86, 75 N.W.2d 99 (1956), distinguished by *Gibb v. Strickland*, 245 Neb. 325, 513 N.W.2d 274 (1994).

Alcohol. Legal intoxication in Nebraska is 0.08%. Neb. Rev. Stat. § 60-6, 196.

Contributory Negligence. Imputed to passenger where driver and passenger on joint venture, and each has equal right to direct and control the operation of the vehicle. *Hofrichter v. Kiewit-Condon-Cunningham*, 147 Neb. 224, 22 N.W.2d 703 (1946). Negligence imputed to owner passenger where he assumes to direct or has power to direct operation of automobile. *Kremlacek v. Sedlacek*, 190 Neb. 460, 209 N.W. 2d 149 (1973).

Automobile furnished by employer for business use only. Employee traveling salesman stayed overnight out of city and used auto for personal social affair. Court held once initial permission given by employer, employee was insured under ordinary omnibus clause until permission terminated. *Arndt v. Davis*, 183 Neb. 726, 163 N.W.2d 886 (1969).

Compulsory coverage. Neb. Rev. Stat. § 60-310 requires coverage of \$25,000 for bodily injury or death of one person in accident or injury or destruction of property and \$50,000 for bodily injury or death to two persons in one accident. Neb. Rev. Stat. § 60-310.

Emergency Doctrine. Doctrine of sudden emergency may not be successively invoked by litigant unless there is evidence that such emergency existed, that party seeking benefit of doctrine did not cause emergency, and that he used due care to avoid it. *Schwartz v. Hibdon*, 174 Neb. 129, 116 N.W.2d 187, opinion clarified, reh'g denied, 174 Neb. 397, 118 N.W.2d 327 (1962). Not applicable where emergency caused in part by party claiming its benefit. *Jones v. Consumers Co-op. Propane Co.*, 186 Neb. 629, 185 N.W.2d 458 (1971); *Maurer v. Harper*, 207 Neb. 655, 300 N.W.2d 191 (1981).

Family Purpose Doctrine. Followed in Nebraska. *Garska v. Harris*, 172 Neb. 339, 109 N.W.2d 529 (1961). Plaintiff must establish the following: (a) that defendant was head of household; (b) that defendant furnished the vehicle for the use and pleasure of his family; (c) that driver was member of household family; and (d) that driver was operating vehicle at time of collision with the express or implied permission of head of household. *Leonard v. Wilson*, 238 Neb. 1, 468 N.W.2d 604 (1991). Joint ownership of vehicle is not alone sufficient basis for imputation of negligence of family member. *Ramsey v. Rimpley*, 196 Neb. 516, 244 N.W.2d 78 (1976).

Guests. Guest Statute, Neb. Rev. Stat. § 25-21, 237. Owner of vehicle not liable for spouse or relatives within the second degree of consanguinity or affinity unless driver intoxicated or gross negligence is found. Guest statute does not violate state constitution's equal protection clause or prohibition on special legislation when applied to grandchild-grandparent relationship. *Le v. Lautrup*, 271 Neb. 931, 716 N.W.2d 713 (2006).

Last Clear Chance. See generally NJI2d § 3.23 comments. Assumed but not decided that doctrine has continuing validity in comparative fault system. *Baldwin v. City of Omaha*, 259 Neb. 1, 607 N.W.2d 841 (2000).

Ownership-Title. Certificate of Title Act, Neb. Rev. Stat. § 60-101 *et seq.*, is strictly construed and is exclusive means of transferring automobile titles. *Wolfson Car Leasing Co. v. Weberg*, 200 Neb. 420, 264 N.W.2d 178 (1978).

Range of Vision. Motorist negligent as matter of law if operates motor vehicle in such manner to be unable to stop or turn aside without colliding with object or obstruction within range of vision. *Martin v. Roth*, 252 Neb. 969, 568 N.W.2d 553 (1997). Exception when motorist suddenly stops or slows on road or the object is indiscernible because similar color as road. *McFadden v. Winters & Merchant, Inc.*, 8 Neb. App. 870, 603 N.W.2d 31 (1999).

Pedestrians. Vehicle drivers shall exercise due care to avoid colliding with pedestrian, give audible signal



when necessary, and take proper precautions when observe child or obviously confused or incapacitated person on road. Neb. Rev. Stat. § 60-6, 109. Due care means the absence of negligence. *State v. Mattan*, 207 Neb. 679, 300 N.W.2d 810 (1981). Intoxicated person not obviously confused or incapacitated. Pedestrian has duty of care when crossing between intersections. *Hines v. Pollock*, 229 Neb. 614, 428 N.W.2d 207 (1988).

**Seat Belts.** Driver and front seat occupant required to wear seat belts. Neb. Rev. Stat. § 60-6, 270. Evidence that a person was not wearing an occupant protection system at the time he or she was injured shall not be admissible in regard to the issue of liability or proximate cause but may be admissible as evidence concerning mitigation of damages, except that it shall not reduce recovery by more than 5%. Neb. Rev. Stat. § 60-6, 273.

**Service of Process Upon Non-resident Motorists.** Substantially same as federal rules. Neb. Rev. Stat. § 25-536 and 25-540; *Crete Carrier Corp. v. Red Food Stores, Inc.*, 254 Neb. 323, 576 N.W.2d 760 (1998).

**Strict compliance with provisions relating to use of postal service to notify defendant is mandatory and jurisdictional.** *Wilson v. Smith*, 193 Neb. 433, 227 N.W.2d 597 (1975).

**Speed Limits.** Unless special hazard or reduced by Department of Roads or local authorities, 25 mph in residential district, 20 mph in business district, 50 mph on dirt/gravel road, 55 mph on surfaced road not part of highway system, 65 mph on expressway, and 75 mph on interstate. Neb. Rev. Stat. § 60-6, 186.

**Trailer Weight Limit.** See generally Neb. Rev. Stat. § 60-6, 294.

**Uninsured and Underinsured Motorist Insurance Coverage.** Neb. Rev. Stat. § 44-6401 to 44-6414. No policy insuring against liability shall be issued with respect to any motor vehicle unless coverage is provided for protection of persons from uninsured or underinsured motor vehicles. Neb. Rev. Stat. § 44-6408. Insured did not need to procure a judgment against uninsured motorist as precondition to action against the insurance carrier. *Swift v. Dairyland Ins. Co.*, 250 Neb. 31, 547 N.W.2d 147 (1996). Provision in policy for underinsured coverage rendered void against public policy where provision sought to reduce liability by value of benefits paid under workers' compensation act. *Muller v. Tri-State Ins. Co. of Minnesota*, 252 Neb. 1, 560 N.W.2d 130 (1997).

## AVIATION

See Generally Neb. Rev. Stat. § 3-101 *et seq.* Guest statute applicable based on second degree of consan-

guinity or affinity. Neb. Rev. Stat. § 3-129.01 (Reissue 1997).

Violation of FAA regulations are evidence of negligence not negligence per se. *Tank v. Peterson*, 219 Neb. 438, 363 N.W.2d 530 (1985). There is no statutory limit of liability.

## BROKERS

See "AGENTS AND BROKERS."

## BURGLARY INSURANCE

Terms theft, escape, conversion, embezzlement, and mysterious disappearance defined in *Raff v. Farm Bureau Ins. Co.*, 181 Neb. 444, 149 N.W.2d 52 (1967).

When cattle disappeared but no physical evidence of theft, plaintiff did not meet prima facie burden. Circumstantial evidence alone not enough unless circumstances of such nature and so related that conclusion of theft only one that can be reasonably drawn. Other inferences could be drawn because no direct evidence of theft. *Ward Cattle Co. v. Farm Bureau Ins. Co.*, 223 Neb. 69, 388 N.W.2d 89 (1986).

## CANCELLATION

Cancellation of policy shall be made by insurer on request of insured and insurer shall return premium paid less "customary short rate" for expired time. Insurer can cancel policy on notice and return of unearned premium to insured. *Sculley v. Sullivan*, 171 Neb. 795, 108 N.W.2d 82 (1961). See also *G. Bartling & Co. v. Harris Truck Lines, Inc.*, 175 Neb. 465, 122 N.W.2d 243 (1963). Policies usually so provide, but in any event statutory requirements are considered as part of contracts of insurance. *Johnson v. St. Paul Fire & Marine Ins. Co.*, 104 Neb. 831, 178 N.W. 926 (1920).

Where property is owned jointly and so insured, one owner cannot cancel policy without consent of co-insured. *Kent v. Dairyland Mut. Ins. Co.*, 177 Neb. 709, 131 N.W.2d 146 (1964), distinguished by *City of Columbus v. Swanson*, 270 Neb. 713, 708 N.W.2d 225 (2005).

**Automobile.** Notice of cancellation of an automobile liability policy shall be given thirty days before the cancellation is effective, Neb. Rev. Stat. § 44-515. Exceptions exist for: 1) assigned risk policies, Neb. Rev. Stat. § 44-523; 2) policies primarily covering personal premises liability, Neb. Rev. Stat. § 44-523; and 3) non-renewal policies in effect less than sixty days, Neb. Rev. Stat. § 44-515. This notice is effective if sent by registered, certified or first class mail to insured at address on the policy. Neb. Rev. Stat. § 44-523. If sent by first class



mail, a U.S. Postal certificate of mailing shall be sufficient proof of receipt of notice. Neb. Rev. Stat. § 44-522(4). Sections (2) and (3) of Neb. Rev. Stat. § 44-522 do not apply to automobile insurance coverage.

Automobile liability policies may be cancelled only for non-payment of premium, fraud or material misrepresentation, revocation of insured drivers' license or insured drivers' conviction of larceny of automobile. Not applicable to policies in effect less than sixty days. Neb. Rev. Stat. § 44-515 (Reissue 1998). *But see Saunders v. Mittlieder*, 195 Neb. 232, 237 N.W.2d 838 (1976); *Glockel v. State Farm Mut. Ins. Co.*, 219 Neb. 222, 361 N.W.2d 559 (1985). Notice of cancellation must be mailed by registered or certified mail 30 days prior to cancellation; if cancellation for nonpayment of premium requires 10 days notice accompanied by reason therefore; insured may request reason for cancellation to be mailed to him, reason must be furnished 25 days prior to cancellation date. Neb. Rev. Stat. § 44-516. Twenty days notice required for refusal to renew. Neb. Rev. Stat. § 44-517. Fifteen days notice of reason for non-renewal required upon request. Neb. Rev. Stat. § 44-518. Notice of cancellation or notice of intent not to renew must notify named insured of the insured's possible eligibility for automobile liability insurance through an affiliated insurer. Neb. Rev. Stat. § 44-520.

### CHATTEL MORTGAGE

See "FIRE INSURANCE."

### CONSTRUCTION OF POLICY

Ambiguity. Policy construed as any other contract. If ambiguous will be construed in favor of insured. *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006); *Lumbard v. Western Fire Ins. Co.*, 221 Neb. 804, 381 N.W.2d 117 (1986).

Conditional receipt of application may give rise to coverage. *Hemenway v. M.F.A. Life Ins. Co.*, 211 Neb. 193, 318 N.W.2d 70 (1982), *distinguished by Vesely v. National Travelers Life Ins.*, 12 Neb.App. 622, 682 N.W.2d 713 (2004).

Policy terms prevail over inconsistent endorsements. *Workman v. Great Plains Ins. Co.*, 189 Neb. 22, 200 N.W.2d 8 (1972).

### CONTRIBUTION

See "FIRE INSURANCE"; "LIABILITY INSURANCE."

### DAMAGES

Appeals. Verdict will not be set aside on appeal unless it is a result of passion or prejudice. *Mindt v.*

*Shavers*, 214 Neb. 786, 337 N.W.2d 97 (1983); *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006).

Indemnity provisions are valid but if they are ambiguous they are to be construed against the party who wrote it. *Peter Kiewitt & Sons Co. v. O'Keefe Elevator Co.*, 191 Neb. 50, 213 N.W.2d 731 (1974). Actions for indemnity and/or contribution recognized.

Damages for pain and suffering can be awarded. No mathematical formula for translating pain and suffering into dollars. In awarding damages, must rely upon totality of circumstances. Credibility of evidence and witnesses and weight given rest within discretion of factfinder. *Steinauer v. Sarpy County*, 217 Neb. 830, 353 N.W.2d 715 (1984).

Punitive damages not allowed. *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1975).

Statutory caps on awards only in medical malpractice, \$1,250,000 for any occurrence after December 31, 1992. Neb. Rev. Stat. § 44-2825. After December 21, 2003, increases to \$1,750,000.

Political Subdivision Tort Claims Act. Under the Political Subdivision Tort Claims Act, the total amount recoverable is limited to \$1,000,000 for any person for any claims arising from a single occurrence or \$5,000,000 for all claims arising from single occurrence. Neb. Rev. Stat. § 13-926.

Collateral Source Rule. Under the Collateral Source Rule, fact that party seeking recovery has been wholly or partially indemnified for loss by insurance or otherwise generally cannot be set up by wrongdoer in mitigation of damages. *Chadron Energy Corp. v. First Nat'l Bank of Omaha*, 236 Neb. 173, 459 N.W.2d 718 (1990).

### DEATH

See Law Digest Tables.

Abatement and Revivor. Survival and abatement of claims and actions. Neb. Rev. Stat. § 25-1401. Cause of action survives notwithstanding death of person. No pending action shall abate by death except action for libel, slander, malicious prosecution, assault, or assault and battery, or for a nuisance, which shall abate by the death of the defendant. Neb. Rev. Stat. § 25-322, 25-1402.

Wrongful Death. Damages limited to pecuniary loss to widow, widower, next of kin. Statute of limitations two years after death. Neb. Rev. Stat. § 30-810.

Presumption of. Person who is absent for continuous period of five years during which he is not heard from, and whose absence is not satisfactorily explained

after diligent search or inquiry is presumed to be dead. His death is presumed to have occurred at end of period unless there is sufficient evidence for determining that death occurred earlier. Neb. Rev. Stat. § 30-2207 (3).

### DISABILITY

No Statute. Policy provided only for total disability. Insured had his hand injured by bursting of bottle which injury prevented use of such hand for several months. But insured was able to attend to his "usual and ordinary work" and it was held that he was not "totally disabled." *Coad v. Travelers Ins. Co.*, 61 Neb. 563, 85 N.W. 558 (1901). Physician fell on pavement and injured his hip, which injury resulted in carcinoma. He attended to some, but not all of his professional duties for over two months, but suffered all the time. Court held that he was "totally and continuously" unable to transact all business duties from date of accident. *Rathbun v. Globe Indem. Co.*, 107 Neb. 18, 184 N.W. 903 (1921). Insured suffered fracture of both bones of one leg leading to amputation which injury rendered him incapable of "following any gainful occupation" for four years. Court held that he was totally disabled. *Eastep v. Northwestern Nat'l Life Ins. Co.*, 114 Neb. 505, 208 N.W. 632 (1926). Total disability clause should be liberally construed to mean such disability as renders insured unable to perform substantial and material acts of his business or occupation in usual way. *Brown v. Inter-Ocean Ins. Co.*, 195 Neb. 189, 237 N.W.2d 146 (1976).

Insured may not recover where accident aggravated existing disease, and both contributed to total disability. *Russell v. Glens Falls Indem. Co.*, 134 Neb. 631, 279 N.W. 287 (1938), *disapproved of by Long v. Railway Mail Ass'n*, 145 Neb. 623, 17 N.W.2d 675 (1945); *Nee-man v. John Hancock Mut. Life Ins. Co.*, 182 Neb. 144, 153 N.W.2d 448 (1967); *Brown v. Inter-Ocean Ins.*, 195 Neb. 189, 237 N.W.2d 146 (1976).

Policy provided total and permanent benefits to be discontinued in event of recovery—to be entitled to payment, disability must be such as to honestly and reasonably prevent insured from performing the substantial and material acts necessary to performance of any occupation for compensation of financial value, and disability during time benefits that are allowed must be expected with reasonable certainty to continue indefinitely. *Thomas v. Prudential Ins. Co.*, 131 Neb. 274, 267 N.W. 446 (1936).

Although insured totally disabled for over three months, held not entitled to total and permanent disability benefits under policy raising presumption of permanency after three months disability, where disability was neither total nor permanent. *Reed v. New York Life Ins. Co.*, 131 Neb. 330, 268 N.W. 290 (1936).

Total disability is not utter mental and physical helplessness; provision that disability must be total and continuous from date of accident held not to cause forfeiture where insured worked seven months after accident with latent hernia. Proper medical care would have required operation and hospitalization immediately after accident, if true injury had been known. *McCleneghan v. London Guar. & Accident Co.*, 132 Neb. 131, 271 N.W. 276 (1937); *Schultz v. John Hancock Mut. Life Ins. Co.* 134 Neb. 885, 280 N.W. 165 (1938); *Brown v. Inter-Ocean Ins. Co.*, 195 Neb. 189, 237 N.W.2d 146 (1976).

Total disability defined as an "inability to do all the substantial and material acts necessary to prosecution of insured's business or occupation in his customary and usual manner." *Bennett v. Metropolitan Life Ins. Co.*, 136 Neb. 785, 287 N.W. 609 (1939). Inability to perform any material act necessary to substantially and practically carry on his business. *Miceli v. Equitable Life Assurance Soc'y*, 138 Neb. 367, 293 N.W. 112 (1940), *reh'g denied*, 249 N.W.2d 659 (1940). Insured who could collect rents and lease property, though later held insane, is not "totally and permanently disabled." *Gowe v. Mutual Life Ins. Co.*, 139 Neb. 1, 296 N.W. 163 (1941).

Total disability exists "from date of accident" within meaning of policy when it results within time required by processes of nature for injury to produce effect. *Murphy v. Travelers Ins. Co.*, 141 Neb. 41, 2 N.W.2d 576 (1942).

Proof of. If provision of policy with disability benefits clearly shows benefits shall not accrue until proof is furnished the insurer, furnishing of proof is condition precedent to commencement of company's liability to pay benefits. *Thomas v. Prudential Ins. Co.*, 131 Neb. 274, 267 N.W. 446 (1936); *Radecki v. Mutual of Omaha Ins. Co.*, 225 Neb. 224, 583 N.W.2d 320 (1998). "Due proof of such disability" does not require any particular form of proof but only statement of facts, which, if established in Court, would call for payment of claim. *Wray v. Equitable Life Assurance Soc'y*, 129 Neb. 703, 262 N.W. 833 (1935).

Partial Disability. Permanent partial disability payments measured by loss of earning power or employability, not loss of bodily function pursuant to Neb. Rev. Stat. § 48-121(2). *Miller v. Commercial Contractors Equip. Inc.*, 14 Neb. App. 606, 711 N.W.2d 893 (2006).

### FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables; "AUTOMOBILES, Compulsory Coverage."

## FIRE INSURANCE

Statute requiring "open" policy, Neb. Rev. Stat. § 44-501 prevails over statute requiring "valued" policy, Neb. Rev. Stat. § 44-501.02. *Insurance Co. v. County of Hall*, 188 Neb. 609, 198 N.W.2d 490 (1972).

Nebraska adheres to the 1943 New York Standard form of fire insurance policy. Neb. Rev. Stat. § 44-501.

Arbitration. Though policy contained arbitration provision, failure to arbitrate does not preclude action on policy. *Insurance Co. v. Bachler*, 44 Neb. 549, 62 N.W. 911 (1895). Both mandatory arbitration provision and no suit without written permission clauses under uninsured motorist provision held contrary to public policy and Nebraska Constitution. *State v. Nebraska Ass'n of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991); *Booth v. Seaboard Fire & Marine Ins. Co.*, 285 F. Supp. 920 (1968), modified on other grounds by 431 F.2d 212 (8<sup>th</sup> Cir. 1970).

Arson. Implied exception to all contracts of marine or of fire insurance. However, arson by stockholder of corporate insured is not defense to action on policy of insurance, unless stockholder is beneficial owner of practically all of stock, or is dominant in management and control of its affairs and property. Rule as to partnerships and joint ventures is that innocent partners and joint venturers are barred from recovery where arson is perpetrated by partner or joint venturer. *Continental Ins. Co. v. Gustav's Stable Club, Inc.*, 211 Neb. 1, 317 N.W.2d 734 (1982).

Assignment. Before loss, policy may be assigned with consent of insurer. After loss, claim may be assigned to anyone. *Connolly v. Providence Washington Ins. Co.*, 126 Neb. 303, 253 NW 340 (1934).

Cancellation. See "CANCELLATION."

Strict compliance with policy provisions required. *Sanks v. St. Paul Fire & Marine Ins. Co.*, 131 Neb. 266, 267 N.W. 454 (1936).

Chattel Mortgage. Policies usually provide that any incumbrance without consent or knowledge of insurer will void insurance. However, statute states "breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding." Neb. Rev. Stat. § 44-358. This section has no application to breach which could only arise after loss has occurred. *Ach v. Farmers Mut. Ins. Co.*, 191 Neb. 407, 215 N.W.2d 518 (1974). Supreme Court has upheld such clause. *Security State Bank v. Aetna Ins. Co.*, 106 Neb. 126, 183 N.W. 92 (1921). If proof shall show in any

given case that chattel mortgage or other incumbrance on part or all of property contributed to loss, it is obvious that whole policy shall be void under statute. Chattel mortgage held to have voided policy. *Home Fire Ins. Co. v. Johansen*, 59 Neb. 349, 80 N.W. 1047 (1899).

Concurrent Insurance. An insurance company is estopped, after a loss, to insist that a fire insurance policy is void because consent to concurrent insurance was not given in writing when an insurance agent issues policy with knowledge of concurrent policy. *Phenix Ins. Co. of Brooklyn v. Covey*, 41 Neb. 724, 60 N.W. 12 (1894).

Contribution between Companies. Neb. Rev. Stat. § 44-501 (5), allows companies to issue joint policy. Contribution clause in fire policy will be enforced. *German Ins. v. Heiduk Oskibowski*, 30 Neb. 288, 46 N.W. 481 (1890). Standard mortgage clause only makes mortgagee appointee to receive insurance money due to mortgagor. *St. Paul Fire & Marine Ins. Co. v. Ruddy*, 299 F. 189 (8<sup>th</sup> Cir. 1924). Union mortgage clause is contract between the mortgagee and insurance company and cannot be invalidated by acts of insured contrary to policy. *Phenix Ins. Co. v. Omaha Loan & Trust Co.*, 41 Neb. 834, 60 N.W. 133 (1894).

Excessive Insurance. Taking out additional policy without insurer's consent does not render original policy void, but makes it voidable at insurer's election. *Slafter v. New Brunswick Fire Ins Co*, 142 Neb. 209, 5 N.W.2d 217 (1942).

Examination of Insured. There is no statutory provision concerning examination of insured after loss, but provision is usually inserted in fire and burglary policies that insured shall submit to examination under oath if companies desire such. *Wright v. Farmers Mut. of Nebraska*, 266 Neb. 802, 669 N.W.2d 462 (2003).

Fireman's Rule. Applied only to professional or volunteer fire fighters. *Moravec v. Moravec*, 216 Neb. 412, 343 N.W.2d 762 (1984).

Excepted Risks. Friendly Fires. Friendly—confined to place intended; hostile—not so confined. *Coryell v. Old Colony Ins. Co.*, 118 Neb. 312, 229 N.W. 326 (1930).

Fixtures. Recovery allowed for fixtures if covered under fire insurance policy, even if fixtures destroyed while temporarily removed from insured building and stored elsewhere. *Nile Valley Co-op. Grain & Mill. Co. v. Farmer's Elevator Mut.*, 187 Neb. 720, 193 N.W.2d 752 (1972).

Smoke and Soot. Recovery for smoke and soot damage not allowed if result of friendly fire. *Coryell v. Old Colony Ins. Co.*, 118 Neb. 312, 229 N.W. 326 (1930).

Replacement Value. Evidence must be such that replacement cost for damages can be determined with reasonable certainty, and cannot be based on speculation or conjecture. *Sherman v. Travelers Ins. Co.*, 193 Neb. 104, 225 N.W.2d 547 (1975). Insured should not be barred from recovery for replacement costs due to failure to rebuild within time restraints of policy making timely rebuilding condition precedent to recovery, when insurer's conduct prevented insured from rebuilding. *Bailey v. Farmers Union Co-op. Ins. Co.*, 1 Neb. App. 408, 498 N.W.2d 591 (1992).

Knowledge of Agent. Where insurance agent had knowledge of vacancy of premises on date of issuance of fire policy, on date when he increased coverage of policy, and on date vandalism occurred, provisions of policy voiding same while premises remained vacant were waived as to existing vacancy which continued until premises were destroyed by fire. *Zweygardt v. Farmers Mutual Ins. Co.*, 195 Neb. 811, 241 N.W.2d 323 (1976).

Ownership. Court will not, under guise of construction extend coverage to property elsewhere than as described in policy. *Peony Park, Inc. v. Security Ins. Co.*, 137 Neb. 504, 289 N.W. 848 (1940).

Proration. Clause immediately after or before prohibition against other insurance shows that pro rata clause was intended if violation existed. *Kent v. Ins. Co. of North America*, 189 Neb. 769, 205 N.W.2d 532 (1973).

Proof of Loss. Policies usually require such within given time and such limitations are held valid. *McCann v. Aetna Ins. Co.*, 3 Neb. 198 (1874). See *Clark v. State Farmers Ins. Co.*, 142 Neb. 483, 7 N.W.2d 71 (1942). But it may be waived by denial of liability. *Kilpatrick & Co. v. London Guar. & Acc. Co.*, 121 Neb. 354, 237 N.W. 162 (1931). No error for failure to disclose origin of fire if insured did not know. *Anderson v. Clay County Mut. Ins. Co.*, 145 Neb. 353, 16 N.W.2d 481 (1944). Whoever knowingly submits false information or proof of fraudulent claim to an insurer or its agent may be held criminally liable. Neb. Rev. Stat. § 28-631.

Misrepresentation by insured in proof of loss or deposition may void insurance policy only if misrepresentation is material. Reliance and resulting injury are essential elements. *Omaha Paper Stock Co. v. California Union Ins. Co.*, 200 Neb. 31, 262 N.W.2d 175 (1978).

Representation. Owner who contracts to procure insurance to cover contractor and fails to do so or to have contractor named insured becomes insurer of contractor. *Midwest Lumber Co. v. Dwight E. Nelson Constr. Co.*, 188 Neb. 308, 196 N.W.2d 377 (1972). See also, *In Re Estate of Johnson*, 195 Neb. 131, 236 N.W.2d 838 (1975).

## GUEST CASES

See "AUTOMOBILES, Guests."

## HOSPITALS

Hospital has duty to keep and retain records which are quasi-public in nature. Neb. Rev. Stat. § 71-2024 (repealed). *Bishop Clarkson Hosp. v. Reserve Life Ins. Co.*, 350 F.2d 1006 (8th Cir. 1965).

Lien of physician, nurse or hospital recognized. Neb. Rev. Stat. § 52-401. Lien is equal to the debt still owed for usual and customary charges. If lien impaired by insurer, insurer directly liable for amount to satisfy lien. *Midwest Neurosurgery v. State Farm Ins. Co.*, 268 Neb. 642, 686 N.W.2d 572 (2004).

When hospital perfects lien and insurer subsequently settles with patient, and patient then files for bankruptcy, the lien is still valid against the insurer. *Alegent Health v. Am. Fam. Ins.*, 265 Neb. 312, 656 N.W.2d 906 (2003).

Hospital immunity abrogated in *Myers v. Drozda*, 180 Neb. 183, 141 N.W.2d 852 (1966).

## HUSBAND AND WIFE

Divorce. See generally Neb. Rev. Stat. § 42-341 to 42-381.

Common law doctrine of interspousal tort immunity abrogated in *Imig v. March*, 203 Neb. 537, 279 N.W.2d 382 (1979).

Cause of action for loss of consortium recognized. *Anson v. Fletcher*, 192 Neb. 317, 220 N.W.2d 371 (1974). Limited spousal immunity protects confidential communications conferred between spouses. Neb. Rev. Stat. § 27-505.

## INFANTS

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

Standard of conduct to which such child must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under the circumstances. *Camerlinck v. Thomas*, 209 Neb. 843, 312 N.W.2d 260 (1981).

## INLAND MARINE

The term "inland marine coverage" encompasses a variety of specialized insurance coverages, including coverage for loss or damage to goods while in transit. *Ohio Cas. Ins. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001).



## LIABILITY INSURANCE

**Arbitration.** Arbitration clause in policy of insurance compelling parties to contract, to arbitrate, and thus to oust court of jurisdiction to settle dispute is against public policy in Nebraska and will not be enforced. *Heisner v. Jones*, 184 Neb. 602, 169 N.W.2d 606 (1969). To same effect, *German-American Ins. Co. v. Etherton*, 25 Neb. 505, 41 N.W. 406 (1889).

**Cancellation.** Effective if for nonpayment of premium, fraud or material misrepresentation, suspended or revoked driver's license, convicted of theft of automobile, driver's license subject to revocation or suspension. If policy in effect less than sixty days, statute does not apply. Neb. Rev. Stat. § 44-515. Must have thirty days notice and mailed through certified mail unless cancellation for nonpayment of premium, which must have ten days notice. Neb. Rev. Stat. § 44-516. No notice required in automatic termination by expiration of the policy period. *Sampson v. State Farm Mut. Ins. Co.*, 205 Neb. 164, 286 N.W.2d 746 (1980).

**Contribution among Joint Tort-feasors.** When negligence of two or more persons occurs, producing a single indivisible injury, such persons are jointly and severally liable. *Lindgren v. City of Gering*, 206 Neb. 360, 292 N.W.2d 921 (1980). A right to contribution exists among judgment debtors jointly liable in tort for damages negligently caused and becomes enforceable on behalf of any party when he discharges more than his proportional share of the judgment. *Royal Indem. Co. v. Aetna Cas. & Sur. Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975).

**Cooperation of Insured.** Insurer cannot assert breach of cooperation clause in absence of showing of prejudice or detriment to insurer. *Iowa Mut. Ins. Co. v. Meckna*, 180 Neb. 516, 144 N.W.2d 73 (1966). Where no evidence of collusion between injured and insured and no showing of prejudice to insurer, breach of cooperation clause not a defense. *MFA Mut. Ins. Co. v. Sailors*, 180 Neb. 201, 141 N.W.2d 846 (1966). Failure of insured to attend trial as requested by insurer not per se prejudicial. *Pupkes v. Sailors*, 183 Neb. 784, 164 N.W.2d 441 (1969).

**Coverage.** Where policy limited to accidents "during progress of the work," accident during policy period but not "during progress of work" not covered. *Smith v. USF&G*, 142 Neb. 321, 6 N.W.2d 81 (1942). Mere fact that operation may need further service or maintenance work or require correction, repair, or replacement because of any defect or deficiency, does not preclude project from being deemed completed if, otherwise, it is completed. *Hartford Acc. & Indem. Co. v. Burmeister*, 207 Neb. 206, 297 N.W.2d 401 (1980).

No statutory provisions relative to coverage, but statute defines liability insurance as being against legal liability for injury or damage to persons or property and the providing of medical or death benefits to injured persons. Neb. Rev. Stat. § 44-201 (10). Construction of automobile liability policy providing automatic insurance on newly acquired auto for only ten days unless company notified, goes into effect from date insured obtains possession and control of car despite fact transfer of title not completed. *Blixt v. Home Mut. Ins. Co.*, 145 Neb. 717, 18 N.W.2d 78 (1945), *overruled on other grounds*, *Loyal's Auto Exchange v. Munch*, 153 Neb. 628, 45 N.W.2d 913 (1951).

Two similar policy provisions contained the following language: "OCCURRENCE means accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from standpoint of insured." *Millard Warehouse v. Hartford Fire Ins. Co.*, 204 Neb. 518, 283 N.W.2d 56 (1979). "Occurrence [means] an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." *Foxley v. USF&G*, 203 Neb. 165, 277 N.W.2d 686 (1979). In *Foxley*, this clause was held not to cover situations where one intentionally does damage to property of another in mistaken belief that property belongs to him. In *Millard Warehouse*, damages suffered by reason of action in nuisance brought against the policy holder were held not covered as acts constituting nuisance were voluntary and intentional and injury was natural result of acts. Result was not caused by accident even though result may have been unexpected, unforeseen, and unintended. 204 Neb. 518, 283 N.W.2d 56.

Terms and provisions which control construction of coverage provided by temporary insurance "binder" are those contained in ordinary form of policy usually issued by company at time upon similar risks. *Robinson v. State Farm Mut. Ins. Co.*, 188 Neb. 470, 197 N.W.2d 396 (1972).

Liability for fire loss allegedly resulting from defective condition of truck being used to power corn sheller was not within coverage of policy expressly excluding liability arising from operation of sheller mounted on insured truck. *Gottula v. Standard Reliance Ins. Co.*, 165 Neb. 1, 84 N.W.2d 179 (1957).

**Compromise of Claims.** Amount of liability fixed by policy, upon which premium is paid, determines limit of contractual liability and duty of insurer. When insurer has exclusive right to settle claim within policy limit it has option to compromise but no obligation to do so. *Olson v. Union Fire Ins. Co.*, 174 Neb. 375, 118 N.W.2d



318 (1962), distinguished by *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001). Liability of an insurer to pay in excess of face of policy accrues when insurer, having exclusive control of settlement, in bad faith refuses to compromise claim for amount within policy limit. *Hadenfeldt v. State Farm Mut. Ins. Co.*, 195 Neb. 578, 239 N.W.2d 499 (1976), distinguished by *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001).

**Direct Action against Insurer.** Direct actions against liability insurer carriers because of negligence of their insureds are not permitted. *State Auto & Cas. Underwriters v. Farmers Ins. Exch.*, 204 Neb. 414, 282 N.W.2d 601 (1979). Because no privity between insured person and tortfeasor's insurer, direct actions against liability insurance carrier not permitted. *German Mut. Ins. Co. v. Federated Mut. Ins. Co.*, 8 Neb. App. 1062, 606 N.W.2d 856 (2000).

**Duty to Defend.** Allegations set forth in plaintiff's complaint no longer govern duty to defend under liability policy. "Insurer therefore bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under a policy." *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 194, 313 N.W.2d 636, 641 (1981), but see *Allied Mut. Ins. v. State Farm*, 243 Neb. 779, 502 N.W.2d 484 (1993).

**Insolvency.** Automobile policy shall contain provision to effect that insolvency or bankruptcy of insured shall not release insurer from payment of damages for injury or loss; and injured may maintain action directly against insurer, Neb. Rev. Stat. § 44-508. If policy does not contain such provisions they shall be read into policy, Neb. Rev. Stat. § 44-509. See generally Neb. Rev. Stat. § 44-514.

**Jury.** Where witness on cross examination was asked about statements made in writing concerning details of accident he could on redirect be asked to whom he made statements and his answer "to lawyer for insurance company" is not grounds for mistrial, in absence of bad faith. *Gleason v. Baack*, 137 Neb. 272, 289 N.W. 349 (1939). Evidence of liability insurance not admissible to show negligence. Neb. Rev. Stat. § 27-411.

**Limit of Liability.** Limits on liability are 25/50. Neb. Rev. Stat. § 60-534. Where limits are 25/50, \$25,000 is maximum for both consequential as well as direct damages to one person; this includes wife's action for injuries and husband's action for expenses and loss of services. *Wilson v. Capitol Fire Ins. Co.*, 136 Neb. 435, 286 N.W. 331 (1939).

**No Liability Clause.** Where excess insurance clause in driver's automobile policy and no-liability clause in automobile owner's liability policy apparently conflict,

no-liability clause is ineffective and driver's insurance excess. *Jensen v. Universal Underwriters Ins. Co.*, 208 Neb. 487, 304 N.W.2d 51 (1981).

**Notice.** Provision for notice of accident within 20 days which was not given does not bar recovery where injury was latent and insured considered it only trivial for seven months. *McCleneghan v. London Guar. & Acc. Co.*, 132 Neb. 131, 271 N.W. 276 (1937).

**Uninsured Motorist.** All motor vehicle policies of insurance delivered or issued with regard to motor vehicles registered in Nebraska must contain uninsured motorist coverage for bodily injury and death in the amount of \$25,000 for one injured individual; \$50,000 for injury or death to two or more individuals. Neb. Rev. Stat. § 44-6408.

Provision in automobile liability policy which allows insurer to credit amount paid under medical pay coverage against amount due as damages to insured under uninsured motorist coverage is void and against public policy in that it reduces amount of uninsured motorist coverage required by law. *Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 156 N.W.2d 133 (1968), but see *Ostransky v. State Farm Ins.*, 252 Neb. 833, 566 N.W.2d 399 (1997) and Neb. Rev. Stat. § 44-6409 (2), which allows a credit without reducing UM or UIM claims.

**Uninsured and Underinsured Motorist.** Neb. Rev. Stat. § 44-6401 to 44-6414. Effective Jan. 1, 1997, coverage mandatory for bodily injury and death in the amount of \$25,000 for one individual; \$50,000 for injury or death to two or more individuals. Neb. Rev. Stat. § 44-6408.

Insurer not liable where insured's 15 year old son injured third party, since policy excluded operation in violation of law. *Gulizia v. Royal Indem. Co.*, 139 Neb. 832, 299 N.W. 220 (1941).

Punitive damages not recoverable. *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989).

## LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Neb. Rev. Stat. § 25-217 provides an action shall be deemed commenced on the date the complaint is filed with the court if proper service is obtained within six months of filing. If service is not perfected within six months, case is automatically dismissed without prejudice.

**Limitations in Contract.** Must be brought within 5 years (written). Neb. Rev. Stat. § 25-205. Oral contract

action must be brought within 4 years. Neb. Rev. Stat. § 25-206.

Accrual. Cause of action accrues and statute of limitations begins to run when aggrieved party has the right to institute and maintain suit. *Condon v. A.H. Robins Co., Inc.*, 217 Neb. 60, 349 N.W.2d 622 (1984). See also Neb. Rev. Stat. § 25-201.

Discovery Rule. Cause of action accrues when person knew or should have known of his right to institute and maintain suit, although nature and extent of damages may not be known. *Ames v. Hehner*, 231 Neb. 152, 435 N.W.2d 869 (1989). If continuing tort, limitations period does not run until date of last injury or cessation of wrongful action. *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 276 (2007).

Fraud. Fraud or mistake may toll statute under certain circumstances. *Mangan v. Landen*, 219 Neb. 643, 365 N.W.2d 453 (1985).

Tolling. Statute tolled for minors, incompetents, and imprisoned. Neb. Rev. Stat. § 25-213.

Waiver. Running of statute of limitations is an affirmative defense and will be waived if not raised by the pleadings. *Vielehr v. Malone*, 158 Neb. 436, 63 N.W.2d 497 (1954).

Limits on Causes of Action. Neb. Rev. Stat. § 25-202 to 25-226.

## MALPRACTICE

Medical. Two year statute of limitations. Neb. Rev. Stat. § 25-222 (Reissue 1995). Cause of action accrues when patient discovers or should have discovered malpractice. *Frezell v. Iwerson*, 231 Neb. 365, 436 N.W.2d 194 (1989). One year discovery rule for actions discovered after initial two years, 10 year statute of repose. Neb. Rev. Stat. § 25-222.

Expert Testimony. Usually required to prove lack of skill or care in diagnosis or treatment or knowledge or failure to exercise reasonable care. *Vileinskas v. Johnson*, 252 Neb. 292, 562 N.W.2d 57 (1997). Experts usually not required where negligence obvious. *Halligan v. Cotton*, 193 Neb. 331, 227 N.W.2d 10 (1975).

Informed Consent. Must show reasonable person would not have procedure and lack of informed consent was proximate cause of damages. Neb. Rev. Stat. § 44-2820. Consent based on information ordinarily provided patients in like circumstances by providers in similar practice in same or similar locality. Neb. Rev. Stat. § 44-2816. Consent may be implied. *Jones v. Malloy*, 226 Neb. 559, 412 N.W.2d 837 (1987).

Standard of Care. Reasonable and ordinary care, skill, and diligence on part of doctor under like circumstances in particular community. Test is amount of care that physicians similarly situated would exercise. *Ander-son v. Moore*, 202 Neb. 452, 275 N.W.2d 842 (1979). Neb. Rev. Stat. § 44-2810. Hospitals must exercise toward patient degree of care, skill, and diligence used by hospitals in same or similar community. *Foley v. Bishop Clarkson Hosp.*, 185 Neb. 89, 173 N.W.2d 881 (1970). Neb. Rev. Stat. § 44-2810.

Hospital. Charitable immunity abrogated in *Myers v. Drozda*, 180 Neb. 183, 141 N.W.2d 852 (1966). Staff members lack authority to alter or depart from attending physicians order for hospital patient and lack authority to determine what is a proper course of medical treatment for a hospitalized patient. *Miles v. Box Butte County*, 241 Neb. 588, 489 N.W.2d 829 (1992). Hospital generally cannot be held liable for patients injury on theory that staff should have known treatment by physician was inadequate and therefore should have intervened. *Id.*

Other Professionals. Professional standard of care applies to those performing professional services, which are acts arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical. See e.g. *Overland Constructors v. Millard School Dist.*, 220 Neb. 220, 369 N.W.2d 69 (1985).

Damages. Maximum recoverable for any occurrence after Dec. 31, 1992, \$1,250,000. Neb. Rev. Stat. § 44-2825. After Dec. 31, 2003 maximum increases to \$1,750,000. *Id.*

## NEGLIGENCE

See Law Digest Tables.

See "AUTOMOBILES."

Age. Child's capacity for negligence or contributory negligence, exists as fact question for jury, "probably somewhere in neighborhood of four years of age." However, Restatement (Second) Torts § 283A followed. *Camerlinck v. Thomas*, 209 Neb. 843, 312 N.W.2d 260 (1981). Minor, 10 years, is required to exercise that degree of care which reasonable person of like age, intelligence and experience under same circumstances. *Cullinane v. Interstate Iron & Metal*, 216 Neb. 245, 343 N.W.2d 725 (1984).

Attractive Nuisance. Condition must involve foreseeable unreasonable risk of death or serious harm to child. Instrumentality or condition must be inherently or unusually dangerous. *Davis v. Cunningham*, 196 Neb. 8, 241 N.W.2d 343 (1976).

Comparative Negligence. Neb. Rev. Stat. § 25-21,185.07. Effective 2/8/92, plaintiff's contributory negligence shall proportionately diminish plaintiff's damage recovery. Contributory negligence will not be a bar unless plaintiff's negligence is equal to or greater than total negligence of all other parties. Neb. Rev. Stat. § 25-21, 185.09. Statute now provides for application to strict liability claims. Neb. Rev. Stat. § 25-21, 185.07.

Assumption of risk is defense when one voluntarily exposes himself to injury, even though he plays no part in causing injury. *Circo v. Sisson*, 193 Neb. 704, 229 N.W.2d 50 (1975). Assumption of risk remains an affirmative defense under comparative negligence statute. Neb. Rev. Stat. § 25-21, 185.12.

Damages. Measure of recovery in all civil cases is compensatory. *Sober v. Smith*, 179 Neb. 74, 136 N.W.2d 372 (1965). No punitives allowed. Nebraska Const. Act. VII, § 5. *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1975). Medical malpractice liability for physicians, after December 31, 1992, is limited to \$1,250,000 per occurrence. Neb. Rev. Stat. § 44-2825. After December 31, 2003 maximum increases to \$1,750,000. Held as constitutional by Nebraska Supreme Court in *Gourley v. Nebraska Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003).

Definition and discussion of negligence. *McClelland v. Interstate Transit Lines*, 142 Neb. 439, 6 N.W.2d 384 (1942).

Governmental Immunity. Nebraska has enacted the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8, 209 to 81-8, 235. The statute of limitations for any claim under this act is two years. Neb. Rev. Stat. § 81-8, 227. All tort claims must be filed with the Risk Manager in the manner prescribed by the State Claims Board. Neb. Rev. Stat. § 81-8, 212. Any award given that exceeds \$50,000 must be reviewed by the legislature. Neb. Rev. Stat. § 81-8, 224. Nebraska has also enacted the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 to 13-926. The statute of limitations under this act is one year. Neb. Rev. Stat. § 13-919. All tort claims must be filed with the political subdivision being sued. Neb. Rev. Stat. § 13-905. The total amount recoverable is limited to \$1,000,000 for any person for any claims arising from single occurrence and \$5,000,000 for all claims arising from single occurrence. Neb. Rev. Stat. § 13-926.

Imputed Negligence. Negligence of family-purpose driver not ordinarily imputed to family purpose owner in actions by third parties to recover damages. *Looney v. Pickering*, 232 Neb. 32, 439 N.W.2d 467 (1989). Negligence of vehicle operator is imputed to owner of vehicle where owner is passenger and has power to direct operation of vehicle. *Kremlacek v. Sedlacek*, 190 Neb. 460,

209 N.W.2d 149 (1973). Injured party has cause of action against social host for damage caused by intoxicated minor under host's supervision. Neb. Rev. Stat. §§ 53-401 to 53-409.

Contribution between Joint Tort-feasors. Right of equitable contribution among judgment debtors jointly liable in tort and enforceable when party discharges more than his proportionate share. *Royal Indem. Co. v. Aetna Cas. & Sur. Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975). Where negligence of two or more persons combines to produce single indivisible injury, joint and several liability attaches. *Kudlacek v. Fiat*, 244 Neb. 822, 509 N.W.2d 603 (1994). Dram Shop Act repealed in 1935. *Arant v. G.H. Inc.*, 229 Neb. 729, 428 N.W.2d 631 (1988).

Infliction of Emotional Trauma. Impact rule abrogated. *Owens v. Children's Memorial Hosp.*, 347 F. Supp. 663 (8th Cir. 1972). "Zone of danger" rule abrogated; substituted with reasonable foreseeability of harm. *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985). "[E]vidence of concurrent physical injury is not required to prove a claim of negligent infliction of emotional distress." *Farm Bureau Ins. Co. v. Martinsen*, 265 Neb. 770, 659 N.W.2d 823 (2003); see also *Hamilton v. Nestor*, 265 Neb. 757, 659 N.W.2d 321 (2003).

Joint and Several Liability. Under joint and several liability, either tortfeasor may be held liable for entire amount of damages, and plaintiff need not join all tortfeasors as defendants in action for damages. *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997); *Mazankowski v. Harders*, 206 Neb. 583, 293 N.W.2d 869 (1980). Typically, liability for each defendant is joint and several for economic damages, and is several only for noneconomic damages in the amount in direct proportion to individual defendant's percentage of negligence. In an action involving multiple defendants, when two or more defendants are part of common enterprise or plan act in concert and cause harm, the liability of each defendant for economic and noneconomic damages is joint and several. *Lackman v. Roussell*, 257 Neb. 87, 596 N.W.2d 15 (1999).

Last Clear Chance. Doctrine discussed. *Donald v. Heller*, 143 Neb. 600, 10 N.W.2d 447 (1943). Doctrine presupposes time for action and is not applicable where emergency is so sudden that no time exists to avert accident. *Bush v. James*, 152 Neb. 189, 40 N.W.2d 667 (1950). Person who has committed negligent act may not recover under doctrine of last clear chance, where his negligence is active and continuing to very time of accident. In such case, questions of comparative negligence are involved and not last clear chance doctrine. *Bezdek v. Patrick*, 170 Neb. 522, 103 N.W.2d 318 (1960). But see



new comparative negligence statute, Neb. Rev. Stat. § 25-21, 185 *et seq.*

Negligence Per Se. Breach of duty imposed by statute is evidence of negligence. *Oddo v. Speedway Scaffold Co.*, 233 Neb. 1, 443 N.W.2d 596 (1989). *But see Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992).

Premises Liability. Distinction between invitees and licensees is no longer recognized, and the standard of reasonable care is required for all lawful visitors. A separate classification is retained for trespassers, because one should not owe duty to exercise reasonable care to those not lawfully on one's own property. *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996). For causes of action accruing before *Heines* (Aug. 23, 1996), the previous classifications apply that landowners owe invitees the duty of reasonable care. *Tighe v. Cedar Lawn, Inc.*, 11 Neb. App. 250, 649 N.W.2d 520 (2002); *Neff v. Clark*, 219 Neb. 521, 363 N.W.2d 925 (1985). Owner or occupant of property owes licensee duty to refrain from willful/wanton negligence. Duty to warn of hidden danger. *Dukes v. Barkdoll*, 211 Neb. 546, 319 N.W.2d 432 (1982).

Proximate Cause. Supreme Court has defined proximate cause as primary cause which produces effect without intervention of outside cause. *Bell v. Rocheford*, 78 Neb. 310, 113 N.W. 157 (1907); and as that cause which in natural and continuous sequence, unaccompanied by any efficient intervening cause, produces injury and without which result would not have occurred. *Spratlen v. Ish*, 100 Neb. 844, 161 N.W. 573 (1917); *Johnson v. City of Omaha*, 108 Neb. 481, 188 N.W. 122 (1922); *Weichel v. Lojka*, 185 Neb. 819, 179 N.W.2d 112 (1970). Proximate cause is a cause that produces result in a natural and continuous sequence, and without which result would not have occurred. Instructing juries on efficient intervening cause discontinued. *Sacco v. Caruthers*, 253 Neb. 9, 567 N.W.2d 299 (1997).

An injury must be thing that directly causes subsequent disease, and not merely condition which enables it to independently operate. *Williams v. Hines*, 109 Neb. 11, 189 N.W. 623 (1922). Death from morbid changes in bodily functions following accident, held proximately caused by such accident. *Ward v. Aetna Life Ins. Co.*, 82 Neb. 499, 118 N.W. 70 (1908). Fact that person of 50 or 55 years of age would be likely to have normal hardening of arteries in parts of body which might tend to bring about rupture of heart in case of violent accident, is not sufficient to show that accident was not proximate cause of death of assured. *Moon v. United Commercial Travelers*, 96 Neb. 65, 146 N.W. 1037 (1914). Blood poisoning will be considered as effect of injury and not as additional or other cause aside from accident. *Hornby v. State Life Ins. Co.*, 106 Neb. 575, 184 N.W. 84 (1921).

Release. Language in insurer-prepared release which indicates that settlement covers all injuries, known and unknown, does not in and of itself conclusively demonstrate, under Nebraska law, parties' intent to settle claims for unknown injuries. *McCamley v. Moss*, 587 F.2d 391 (1978). Valid release doesn't effect subsequent tort-feasor. *Scheideler v. Elias*, 209 Neb. 601, 309 N.W.2d 67 (1981). Although covenant not to sue may operate as release between parties to agreements, it will not release claim against joint tortfeasors. *Horace Mann Co. v. Pinaire*, 248 Neb. 640, 538 N.W.2d 168 (1995).

Res Ipsa Loquitur. Where plaintiff demonstrates that instrumentality under exclusive control and management of wrongdoer produced occurrence which would normally not occur in the absence of negligence, plaintiff is entitled to circumstantial inference of negligence. *Anderson v. Service Merchandise*, 240 Neb. 873, 485 N.W.2d 170 (1992). Res ipsa may be applied where joint exercise of control over the instrumentality is exercised by several defendants. *Swierczek v. Lynch*, 237 Neb. 469, 466 N.W.2d 512 (1991); *Asher v. Coca Cola Bottling Co.*, 172 Neb. 855, 112 N.W.2d 252 (1961). However, res ipsa is not available where specific acts of negligence are alleged or where evidence of the precise cause of the accident is produced. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994); *Beatty v. Davis*, 224 Neb. 663, 400 N.W.2d 850 (1987).

Sudden Emergency Doctrine. Focus of doctrine is not suddenness with which emergency developed, but rather suddenness with which person became aware of emergency. *Starns v. Jones*, 500 F.2d 1233 (8<sup>th</sup> Cir. 1974).

Driver required to make instant decision not necessarily negligent in pursuing course which deliberate judgment might prove wrong. *Willey v. Parriott*, 179 Neb. 828, 140 N.W.2d 652 (1966); *Maurer v. Harper*, 207 Neb. 655, 300 N.W.2d 191 (1981).

In order for sudden emergency doctrine to be invoked, there must exist: 1) sudden emergency not of actor's own making; 2) alternative courses of action from which to choose; and 3) need for instant decision. *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985); *McClymont v. Morgan*, 238 Neb. 390, 470 N.W.2d 768 (1991).

## NO-FAULT INSURANCE

No statute in Nebraska.

## PENALTY AND ATTORNEYS' FEES

In discretion of Court, based upon questions involved, work, skill, etc. *McNaught v. New York Life Ins.*



Co., 145 Neb. 694, 18 N.W.2d 56 (1945). Allowed by Statute Neb. Rev. Stat. § 44-359 (Reissue 1998), "any type of insurance policy except workers' compensation insurance," and also on appeal unless plaintiff fails to obtain recovery in excess of amount offered by insurance company no attorney fee allowed.

Reasonable attorney fees determined by nature of case, amount involved, results, time spent, services actually performed, diligence exhibited, and character and standing of attorney. *Barnes v. Barnes*, 192 Neb. 295, 220 N.W.2d 22 (1974). See also *Schmer v. Hawkeye Security Ins. Co.*, 194 Neb. 94, 230 N.W.2d 216 (1975).

Allowed in suit upon errors and omissions policy. *Ottoman v. Interstate Fire & Cas. Co.*, 172 Neb. 574, 111 N.W.2d 97 (1961). Allowed in suits upon construction and builders bonds. *Church of Jesus Christ of Latter Day Saints v. Universal Surety Co.*, 177 Neb. 60, 128 N.W.2d 361 (1964). Unaffected by fact that attorney has contingent fee contract. *Metcalf v. Hartford Acc. & Indem. Co.*, 176 Neb. 468, 126 N.W.2d 471 (1964). Allowed in garnishment action. *Townley v. Whetstone*, 190 Neb. 541, 209 N.W.2d 350 (1973).

Where insurer brings action for declaratory judgment to have coverage determined and insured prevails, latter is entitled to attorney's fee under provisions of Neb. Rev. Stat. § 44-359. *State Farm Mut. Ins. Co. v. Selders*, 189 Neb. 334, 202 N.W.2d 625 (1972), distinguished by *State Farm Fire & Cas. Co. v. Muth*, 190 Neb. 248, 207 N.W.2d 364 (1973).

Under Neb. Rev. Stat. § 48-118, subrogated interest of employer, for computation and allocation of fees and expenses, is not restricted to workers' compensation benefits actually paid, but is measured by workers' compensation liability relieved or discharged by recovery against third party. *Nekuda v. Waspi Trucking*, 222 Neb. 806, 388 N.W.2d 438 (1986), distinguished by *Thomas v. Lincoln Pub. Sch.*, 9 Neb. App. 965, 622 N.W.2d 705 (2001). Frivolous pleadings or pleadings filed in bad faith, may be stricken; frivolous actions or actions interposed solely for delay or harassment subject to attorney's fees and costs. Neb. Rev. Stat. § 25-824.

## PRIVILEGES

Attorney/Client. Protects confidential communications made for purpose of facilitating rendition of legal services. Neb. Rev. Stat. § 27-503.

Clergy/Penitent. Protects confidential communications made privately and not intended for disclosure, and protects confidential communication made to a clergyman in his professional character as spiritual advisor. Neb. Rev. Stat. § 27-506.

Doctor/Patient. Protects confidential communications made for purpose of diagnosis or treatment. Neb. Rev. Stat. § 27-504.

Insurer. Report or other communication made by an insured to liability insurance company concerning event which may be basis of claim covered by policy if policy requires defense and communication intended for assistance of attorney, even if communication made to agents of attorney. *Brakage v. Graff*, 190 Neb. 53, 206 N.W.2d 45 (1973).

Spousal. Protects confidential communications made while married. Neb. Rev. Stat. § 27-505.

Waiver. Neb. Rev. Stat. § 27-511. A person upon whom a privilege against disclosure of a confidential matter or communication is conferred, may waive the privilege if he or his predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure itself is privileged communication. Neb. Rev. Stat. § 27-511.

## PRODUCTS LIABILITY

Care Required. Standards of design and manufacturing skill must be consonant with state of art and risk to be avoided must be foreseeable. *Schneider v. Chrysler Motors Corp.*, 401 F.2d 549 (1968). Manufacturer of goods has duty to use reasonable care in their design of goods to protect those who use his goods from unreasonable risk of harm while goods are being used for their intended purpose or for any purpose which could reasonably be expected. *Friedrich v. Anderson*, 191 Neb. 724, 217 N.W.2d 831 (1974).

Product is unreasonably dangerous if it creates risk of harm beyond that which would be contemplated by ordinary foreseeable user. *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979).

Manufacturer is not liable for injuries to user of product which it has manufactured in accordance with plans and specifications of one other than manufacturer, except when plans are patently dangerous. *Moon v. Winger Boss Co.*, 205 Neb. 292, 287 N.W.2d 430 (1980), distinguished by *Brassette v. Burlington Northern, Inc.*, 687 F.2d 153 (1982).

Defenses. Assumption of the risk can be an affirmative defense when plaintiff willingly uses or consents to use a product which he/she knows is defective and appreciates the danger resulting from such defect. *Rahmig v. Mosely Machine Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987); see also *Hughes v. OPPD*, 274 Neb. 13, 735 N.W.2d 793 (2007).

Alteration. Manufacturer not liable when product is altered after leaving manufacturer's hands. *Erickson v. Monarch Industries*, 216 Neb. 875, 347 N.W.2d 99 (1984).

State of the Art. Manufacturer not liable if it can prove testing, design, and labeling of product conformed with generally recognized and prevailing state of the art at time the product was first sold to any person not engaged in the business of selling such a product. Neb. Rev. Stat. § 25-21,182.

Contributory Negligence. In traditional sense of failure to discover defect or guard against it is not defense to suit in strict tort liability or for breach of warranty, but assumption of risk and misuse of product is. *Hawkins Constr. Co. v. Matthews Co.*, 190 Neb. 546, 209 N.W.2d 643 (1973), *overruled on other grounds, National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 789, 332 N.W.2d 39 (1983); *See Melia v. Ford Motor Co.*, 534 F.2d 795 (1976). Comparative negligence statute, now expressly includes products liability claims. Neb. Rev. Stat. § 25-21,185.07. Contributory negligence is not permitted in a strict liability action. *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006).

Insurer. Manufacturer is not insurer and cannot be held to standard of duty of guarding against all possible types of accidents and injuries. Standard is foreseeability. *Schneider v. Chrysler Motors Corp.*, 401 F.2d 549 (8th Cir. 1968). Automobile manufacturer is not insurer that its product is, from design standpoint, incapable of producing injury. *Friedrich v. Anderson*, 191 Neb. 724, 217 N.W.2d 831 (1974).

Particular Products. Manufacturer of compressor held strictly liable for property damage when compressor exploded causing fire because of failure of pistons to collapse as designed. *Norfolk Development Corp. v. St. Regis Pulp & Paper Corp.*, 338 F. Supp. 1213 (D. Neb. 1972). Manufacturer of fork lift with uncovered resistor coil used by processor of used paper which ignited scraps of confetti-like paper when paper fell on coil, had duty to warn its distributors and users of heating propensity of coil. *Libbey-Owens Ford & Glass Co. v. L & M Paper Co.*, 189 Neb. 792, 205 N.W.2d 523 (1973). Although manufacturer of crane failed to provide shield over power-down chain, and contractor's workman was injured when attempting to dislodge cable by prying it with crow bar and struck by chain, plaintiff failed to show harm to workman was within any reasonable risk created by manufacturer. Manufacturer was not liable. *Leistra v. Bucyrus-Erie Co.*, 443 F.2d 157 (8th Cir. 1971). Vehicle manufacturer held strictly liable for seat belt during rollover; evidence of previous accidents admissible to show notice and actual knowledge of defec-

tive condition if plaintiff can prove accidents are substantially similar. *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006).

Evidence in lessee contractor company's action against lessor and manufacturer of scaffold for damages sustained as result of collapse was sufficient to support findings that connectors were defective, and defect actually resulted in lack of support causing collapse of scaffold. *Hawkins Constr. Co. v. Matthews Co.*, 190 Neb. 546, 209 N.W.2d 643 (1973), *overruled on other grounds, National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 789, 332 N.W.2d 39 (1983).

Privity of Contract. Person who has had no direct contractual relations with manufacturer may nevertheless recover from manufacturer for damages to his property caused by manufacturer's negligence in the same manner as such remote buyer or other third person may recover for personal injuries. *Rose v. Buffalo Air Service*, 170 Neb. 806, 104 N.W.2d 431 (1960).

Property Damage. The purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligence or strict liability in the absence of physical harm to persons or property caused by the defective product. *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983).

Proximate Cause. In determining whether manufacturer is liable in case involving manufacturer's conduct requiring activation by another force to produce injury, real question is whether forces set in operation by manufacturer have come to rest in position of apparent safety and some new force intervenes. *Leistra v. Bucyrus-Erie Co.*, 443 F.2d 157 (8th Cir. 1971). Not every intervening act or occurrence will break necessary causal connection and insulate manufacturer from liability from its original negligent act. *Libbey-Owens Ford Glass Co. v. L & M Paper Co.*, 189 Neb. 792, 205 N.W.2d 523 (1973). Negligence defendant's conduct is the cause of event if event would not have occurred but for that conduct; defendant's conduct not cause of event if event would have occurred without conduct. Thus, when vehicle's tire failed and motorist then murdered, no proximate cause. *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244.

One who is injured as result of mechanical defect in motor vehicle should be protected under doctrine of strict liability even though defect was not cause of collision which precipitated injury. There is no rational basis for limiting manufacturer's liability to those instances where structural defect has caused collision and resulting injury. This is so because even if collision is not caused by structural defect, collision may precipitate malfunction.



tion of defective part and cause injury. In that circumstance, collision, defect, and injury are interdependent and should be viewed as combined event. Such event is foreseeable risk that manufacturer should assume. Since collisions for whatever cause are foreseeable events, scope of liability should be commensurate with scope of foreseeable risks. *Hancock v. Paccar*, 204 Neb. 468, 283 N.W.2d 25 (1979).

**Strict Liability.** Strict liability theory is essentially liability of implied warranty divested of contract doctrines of privity, disclaimer and notice. *Fisher v. Gate City Steel Corp.*, 190 Neb. 699, 211 N.W.2d 914 (1973). Manufacturer is strictly liable in tort when article he places in market, knowing it to be used without inspection for defects, proves to have defects which causes injury to person rightfully using product. *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971); *Hawkins Constr. Co. v. Matthews Co.*, 190 Neb. 546, 209 N.W.2d 643 (1973), *overruled on other grounds*, *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 789, 332 N.W.2d 39 (1983). Seller or lessor of product may not be strictly liable unless also a manufacturer of whole product or the part of product claimed to be defective. Neb. Rev. Stat. § 25-21, 181. Contributory negligence is not permitted in a strict liability action. *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006).

Plaintiff must show that offending condition existed when product left manufacturer's control in products liability case. *Sundet v. Olin Mathieson Chem. Corp.*, 179 Neb. 587, 139 N.W.2d 368 (1966). In negligence case, proof that chattel left manufacturer in defective condition is evidence of negligence. *Morris v. Chrysler Corp.*, 208 Neb. 341, 303 N.W.2d 500 (1981).

Doctrine of strict liability inapplicable where plaintiff conclusively shown to have knowledge of claimed defect. *Waegli v. Caterpillar Tractor Co.*, 197 Neb. 824, 251 N.W.2d 370 (1977). However, there is no need to plead unawareness. *Hancock v. Paccar*, 204 Neb. 468, 283 N.W.2d 25 (1979).

**Damages.** Measure of recovery in all civil cases is compensation for injury sustained. *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960). No punitive damages allowed. *Miller v. Kinglsey*, 194 Neb. 123, 230 N.W.2d 472 (1975). Damages awarded cannot be reduced by amount paid by source other than tortfeasor even if plaintiff compensated twice due to collateral source rule. *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006). Some injury must occur before manufacturer can recover from supplier of material or defective part under indemnity. *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983).

**Warranty.** Implied warranty of merchantability. Neb. U.C.C. § 2-314. Implied warranty of fitness for particular purpose. Neb. U.C.C. § 2-315. Express warranty. Neb. U.C.C. § 2-313.

**Warnings.** Restatement of Torts Second § 388 adopted in *Driekosen v. Black, Sivalls & Bryson*, 158 Neb. 531, 64 N.W.2d 88 (1954).

## RELEASE

**Consideration.** Inadequacy of consideration alone usually not grounds for release avoidance. *Humber v. Gibreal Auto Sales, Inc.*, 207 Neb. 286, 298 N.W.2d 363 (1980).

**Accord and Satisfaction.** Settlement between parties involved in accident without express reservation of rights against parties executing release operates as accord and satisfaction of all claims of immediate parties to settlement. *Burke v. Shaffer*, 184 Neb. 100, 165 N.W.2d 352 (1969).

**Covenant Not to Sue.** Agreement not to enforce existing cause of action may operate as release between parties to agreement but will not release claim against joint tortfeasors. *Horace Mann Co. v. Pinaire*, 248 Neb. 640, 538 N.W.2d 168 (1995).

**Fraud and Misrepresentation.** Damage waiver procured by material misrepresentations is voidable. *Kline v. Department of Public Works*, 126 Neb. 587, 253 N.W. 861 (1934).

**Joint Tortfeasors.** When one joint tortfeasor makes full payment of damages or makes payment that is agreed to be full compensation for damages, no further recovery for same injury. Release of one joint tortfeasor not defense unless agreed that payment was in full satisfaction of damages. *Fitzgerald v. Union Stock Yards Co.*, 89 Neb. 393, 131 N.W.2d 612 (1911).

**Mistake.** Release may be avoided by mutual mistake. Release of claims for injuries known and unknown was avoided on basis of mutual mistake where it was shown neither party knew of existence of additional serious injuries. *Oliver v. Clark*, 248 Neb. 631, 537 N.W.2d 635 (1995).

## REPRESENTATIONS AND WARRANTIES

Statute provides that no oral or written misrepresentation or warranty made in negotiation for contract or policy of insurance by insured, or in his behalf, shall be deemed material or defeat or avoid policy or prevent its attaching unless such misrepresentations or warranty deceived company to its injury. The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor allow the insurer to avoid liability.



ity, unless such breach exists at time of loss and contributes to the loss, anything in the contract or policy of insurance to the contrary notwithstanding. Neb. Rev. Stat. § 44-358. *Security State Bank v. Aetna Ins. Co.*, 106 Neb. 126, 183 N.W. 92 (1921). But fraudulent representations relative to matters material to risk if made by insured in application will defeat recovery. Insured had untruthfully answered that his parents had not suffered from insanity and proof showed that policy would not have been issued by insurance company if question had been answered truthfully. Policy was held void. *Muhlbach v. Illinois Bankers Life Assoc.*, 108 Neb. 146, 187 N.W. 787 (1922).

**Materiality.** If the insurer would not have issued the policy had it known the true facts, the misrepresentation is material. *Lowry v. State Farm Mut. Ins. Co.*, 228 Neb. 171, 421 N.W.2d 775 (1988).

As defense, insurer must plead and prove answers made as written in application attached to policy were false, material to risk, with knowledge and intent to deceive, reliance and injury to insurer. *Farm Bureau Life Ins. Co. v. Luebbe*, 218 Neb. 694, 358 N.W.2d 754 (1984).

False answers in application on matters within applicant's knowledge and material to risk are grounds for equitable cancellation of policy. *Pennsylvania Mutual Life Ins. Co. v. Lindquist*, 130 Neb. 813, 266 N.W. 600 (1936).

Untrue representations by insured in response to question in application calling for opinion, judgment, or belief will not void policy issued on application unless misrepresentation was knowingly made with intent to deceive. *Vackiner v. Mutual of Omaha Ins. Co.*, 179 Neb. 300, 137 N.W.2d 859 (1965). However, nature of false statement in insurance application may be such that trier of fact may infer from mere making of statement that it was made knowingly with intent to deceive. *Farm Bureau Life Ins. Co. v. Luebbe*, 218 Neb. 694, 358 N.W.2d 754 (1984).

### SERVICE OF PROCESS

Upon Non-resident Motorists. See "AUTOMOBILES."

Upon Corporations. Residence, personal, or certified mail service on officer, managing agent, director, or registered agent, or leave process with employee at corporations registered office or by certified mail to such office. Neb. Rev. Stat. § 25-509.01.

Upon Non-residents. Service must be reasonably calculated to give actual notice in manner prescribed for in-state service, in manner prescribed by the non-

resident's state, in manner prescribed by foreign authority, as directed by court. Neb. Rev. Stat. § 25-540.

**Personal Service.** Individual may be served by personal, residence or certified mail. Neb. Rev. Stat. § 25-508.01.

The State, any State agency, or any State employee, as defined in Neb. Rev. Stat. § 81-8, 210, sued in official capacity must be served by leaving the summons at the office of the Attorney General, with the Attorney General, Deputy Attorney General, or someone designated in writing by the Attorney General, or by certified mail service addressed to the office of the Attorney General. Neb. Rev. Stat. § 25-510.02.

Suit shall be deemed commenced on date petition is filed with court if proper service is obtained within six months of such filing. If proper service is not obtained within 6 months of filing, the action will be dismissed without prejudice. Neb. Rev. Stat. § 25-217.

### SUBROGATION

Subrogation rights follow and do not precede payment under policy. *Schmer v. Hawkeye Security Ins. Co.*, 194 Neb. 94, 230 N.W.2d 216 (1975).

**Parties to Action.** Where amount of loss under terms of policy is loaned to insured under agreement to be repaid on recovery from third party, held valid agreement and insured, not insurer, is real party in interest. *Bozell & Jacobs v. Blackstone Terminal Garage*, 162 Neb. 47, 75 N.W.2d 366 (1956). See also *Royal Indem. Co. v. Aetna Cas. & Sur. Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975).

Release by insured of all claims against tort-feasor destroyed insurer's right to sue tort-feasor in insured's name as insured was no longer real party in interest. *Schmidt v. Henke*, 192 Neb. 408, 222 N.W.2d 114 (1974).

Under real party in interest statute, insured still real party where insurance paid cover only portion of loss, and right of action is for entire loss. Neb. Rev. Stat. § 25-301.

**Liability Insurance.** Right of subrogation for payment of medical benefits in automobile liability policy valid, except if claimant receives less than actual economic loss from all parties liable for bodily injuries, subrogation will be in same proportion medical expenses bear to total economic loss. Neb. Rev. Stat. § 44-3,128.01.

**Collision Insurance.** Subrogation clause in automobile policy providing that if insurance company paid insured, it was subrogated to insured's cause of action was

valid. *Milbank Ins. Co. v. Henry*, 232 Neb. 418, 441 N.W.2d 143 (1989).

Workers' Compensation. Employer subrogated to employee's right of recovery against third parties. Neb. Rev. Stat. § 48-118. Workers compensation carrier has statutory right to any and all sums recovered by insured worker from third parties to extent of benefits paid, regardless of whether injured employee has been fully compensated by tort-feasor. Neb. Rev. Stat. § 48-118. *Neumann v. American Family Ins.*, 5 Neb. App. 704, 563 N.W.2d 791 (1997).

Insurer cannot recover by right of subrogation from his own insured nor can rights of subrogated insurer rise higher than rights of its insured against third party. *Employers Reinsurance Corp. v. Santee Public Sch. Dist.*, 231 Neb. 744, 438 N.W.2d 124 (1989).

Attorney for insured entitled to fee out of portion of fund, obtained in settlement of insured's claims, which availed to insurer holding subrogation right even though insurer did not employ attorney to handle its subrogation claim. *United Services Auto. Assoc. v. Hills*, 172 Neb. 128, 109 N.W.2d 174 (1961). See also *Krause v. State Farm Mut. Ins. Co.*, 184 Neb. 588, 169 N.W.2d 601, modified, 184 Neb. 638, 170 N.W.2d 882 (1969); *St. Paul Fire & Marine Ins. Co. v. Truesdell Distributing Corp.*, 207 Neb. 153, 296 N.W.2d 479 (1980).

## THEFT

Possession of auto procured from dealer by fraud, not theft. *Boyd v. Travelers Fire Ins. Co.*, 147 Neb. 237, 22 N.W.2d 700 (1946).

Automobile theft insurance protects only against losses arising from criminal takings of insured vehicle. There can be no recovery under such policy for loss asserted to amount to theft in absence of proof of existence of criminal intent on part of taker. *Hubbell v. Farmers Ins. Group*, 200 Neb. 472, 263 N.W.2d 863 (1978).

## WAIVER AND ESTOPPEL

Forfeiture is waived by any conduct inconsistent with right or intention of insurer to claim forfeiture. *Jensen v. Palatine Ins. Co.*, 81 Neb. 523, 116 N.W. 286 (1908). Collection and retention of premiums after company has knowledge of facts constituting forfeiture on the part of the life insurance holders, is waiver of such forfeiture. *Modern Woodmen v. Berry*, 100 Neb. 820, 161 N.W. 534 (1917). Any conduct of insurance agent which reasonably induces insured to believe that settlement will be made is waiver of proof of loss. *Brown v. Firemen's Ins. Co.*, 106 Neb. 615, 184 N.W. 88 (1921). Where refusal to pay loss is grounded upon lapse of policy, insurer is estopped to raise other or different de-

fenses. *Yates v. New England Mut. Life Ins. Co.*, 117 Neb. 265, 220 N.W. 285 (1928); *Ross v. First American Ins. Co.*, 125 Neb. 329, 250 N.W. 75 (1933). Payment of proceeds of policy into court waived provision invalidating assignment of policy. *Brown v. Ehlers*, 130 Neb. 918, 267 N.W. 156 (1936).

If an insurance company has knowledge through its agent, when insurance contract is affected, that the premises are vacant or unoccupied, the issuance of the policy waives any provision as to vacancy or unoccupancy, at least so far as the existing vacancy is concerned. *Zweygardt v. Farmers Mut. Ins. Co.*, 195 Neb. 811, 241 N.W.2d 323 (1976). Insurer held not estopped to lapse policy because of acceptance of three overdue premiums over 12-year period. *Aetna Life Ins. Co. v. Kepler*, 116 F.2d 1 (8<sup>th</sup> Cir. 1941).

Insurer may be estopped from denying liability where by its course of dealing and acts of its agent it has induced insured to pursue course of action to latter's detriment. *Keene Co-op Grain & Supply Co. v. Farmers Union Industries Mut. Ins. Co.*, 177 Neb. 287, 128 N.W.2d 773 (1964).

Unreasonable delay on part of insurer in processing claim constituted waiver of rights under policy provision prohibiting settlement by insured. *Ottoman v. Interstate Fire & Cas. Co., Inc.*, 172 Neb. 574, 111 N.W.2d 97 (1961), distinguished by *Lynch v. State Farm Mut. Auto. Ins. Co.*, 275 Neb. 136, 745 N.W.2d 291 (2008).

Acknowledgement of notice, furnishing of forms for filing proofs of loss, giving or accepting proofs of loss, and investigation of claims does not constitute waiver of defenses by insurer. Neb. Rev. Stat. § 44-710.15.

## WARRANTIES

See "REPRESENTATIONS AND WARRANTIES."

## WORKERS' COMPENSATION

Statutory Reference. Original Jurisdiction. Workers' Compensation Court has authority to administer and enforce provisions of Nebraska Workers' Compensation Act. Neb. Rev. Stat. § 48-152. Appellate jurisdiction. Appeals from Workers' Compensation Court go to Court of Appeals, Neb. Rev. Stat. § 48-185.

Benefits. Wages defined in Neb. Rev. Stat. § 48-126.

Medical. Employer liable for reasonable medical expenses. Neb. Rev. Stat. § 48-120.

Disability. Total disability compensation 66 2/3% of wages at time of injury, (Neb. Rev. Stat. § 48-121),

not to exceed maximum weekly income benefit specified in Neb. Rev. Stat. § 48-121.01, nor to be less than minimum weekly benefit specified in Neb. Rev. Stat. § 48-121.01. Partial disability compensation 66 2/3% of difference between wages received at time of injury and earning power of employee thereafter (Neb. Rev. Stat. § 48-121) not to exceed the same statutory limits set-out for total disability. Neb. Rev. Stat. § 48-121.01. Maximum period 300 weeks for partial disability. If wages less than minimum amount, employee receives full amount of wages. Neb. Rev. Stat. § 48-121.

**Death.** Dependents of deceased employee entitled to benefits not to exceed the maximum weekly benefit set forth at Neb. Rev. Stat. § 48-121.01, nor be less than \$49 per week provided, that if at time of injury employee receives wages of less than the minimum weekly income specified in Neb. Rev. Stat. § 48-121.01, then compensation shall be the full amount of such wages per week, payable in amount and to persons enumerated in Neb. Rev. Stat. § 48-122.01 subject to maximum limits specified in this section and § 48-122.03. Neb. Rev. Stat. § 48-122.

**Employment Defined.** Casual employment is employment that is occasional or incidental to business. *Petrow & Giannou v. Shewan*, 108 Neb. 466, 187 N.W. 940 (1922). Dual capacity doctrine not recognized in Nebraska. Workers' Compensation Act exclusive remedy available to plaintiff employee who drank urn cleaner from state employer's coffee pot in cafeteria. *Johnston v. State*, 219 Neb. 457, 364 N.W.2d 1 (1985).

Workers' compensation available for injuries arising out of and in the course of employment. Neb. Rev. Stat. § 48-101. "Arising out of" refers to origin or cause of accident. "In the course of" refers to time, place, and circumstances of accident. *Reis v. Douglas Cty. Hosp.*, 193 Neb. 542, 227 N.W.2d 879 (1975).

**Occupational Disease.** Disease due to causes and conditions characteristic of and peculiar to particular trade, process, occupation, or employment and excluding all ordinary diseases of life to which the general public is exposed. Neb. Rev. Stat. § 48-151.

**Mental.** Mental injury is not compensable. *Dyer v. Hastings Industries, Inc.*, 252 Neb. 361, 562 N.W.2d 348 (1997). Where an injury is the result of mental stimulus, in order for it to be compensable under Nebraska workers' compensation law, the injured party must prove an unexpected or unforeseen event, happening suddenly and violently and producing at the time, objective symptoms of injury and violence to the physical structure of the body. *Sorensen v. City of Omaha*, 230 Neb. 286, 430 N.W.2d 696 (1988).

When employee has pre-existing injury, employer liable for percentage of disability that would have resulted from last injury had there been no pre-existing disability. Neb. Rev. Stat. § 48-128. Defense that injury was caused by negligence of fellow employee not available. Neb. Rev. Stat. § 48-102.