

# DIGEST OF INSURANCE LAW

## NEW BRUNSWICK

Courtesy of  
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### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

Court of Queen's Bench of New Brunswick. This Court consists of two divisions namely: (a) Family Division with original jurisdiction in matters of family law; (b) Trial Division with original jurisdiction in civil and criminal matters. Trial Division also exercises jurisdiction of Family Division in judicial districts where Family Division cannot exercise its jurisdiction.

Court of Queen's Bench consists of Chief Justice, twenty-four other judges, any former judge of Court of Queen's Bench who is supernumerary judge and any former Chief Justice of Court of Queen's Bench who is judge or supernumerary judge. Eight Judges of this Court are Judges of Family Division.

Trial by jury in civil actions has practically been abolished in Court of Queen's Bench except in actions for seduction, breach of promise, slander, malicious prosecution, libel, criminal conversation, malicious arrest or false imprisonment.

In 2006, Rule 79, the Simplified Procedure Rule, of the *Rules of Court* of New Brunswick came into effect. Rule 79 purports to set out an accelerated procedure applicable to an action where the plaintiff's claim is exclusively for money, an interest in real property, an interest in personal property and the total of the amount claimed or the fair market value of any interest in real or personal property at the date the action is commenced is \$75,000 or less (exclusive of costs and disbursements).

Small Claims Court. This court was created in 1997 by the *Small Claims Act*, S.N.B. 1997, c. S-9.1. The jurisdiction of the Small Claims Court is limited to actions for debt or damages not exceeding \$6,000 as well as actions for the recovery of personal property where the value of the personal property does not exceed \$6,000.

On July 15, 2010 *An Act to Repeal the Small Claims Act* came into force. The entire small claims system has shifted to the Court of Queen's Bench, under Rule 80, with monetary jurisdiction of \$30,000. Trials are before a judge instead of an adjudicator.

Federal Court of Canada. This Court was created in 1971 by the Federal Court Act, R.S.C. 1970, c. 10 (2<sup>nd</sup> Supp.), now R.S.C. 1985, c. F-7, and deals with claims by and against Dominion Government and patent and copyright cases, and has unlimited jurisdiction in admiralty matters. The Federal Court is a court of law, equity and admiralty, and a superior court of record having civil and criminal jurisdiction.

Probate Court. This Court has jurisdiction in probate matters.

Provincial Court. This Court has jurisdiction in criminal and quasi-criminal matters.

#### Appellate Courts

Court of Appeal of New Brunswick. This Court sits in City of Fredericton, and may sit in other locations, at such times as Court requires as determined by Chief Justice. It shall hold regular sittings commencing on second Tuesday in each month except July, August, and December. Court of Appeal is always open.

Court of Appeal consists of Chief Justice of New Brunswick, five other judges, any former judge of Court of Appeal and any former Chief Justice of New Brunswick who is judge or supernumerary judge. It has jurisdiction in both criminal and civil matters.

Supreme Court of Canada. Appeals may be taken from decision of Court of Appeal of New Brunswick or Federal Court of Canada to Supreme Court of Canada. All appeals from Court of Appeal of New Brunswick in civil matters are by leave of Court of Appeal or by leave of Supreme Court of Canada. Appeals from Federal Court are by leave obtained from Federal Court of Appeal or Supreme Court of Canada. Court sits at Ottawa in Province of Ontario.

### LAW

Abbreviations, Uniform Statutes and Other Statutes

A.C. – Appeal Cases (English).

D.L.R. – Dominion Law Reports (Canadian).

M.P.R. – Maritime Provinces Reports (Canadian).



M.V. Act – Motor Vehicle Act R.S.N.B. 1973, Ch. M-17.

N.B.R. – New Brunswick Reports.

N.B.R. (2d) – New Brunswick Reports Second Series.

N.R. – National Reporter (Canadian).

Ontario Digest – Ontario Digest of Insurance.

R.S.N.B. – 1973 Revised Statutes of New Brunswick 1973.

Insurance Act R.S.N.B. 1973, Ch. I-12. This is uniform insurance statute of New Brunswick. All section references in this Digest standing alone are to this statute.

S.C.R. – Supreme Court of Canada Reports.

S.N.B. – Statutes of New Brunswick.

## ACCIDENT AND SICKNESS INSURANCE

See “DISABILITY.”

Preliminary Note. This is dealt with in Part 6 of Act. §186 to §223 inclusive Part 6 does not apply to “accidental death insurance” or “disability insurance” by virtue of §187 (3) (a) (c).

Application. *Price v. Dominion* 11 M.P.R. 490, (1937) 2 D.L.R. 369 held that where accident insurance company fails to set out in policy full application on which it was issued it is prevented from relying as defense upon any statement made by insured in application. *Continental v. Casey* (1934) S.C.R. 54, (1934) 1 D.L.R. 577 followed. Pursuant to §195 (1) of the Act, where a statutory condition is not applicable to benefits provided by the contract, it may be omitted from the policy or varied so that it will be applicable.

Definition. Accident Insurance is defined as insurance by which insurer undertakes, otherwise than incidentally to some other class of insurance, defined by or under Act, to pay insurance money in event of accident to person or persons insured, but does not include insurance by which insurer undertakes to pay both in event of death by accident and in event of death from any other cause. See §1.

Definition. “Sickness Insurance” means insurance by which insurer undertakes to pay insurance money in event of sickness of person or persons insured, but does not include disability insurance or accidental death insurance. See §1 and *Vicars v. Eaton* (1977), 23 N.B.R. (2d) 331.

Disability. If payments for total and permanent disability have been made, onus is on insurer to prove that assured is not entitled thereto. *Blackstone v. Mutual Life* (1945), 1 D.L.R. 165. Total disability benefits have been

allowed where disability is such that person can no longer, exercising common care and prudence, perform remunerative work for wage or profit. *Benoit v. Pitts Ins. Co.* (1975), 12 N.B.R. (2d) 550. “Total disability” should be given a rational and practical construction. *Michaud v. Blue Cross* (1989), 100 N.B.R. (2d) 321 (C.A.)

Standard Policy Provisions. Statutory Conditions to be embodied in every policy are to be found in §194 of Act. Provision is made for protection of insurer and insured where insured changes his occupation to one more or less hazardous during life of policy. Notice of accident or sickness must be given within thirty days from date claim arises. Proof of loss must be filed within ninety days. Action must be commenced within one year after cause of action arose.

Criminal Offenses. Where, on balance of probabilities insured was in course of committing criminal act when his death occurred, beneficiaries action for insurance proceeds was dismissed. *Murphy v. Excelsior Life* (1977), 18 N.B.R. (2d) 350. However, victim or innocent third party can recover from insurer for injury or damages he sustained as result of insured’s criminal act. *Iaquone v. Florou et al* (1981), I.L.R. 1-1367.

## ACCIDENTAL MEANS

Diabetic assured died of insulin shock from unintentionally taking overdose of insulin. Held by Supreme Court of Canada reversing 15 M.P.R. 418, that assured’s estate entitled to recover on ground that while deceased’s diabetic condition co-acted with insulin, there was only one cause of death (*Fidelity & Casualty Co. v. Mitchell* 1917 A.C. 592) viz. bodily injury sustained as result of taking insulin. *Price v. Dominion* (1941), S.C.R. 509. See *New York Life v. Schlitt* (1945), 2 D.L.R. 249.

Infant baby died from crib death held not to be accident. *Vicars v. Eaton Life* (1978), 23 N.B.R. (2d) 331.

For cases on what is and what is not accidental means, see Canadian abridgement (second edition) Vol. R20A, § VII 3.a.i, VII 3.6.

## ADJUSTERS

“Adjuster” means person who, for compensation, not being barrister or solicitor acting in usual course of his profession or trustee or agent of property insured, directly or indirectly solicits right to negotiate settlement of loss under contract of insurance on behalf of insured or insurer, or holds himself out as adjuster of losses under such contracts. See §1.

Adjuster has no authority to settle claim unless expressly authorized by his principals. Also where no litigation is pending at time adjuster submits his report on fire claim, such report is not privileged and may be admitted in evidence. *Calp's Ltd. v. Scottish & Nat'l* (1961), I.L.R. 208; *Ouellet Design Inc. v. Desbiens* (1998), 207 N.B.R. (2d) 128 (C.A.). To be privileged, investigative report must be prepared for the dominant purpose of being submitted to a solicitor or used in contemplation of pending litigation. Evidence Act R.S.N.B. 1973, Ch. E-11, §43.1

## AGE

See "AUTOMOBILE INSURANCE."

## AGENTS AND BROKERS

"Agent" means person who, for compensation, not being duly licensed insurance broker or person acting under authority of §352 (15), (16), (17), (18) or (19), solicits, effects or negotiates insurance on behalf of any insurer whether named or not, or transmits, for person other than himself, application for or policy of insurance to or from such insurer, or acts, offers or assumes to act in negotiation of insurance or in negotiating its continuance or renewal. *See* §1.

"Broker" means person who, for compensation, not being licensed agent or person acting under authority of §352 (15), (16), (17), (18) or (19) acts or aids in any manner in negotiating contracts of insurance or placing risks or effecting insurance, or in negotiating continuance or renewal of such contracts for person other than himself. *See* §1.

Part XV of Act deals with agents, brokers, adjusters and damage appraisers. Agent is personally liable to insured on all contracts of insurance unlawfully made through him with unlicensed insurer. *See* §369 (2).

Agent owes duty to insured to exercise reasonable care and skill. *Chase & Chase v. Hudson Bay* (1977), 17 N.B.R. (2d) 614. Agent must follow instructions of insured with diligence. *Systems Mgmt. Ltd. v. Royal et al.* (1986), 68 N.B.R. (2d) 213.

Agent may bind insurance company where he has actual, ostensible or implied authority to do so. *Wandlyn Motels Ltd. et al* (1969), 1 N.B.R. (2d) 213 (C.A.) Where person applies for insurance to agent who represents several insurance companies, and agent is to select insurer and to distribute risk among insurers, agent is insured's agent in distributing risk. *See New York Boiler Co. Ltd., v. Elliott Ins.* (1980), 30 N.B.R. (2d) 564.

Agent may not be found to have apparent or ostensible authority unless his principal, by words or conduct,

represents to client that agent has authority to bind principal. *See La Ferme de la Vallee St. Jean v. Fairweathers Ins.* (1983), 42 N.B.R. (2d) 553 (C.A.).

Broker is negligent if he fails to advise insured to effects of insurers' conditions. He has duty to protect insured's interests. Also, agent is liable to broker, if he fails to determine from insured whether policy is acceptable or not. *See Waldman's Fish Co. v. Anderson* (1979), 25 N.B.R. (2d) 482 (C.A.).

Renewal. In absence of contract or undertaking to renew, there is no duty on insurance agent to automatically renew policies of insurance. *Roy v. Vienneau* (1986), 67 N.B.R. (2d) 16. However, an agents course of conduct in renewing policies may cause him to be held liable if he fails to renew. *Marash v. Lockhart & Ritchie, Ltd.* (1979), 24 N.B.R. (2d) 181.

## APPLICATION

See Various Kinds of Insurance.

## ASSIGNMENT

See "FIRE INSURANCE."

## AUTOMOBILE INSURANCE

Note: This insurance is dealt with in Part VII of Act - §§224 to 267 inclusive.

Actions. Under §250 (14) insurer who denies liability to indemnify insured shall, upon application to Court, be made Third Party in any action to which insured is party and in which claim is made against insured by any party to action. *See Mahoney v. Kent Gen. Ins.* (1991), 119 N.B.R. (2d) 408 (Q.B.).

Application. Application for contract of automobile insurance should be in writing and must be signed by proposed insured or his agent, and for this purpose no person carrying on business of financing sale or purchase of automobiles, automobile dealer, insurance agent or broker may act as agent of insured; must contain full details of insured, his occupation, previous accidents, and also any other insurance carried. False description or wilful misrepresentation of material fact as to property in respect to which application is made, will invalidate same. Where it is proposed to change subject matter of insurance, by substitution or addition of one or more automobiles, contract may be amended by endorsement to that effect on existing policy, but no contract shall be so amended without written application containing such particulars in reference to new subject matter as would be required in application for new contract and such new application must be signed in same manner as former application.

Act provides that copy of application, or such part thereof as is material to contract, shall be embodied in, endorsed upon, or be attached to policy of insurance when issued by insurer. Where applicant for contract falsely describes automobile to be insured to prejudice of insurer, or knowingly misrepresents or fails to disclose in application any fact required to be stated therein, or when insured violates any term or condition of policy, or commits any fraud or makes any willfully false statement with respect to claim under policy, any claim by insured is voided and right of insured to secure indemnity is forfeited.

**Contribution Between Joint-Tortfeasors.** In Tortfeasors Act, R.S.N.B. 1973, Ch. T-8, it is provided that where damage is suffered as result of tort (whether crime or not) judgment recovered against any tort-feasor liable shall not be bar to action against any other person who, if sued, would have been liable as joint tortfeasor. If more than one action is brought, sums recoverable under judgments given shall not in aggregate exceed amount awarded by first judgment.

Tortfeasor can recover contribution from any other tort-feasor liable in respect to same damage, whether as joint tortfeasor or otherwise amount of contribution recoverable shall be such as the Court may deem just and equitable having regard to extent of other person's responsibility.

**Owner's and Non-Owner's Policies.** Every owner's policy insures person named therein, and every other person who, with his consent, personally drives any automobile designated in policy for loss or damage, (a) arising from ownership, use or occupation of any such automobile, and (b) resulting from bodily injury to or death of any person, and damage to property. Every non-owners policy insures person named therein and such other person, if any, for loss or damage (a) arising from use or occupation of automobile within definition thereof in policy, other than automobile owned by him or registered in his name, and (b) resulting from bodily injury to or death of any person, and damage to property. Both these policies apply to ownership, use or occupation of insured automobile within Canada and U.S.A. and upon vessel plying between ports of these countries. In this part of Act, person shall not be deemed to be owner of automobile for reason only that he has lien on automobile or has legal title to automobile as security.

Upon notification of loss or damage under owner's or non-owner's policy insurer must: (a) investigate and may negotiate and settle any claim; (b) defend at cost of insurer any civil action brought against insured; (c) pay all taxed costs and any interest accruing on that part of judgment obtained up to limits of insurer's liability; (d)

reimburse insured for any outlay for medical aid immediately necessary.

Liability coverage does not apply to any liability (a) imposed by any workmen's compensation law upon any person insured by the contract; (b) arising from injury to or death of any employee of any person insured while that employee is engaged in the operation or repair of the automobile; (c) arising from loss of or damage to property carried in or upon the automobile or property owned or rented by, or in the care, custody or control of an insured.

A section excluding liability arising from injury to or death of any person insured by the contract or their daughter, son, wife or husband was repealed on October 1, 1985. In the case of *Morais v. Commercial Union* (1987), 77 N.B.R. (2d) 386, the Court of Appeal of New Brunswick held that the repeal of the exclusion should not be applied retrospectively. The exclusion therefore still applies to any accident which occurred before October 1, 1985.

Insurer may limit its liability in policy so that it will not be liable (a) to indemnify any person engaged in business of selling, repairing, maintaining, servicing, storing or parking automobiles for any loss or damage sustained while engaged in use or operation of or while working upon automobile in course of that business unless person is owner of automobile or is his employee; (b) for loss of or damage to property carried in or upon automobile or to any property owned or rented by or in care, custody or control of insured; (c) for loss or damage resulting from ownership, use or operation of any machinery or apparatus, including its equipment, mounted on or attached to automobile while such automobile is at site of use or operation of that machinery or apparatus; (d) where automobile is rented or leased to another person; (e) where automobile is used to carry explosives or to carry radioactive material for research, education, development or industrial purposes or for purposes incidental thereto; (f) where automobile is used as taxi-cab, public omnibus, livery, jitney or sightseeing conveyance or for carrying passengers for compensation or hire; (g) where insured vehicle is automobile other than trailer, it is used for towing trailer owned by insured unless like indemnity is also provided by insurer in respect of trailer; (h) where insured vehicle is trailer, it is towed by automobile owned by insured unless like indemnity is also provided by insurer in respect of automobile.

Every owner's and driver's policy shall have minimum limits of \$200,000 with priority of \$20,000 property damage and \$180,000 for bodily injury to or death of one or more persons in priority to all other claims.

Provision is made for claimants against insured in respect to matters for which indemnity is provided by motor vehicle liability policy to have insurance money applied in satisfaction to any "unsatisfied" judgments obtained in respect to such matters. Fact insured has committed criminal offence, breach of conditions of policy, etc., is not defense in action brought by third party to extent of standard limits. Insurer successfully set up defense of misrepresentation of insured in action brought by third party in *Bourgeois v. Prudential* 18 M.P.R. 334, but this defense has now been taken away by Statute, §250 (4).

Section 250 (1) provides that person who had obtained judgment against insured may maintain action against insurer to have insurance money applied to judgment. Held in *New Zealand Ins. v. Cyr* (1964), 41 D.L.R.2d 173, that where X insurance company assumed liabilities on policies issued by Y company that Plaintiff, stranger to policy between Y and insured, could not sue on undertaking between X and Y. Held in *Crawford et al v. Employer's Mut.* (1982), 35 N.B.R. (2d) 109 that judgment creditors can apply to Court of Queen's Bench for declaration that insurance proceeds be applied in satisfaction of their judgments. See *State Farm v. General Acc.* (1996), 167 N.B.R. (2d) 48 (C.A.), Motion for leave to appeal to S.C.C. granted, (1997), 179 N.B.R. (2d) 320.

Unlicensed Driver. Whether Insured has "permitted, suffered, allowed or connived at" use of automobile by person who is either not authorized by law or qualified to drive or operate automobile contrary to Statutory Condition 2 (2) (b) is dependant upon facts in each case. In most cases there should be at least inquiry as to whether prospective driver has license. In many other cases, something more than inquiry might be required. *Peters v. Saskatchewan Government Ins.* (1956), 18 W.W. R 80; *Ferriera v. Manitoba Public Ins.* (1980), I.L.R. 1-1207.

Intoxication. Prior to 1974, by reason of Statutory Conditions under §230 of Act, insured was deprived of recovering from insurer if it could be determined that at time of motor vehicle collision he was under influence of intoxicating liquor or drugs to extent that he was incapable of proper control of automobile. This was shown to be very onerous thing for insurers to prove. See *Girouard v. Guardian* (1975), 9 N.B.R. (2d) 128, where court held that impaired driver with alcohol level of .16 was not necessarily incapable of proper control of motor vehicle.

This subsection was repealed except for claims arising out of loss of or damage to the insured automobile (Section C coverage). The insurer is not liable under Section C where the insured drives the automobile under

the influence of liquor or drugs or permits another to drive the automobile while under the influence of liquor or drugs. Also not liable for no-fault benefits under subsection I or Part II of subsection 2 of Section B of Standard Automobile Policy if convicted of driving automobile under the influence. §253 of Criminal Code.

Age. Operators license may not be issued to anyone under age of 16. Restricted license may be issued to minor between ages of 14 and 16. See M.V. Act §§81 (1) and 82 (1).

Agency. Owner of motor vehicle is liable as well as driver thereof to action in tort as result of negligence in operation of motor vehicle, unless motor vehicle was at time in question, in possession of some person other than owner without owner's consent. See M.V. Act §267 (1). Onus of proving that motor vehicle was taken without owner's consent is on owner. See M.V. Act §267 (2). Guests. §268. of "M.V. Act" provided that owner or driver of motor vehicle, other than vehicle operated in business of carrying passengers for hire or gain, shall not be liable for any loss or damage resulting from bodily injury to, or death of any person being carried in or upon or entering or getting on or alighting from such motor vehicle unless accident was caused by the gross negligence, or willful and wanton misconduct of owner or driver which contributed to accident. This section has now been repealed and guest or passenger in motor vehicle does not now have to prove gross negligence or willful and wanton misconduct of driver - he only has to show he was negligent. See "FINANCIAL RESPONSIBILITY LAW."

*Act to Amend the Insurance Act*, S.N.B. 1997, c. 55, was proclaimed in January of 1997. The amendment to the Insurance Act contains the following five substantive amendments to the calculation of damages arising out of automobile accidents: 1) No pre-judgment interest on non-pecuniary damages; 2) An award of damages for loss of income in the period before judgment is to be reduced by any payments for loss of income that the plaintiff receives from a collateral source in that period; 3) After tax income, rather than before tax income, is to be the basis for an award for loss of income in the period before judgment; 4) There is to be a rebuttal presumption of 25% contributory negligence for failure to wear a seatbelt; and 5) A plaintiff may seek an advance payment for special damages even before liability has been admitted or established. The amendments only apply to accidents that occur after January 1, 1997. Insurance Act §§265.1, 265.2, 265.3, 265.4, 265.5, 265.6.

Bill 54, *An Act to Amend the Insurance Act*, became law on April 11, 2003 (§§265.21 and 265.4). Section 265.21(1) provides that "soft tissue injury" and "minor personal injury" shall be prescribed and defined in the

regulations. Section 265.21(2) provides that amount recoverable as damages for non-pecuniary loss of plaintiff for soft tissue injury shall not exceed amount set out in regulations. 265.21(3) states that amount recoverable as damages for non-pecuniary loss of plaintiff for minor personal injury shall not exceed amount set out in regulations. Section 265.21(4) applies only to motor vehicle accidents occurring on or after commencement of this section. Amendments establish a threshold for recoverable damages for non-pecuniary loss, amount of which is prescribed in Regulation 2003-20, which came into force on July 1, 2003.

Section 2(2) of Regulation 2003-20 defines minor personal injury as an injury that does not result in (a) serious permanent disfigurement, or (b) permanent serious impairment of important bodily function caused by continuing injury which is physical in nature. "Serious impairment" is defined as an impairment that cause substantial interference with a person's ability to perform their usual daily activities or their regular employment. Section 4 states that maximum amount recoverable for all minor personal injuries by a person involved in accident shall not exceed \$2,500.

In *LeBlanc v. Bulmer et al.*, 2007 NBCA 35, the New Brunswick Court of Appeal held that the definition of minor personal injury contained in Regulation 2003-20 includes soft tissue injuries whose severity do not exceed the threshold established by s. 2(2) of the Regulation.

As of January 2005, the automobile insurance policy contains Section A.1 – Direct Compensation – Property Damage by which the insurer indemnifies the insured, proportional to its degree of fault, as though the insured were a third party for damage caused to the insured's automobile, equipment and contents and for loss of use of the automobile, equipment and contents in accordance with s. 254.1 of the *Insurance Act* and the *Fault Determination Regulation*. Section A.1 applies only to collisions involving 2 or more automobiles. There is no right to subrogation under Section A.1

New Brunswick Regulation 2004-141 or the Fault Determination Regulation - Insurance Act, plans to determine fault with respect to payout of property damage claims and applies to all vehicles except a vehicle exempted from registration under the Motor Vehicle Act, unless that vehicle is insured by a motor vehicle liability policy. Therefore, all claims for physical damage to motor vehicles involved in a motor vehicle accident on or before January 1, 2005 are determined in accordance with the Fault Determination Regulation - Insurance Act as passed under Section 254.2 of the *Insurance Act*.

The no-frills auto insurance policy was abolished on January 1, 2009 by *An Act to Amend the Insurance Act*, S.N.B. 2008, c. 2

Section 265.4(1) provides that amount recoverable by plaintiff as damages for loss of income between date of accident and date of judgment shall, subject to subsection (4), be reduced by (a) payments that plaintiff received for loss of income during that period under enactment of any jurisdiction or under income continuation benefit plan, and (b) all payments that plaintiff received during that period under sick leave plan arising by reason of plaintiff's occupation or employment, whether or not plaintiff's credits under that plan can be characterized as a capital asset.

Section 265.4(3) states that (a) a person who makes payment referred to in subsection (1) is not subrogated to right of recovery of plaintiff against another person in respect of that payment and, (b) who has received payment referred to in subsection (1) and who subsequently receives award of damages is not required to reimburse person who made payment, notwithstanding any enactment or agreement or terms of any plan or policy of disability insurance but subject to subsection (4).

Benefits payable to accident victims under Section "B" of the Standard Automobile Policy were increased as follows: 1) Medical and rehabilitation benefit: maximum \$50,000; 2) Funeral benefit: maximum \$2,500; 3) Death benefit: \$50,000 for principal income earner and \$25,000 for his or her spouse, with smaller amounts for other dependents; and 4) Weekly income replacement; maximum to \$250 per week, with increases also to the unpaid housekeeper's benefit. Increased benefits apply to accidents occurring on or after January 1, 1997.

## BROKERS

See "AGENTS AND BROKERS."

## BURGLARY INSURANCE

There are no statutory provisions in New Brunswick relating to burglary insurance.

## CANCELLATION

Accident and Sickness Insurance. Insurer must give ten days notice by registered mail or five days personal notice of cancellation. Insured may cancel by written notice, at any time, and, upon surrender of policy, insurer will refund excess of paid premium beyond customary short rate for expired time.

Automobile Insurance. Insurer must give 15 days notice by registered mail or 5 days written notice if per-

sonally delivered. Insured may, on request, cancel at any time.

Fire Insurance. Insurer must give 15 days notice by registered mail or 5 days written notice if personally delivered. Insured may, on request, cancel at any time.

### CHATTEL MORTGAGE

See "FIRE INSURANCE."

### CONTRIBUTION

See "FIRE INSURANCE"; "AUTOMOBILE INSURANCE."

### CREDITORS

See "ACCIDENT AND SICKNESS INSURANCE."

### DEATH

On death of person, all causes of action subsisting against or vested in him shall survive against or for benefit of his estate (except actions for adultery, seduction, etc.). Generally only damages that have resulted in actual pecuniary loss to deceased or estate are recoverable. However, February 16, 1988, the Fatal Accidents Act, R.S.N.B. 36 was amended to provide that a parent may claim an amount to compensate for the loss of companionship and for the grief caused by the death of a child under the age of nineteen or a dependent child over the age of nineteen but only if the cause of action arises on or after February 16, 1988. The amount of such damages shall be apportioned among the parents in proportion to the loss of companionship incurred. §3 (5). Damages recoverable shall not include punitive or exemplary damages or damages for loss of expectation of life, pain and suffering or physical disfigurement. Proceedings may be brought within 2 years of the death of the person if the cause of action is discovered by the person in whom the cause of action was vested before death or within 2 years of the day the cause of action is discovered by the person bringing the action if the cause of action is discovered after the death of the person in whom the cause of action was vested before death with an ultimate limitation period of 5 years from the day of the death of the person in whom the cause of action was vested before death. Survival of Actions Act Ch. S-18 R.S.N.B. 1973.

Fatal Accident. If someone dies as result of wrongful act, neglect or default of another, and if deceased could have maintained action against other had death not ensued, action for benefit of certain family of deceased may be commenced against other person. Only one such

action lies in respect of death of deceased and is brought by or in name of executor or administrator. Such action must be commenced within two years from the day on which the person bringing the action first knew or ought reasonably to have known that the wrongful act, neglect or default of the tortfeasor caused or contributed to the death of the deceased with an ultimate limitation period of 5 years from the day of the death of the deceased. Sum paid or payable on death of deceased under any contract of insurance shall not be taken into account in assessing damages. Fatal Accidents Act Ch. F-7, R.S.N.B. 1973.

Presumption of Death. If individual is unheard of for period of time inconsistent with his being alive, death must be presumed. Computation of this period must depend on all circumstances, but as general rule, after seven years of uninterrupted absence, application may be made for order declaration that person is presumed dead.

Such order is not proof of death of person whose life is insured under policy of insurance to which Part V of Insurance Act applies for purpose of claiming under that policy of insurance. Presumption of Death Act, S.N.B. 1974, Ch. P-15 (1).

### DISABILITY

See "ACCIDENT AND SICKNESS INSURANCE."

Insurance Act provides for disability insurance. See §1 for definition of Disability Insurance. Policies may be issued in combination with life insurance policies.

### FINANCIAL RESPONSIBILITY LAW

Provisions concerning financial responsibility in New Brunswick are found in "Motor Vehicle Act" R.S.N.B. Ch. M-17.

No motor vehicle may be licensed in New Brunswick unless owner has furnished proof of his financial responsibility as prescribed in regulations. Proof of financial responsibility may be given either (a) by filing Certificate of Insurance stating inter alia that owner is insured in respect of any one accident to limit of at least \$200,000 against liability to passengers for remuneration for loss or damage resulting from bodily injury to or death of one or more such passengers or damage to their property or both; (b) by filing bond of duly licensed guarantee insurance or surety company or bond with personal securities, in amount of \$200,000 in respect of any one accident, or (c) by filing Certificate of Minister of Finance showing that owner of vehicle had deposited with him sum of money or securities for money in amount or value of \$200,000. Separate proof of financial



responsibility must be given for each vehicle registered in person's name.

Proof of financial responsibility may be required before issuing license or renewal thereof to any person under age 19 or over age 65.

Privilege of operating motor vehicle in New Brunswick shall be suspended and withdrawn if person fails to satisfy judgment rendered against him for damages on account of injury to or death of any person or on account of damages to property of \$400 or more occasioned by motor vehicle within 15 days from date which judgment became final. It shall remain suspended until proof of financial responsibility is filed and judgment is either satisfied or satisfactory payment arrangements have been made. This applies to both residents and non-residents of New Brunswick. Exceptions: At time of accident vehicle was stolen or legally parked, or only damage was to person or property of owner or driver, or owner was common carrier covered by self-insurer fund and operation was with consent of owner.

Every insurer that issues owner's or driver's policy shall deliver to insured motor vehicle liability insurance card.

Non-resident motorist may furnish proof of financial responsibility by filing certificate of insurer of state or province in which he resides, provided that such insurer has complied with requirements of Act: power of attorney authorizing registrar to accept service, undertaking to appear in any action or proceeding of which it has notice, notice not to set up any defense which company authorized to transact business in New Brunswick might not set up, and to satisfy up to policy limits and final judgment against it or its insured by New Brunswick court.

Where proof of financial responsibility is required minimum limits shall be \$200,000 of which property damage shall have priority to extent of \$20,000.

See "UNSATISFIED JUDGMENTS."

## FIRE INSURANCE

Preliminary Note. This insurance is dealt with in Part IV of Insurance Act.

Appraisal. In event of differences arising between insured and insurer as to amount of loss, value of property insured or property saved, these questions shall be determined by appraisal before there can be any recovery by insured. There is no right of appraisal until specific demand is made in writing and until after proof of loss has been delivered (Statutory Condition No. 11). In *Hamilton et al v. Commercial Union* (1980), 31 N.B.R. (2d) 635 it was held that when insurer and insured

agreed that two appraisers could determine amount of loss, insured is later bound by appraisal agreed on by two appraisers.

Assignment. Insurer shall be liable for loss or damage after assignment under Bankruptcy Act or change of title by succession, by operation of law or by death. (Statutory Condition No. 3).

Cancellation. See "CANCELLATION."

Chattel Mortgages. Statutory Condition No. 2 states that unless otherwise specifically stated in insurance policy, insurer shall not be liable for loss to property owned by any person other than the insured, unless interest of insured therein is stated in policy. In Alberta, where there is statutory condition similar to above, Court held that condition should be construed as applying only to cases where insured has insurable interest less than that of owner in widest sense, and that intention of company is to insure only his lesser interest, and insurer must use words which make it clear that they are intended to bind insured in particular case. Where, from wording of policy, it may be inferred that any interest, which might not be that of owner, was contemplated, policy need not state interest of insured. *Wabco Insulating v. St. Paul Fire* (1983), 42 N.B.R. (2d) 3. Deschenes, J., states that statutory conditions respecting fire insurance are inapplicable to multi-peril policy under which fire was only incidental peril covered.

Co-Insurance Clause. Contract containing co-insurance, average or similar clause shall have printed or stamped upon its face in red ink words "This policy contains clause which may limit amount payable," and unless those words are so printed or stamped clause is not binding upon insured. See §128 (b).

Contribution Between Insurers. Where there is more than one insurance policy covering same interest, and loss or damage occurs, each insurer is liable for its rateable proportion of loss unless otherwise expressly agreed in writing between insurers. See §129.

Coverage. Contract of fire insurance is deemed to cover insured property (a) against fire, whether resulting from explosion or otherwise (except in application of heat to goods or riot, commotion, war, invasion, act of foreign enemy, etc.), (b) against lightning (but excluding loss due to electrical devices or appliances caused by lightning or other electrical currents) and (c) against explosion.

Fire insurance policy may cover loss or damage caused by contamination by radioactive material directly or indirectly resulting from fire, lightning or explosion. May also cover damage to automobiles by fire, explosion or lightning.

Deliberate act by insured. Co-owner's arson will preclude recovery by co-insured who is innocent of any wrongdoing. *See Scott v. Wawanesa* (1989), 94 N.R. 261 (S.C.C.) An insurer must establish motive, opportunity and that fire was of an incendiary nature. *Bagley v. Wawanesa* (1982), 38 N.B.R. (2d) 475.

Description of Property. When insured materially misdescribes property in fire insurance policy, insurer is not liable for any loss or damage to property. *See Goguen v. Co-Operative Fire & Cas.* (1977), 18 N.B.R. (2d) 139; *Chase & Chase v. Hudson Bay Ins. Co.* (1977), 17 N.B.R. (2d) 614; *Smith v. Home* (1980), 31 N.B.R. (2d) 459.

Fraud. Any fraud or willfully false statement in statutory declaration in relation to insurance policy or proof of loss, shall vitiate claim of person (Statutory Condition No. 6). Where insured submitted inflated statement of loss and also included items which were not destroyed, court held insurer was not liable. *See Taschuk v. Sun Alliance* (1980), 27 N.B.R. (2d) 596; *Robichaud v. Fidelity* (1980), 30 N.B.R. (2d) 299; *Chaisson v. Royal Ins.* (1982), 36 N.B.R. (2d) 109; *Charron v. Co-Operative Fire & Cas.* (1982), 41 N.B.R. (2d) 299.

Insurable Interest. Until January 29, 1987 the law in Canada was that a shareholder did not have an insurable interest in the assets of the company in which he held shares even if he was the sole shareholder. (*See for example Wandlyn Motels Ltd. v. Commerce Gen. Ins. Co.* (1970), S.C.R. 992.) On January 29, 1987, the Supreme Court of Canada in the case of *Kosmopoulos et al. v. Constitution Co. of Canada* (1987), 22 CCLI 296, reversed all the previous case law and held that if an insured can demonstrate "some relation to, or concern in the subject of insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment or prejudice to the person insuring," that person has a sufficient interest.

Limitation of Risk or Hazard. Policy may contain limitation of liability clause. §128.

Misrepresentation. If any person applying for insurance falsely describes property to prejudice of insurer, or misrepresents or fraudulently omits to communicate any circumstance which is material to be made known to insurer in order to enable it to judge risk to be undertaken, contract shall be void as to any property in relation to which misrepresentation or omission is material. Where an insured knowingly and deliberately misrepresents his/her driving record, he/she forfeit their right to be indemnified and the insurer may no longer have a duty to defend the insured. *Comeau v. Roy*, [1999]

N.B.J. No. 365 (Q.L. cite) (C.A.). (Note: See "Description of Property", this Section).

Mortgage Clause. This is clause making loss payable to mortgagee. Mortgagee has right to insurance proceeds. Covenant by mortgagor to insure is equitable assignment of proceeds of policy effective on issue of policy. *Re Clovis King & Sons Ltd.* (1973), 5 N.B.R. (2d) 493. Where there are two mortgagees, first mortgagee is entitled to whole of its claim and second mortgagee is entitled to its claim from balance. *Central & Eastern Trust v. British America Assur.* (1979), 25 N.B.R. (2d) 173. Standard mortgage clause protects mortgagee. Violation of policy by mortgagor may render policy void with respect to mortgagor but not with respect to mortgagee. Mortgage clause waives on behalf of insurer any defenses against mortgagee. However, if violation is such as to render policy void ab initio then mortgagee is not protected. In *N.B.H.C. v. State Farm Fire & Cas.* (1983), 43 N.B.R. (2d) 10, Court of Appeal held that standard mortgage clause in policy creates separate contract between insurer and mortgagee. Further when mortgagee sets up Mortgage Forgiveness Fund, with premium to be paid by mortgagors to pay off mortgage in event of total loss by fire or other perils, this is considered "other insurance" and constitutes breach of policy. *But see Jutras v. Sun Alliance* (1984), 53 N.B.R. (2d) 435, where Kelly, J. held that insurance placed by mortgagee without insured's knowledge, was not other insurance.

Proof of Loss. Upon loss occurring insured shall forthwith give notice in writing to insurer and deliver proof of loss verified by statutory declaration as to loss, cause and that no willful act or connivance of insured was involved, etc. (Statutory condition No. 6) Any fraud in statutory declaration vitiates claim. (See "Fraud", this Section). Loss shall be payable within 60 days after completion of proof of loss, unless contract provides for shorter period. §127 (12).

Replacement Cost. Replacement cost endorsement does not cover replacement of damaged personal property, only destroyed property. For damaged goods it is actual cost of repairing that is covered. *Moncton v. Bugie* (1985), 57 N.B.R. (2d) 219.

Statutory Conditions. These conditions are set forth in §127 and are deemed part of every fire insurance contract in force in New Brunswick and no variation or omission of or addition to any statutory condition shall be binding on insured. Several of these Statutory Conditions have already been seen. Also, statements under this heading in Ontario Digest are also applicable in New Brunswick.

**FRAUD**

See “AGENTS AND BROKERS”; “REPRESENTATIONS AND WARRANTIES.”

**GUEST CASES**

See “AUTOMOBILES.”

**HUSBAND AND WIFE**

Divorce ends rights of wife as preferred beneficiary.

**INFANTS**

See “AUTOMOBILE INSURANCE.” All infants’ settlements must be approved by Court of Queen’s Bench for a tort-feasor to receive a release.

**INSANITY**

Insane person lacks capacity to contract insurance. Requires committee appointed by Court of Queen’s Bench.

**LIABILITY INSURANCE**

See “AUTOMOBILE INSURANCE.”

**LIMITATION OF TIME FOR COMMENCEMENT OF ACTION**

Accident and Sickness - 1 year §194 (12).

Fire - 1 year - §127 (14). No action on policy of fire insurance may be brought until 60 days after completion of proof of loss. §127 (12).

Automobile - 2 years. §230 (6). However, no action may be commenced until certain prerequisites have been met.

**NEGLIGENCE**

Contributory Negligence Act, R.S.N.B., 1973, Ch. C-19. provides where by fault of two or more persons damage or loss is caused to one or more of them, liability to make good damage or loss is in proportion to degree in which each person was at fault. If not possible to determine different degrees of fault, liability shall be apportioned equally. §1 (1).

Infant of tender years may be guilty of contributory negligence. It is inaccurate as matter of law that child of six cannot be guilty of contributory negligence. *McEllistrum v. Etches* (1956), S.C.R. 787.

**NO-FAULT INSURANCE**

No-fault benefits is a reference to Section B - Accident Benefits which form part of every motor vehicle policy issued in New Brunswick pursuant to §264 of the Insurance Act. Section B has an extended definition of word “insured.” It provides compensation to accident victims irrespective of fault including 1) \$50,000 to each insured person for medical expenses incurred within four years from the date of the accident, and such other services considered essential for the treatment, occupational re-training or rehabilitation of the insured accident victim; 2) funeral expenses up to the limit of \$2,500; 3) \$50,000 death benefit for the principal income earner, which now includes a man or woman who have cohabited continuously for at least one year immediately preceding the accident; \$25,000 for his or her spouse and also a \$5,000 death benefit for each dependent of the same household as the deceased; 4) loss of income benefits for a period of 104 weeks to a maximum of \$250 per week for a person employed or deemed to be employed at the date of the accident who is unable to substantially perform the essential duties of his occupation for at least 7 of the 30 days immediately following the accident; 5) loss of income benefits after 104 weeks are available for the duration of the disability if the insured person is unable to engage in any occupation for which he is suited by reason of education, training or experience.

The insuring agreement of Section B was amended. These amendments came into force on January 1, 2005. By these amendments, the insuring agreement of Section B was moved into Subsection 1 – Medical, Rehabilitation and Funeral Expenses and amended to: “The insurer will pay with respect to each insured person who sustains bodily injury as a result of an accident reasonable expenses resulting from the accident within the benefit period...”. Prior to January 1, 2005, that insuring agreement provided coverage for the insured person who sustained “bodily injury or death by an accident arising out of the use or operation of an automobile.”

On January 1, 2009, the no frills auto insurance policy was abolished. Since that date, reduced no-fault benefits in exchange for lower premiums are no longer available. Section B coverage for automobile insurance policies is as detailed above.

Every action against the insurer for the recovery of a claim under Section B shall be commenced within one year from the date on which the cause of action arose. An insured does not have one but rather a series of causes of actions accruing weekly during the continuation of total disability. *Morgan v. Dominion Ins. Co.* (1981), I.L.R. 1-1325, and *MacKenzie v. Federation Ins. Co. of Canada* (1981), I.L.R. 1-1412.



Where a Plaintiff neglects to claim Section B Benefits, he runs the risk of having benefits he did not receive applied to reduce the Defendant's obligation because §263 (2) of the New Brunswick Insurance Act states a Defendant's obligation is reduced to the extent of Section B Benefits "paid" or "available" to a Plaintiff.

### REPRESENTATIONS AND WARRANTIES

Statements in applications for life, health, automobile or fire insurance are considered representations.

### SUBROGATION

Insurer under automobile or fire policy, who makes any payment under contract is subrogated to all rights of recovery of insured against any person and may bring action in name of insured to enforce those rights. (§§131 and 266). Insurer has no right to bring subrogation action in its own name. *Fidelity Ins. v. Levesque* (1983), 45 N.B.R. (2d) 140.

Under principle of subrogation if assured renounces any of his rights and remedies against third parties to benefit of which, if unrenounced, insurers would have been subrogated, assured will have to answer to insurers for amount of benefit lost.

Where insurer waives its subrogation rights against third party it cannot bring action against third party in name of insured. *J. Clark & Sons Ltd. v. Finnamore* (1973), 5 N.B.R. (2d) 467.

Insured is trustee of insurer's subrogation rights and when insured fails to claim full loss of wages against negligent third party, he has impaired or derogated insurer's subrogation rights. *Co-Operative Fire & Cas. v. Levesque* (1976), 13 N.B.R. (2d) 399.

### SUICIDE

Agreement by insurer to pay insurance money in event of suicide by insured is declared to be lawful and enforceable. *See* §149, Ins. Act.

### UNSATISFIED JUDGMENTS

An Act To Amend The Insurance Act was proclaimed on March 1, 1990. The Unsatisfied Judgment Fund is no longer available for accidents occurring on or after March 1, 1990. Provisions for Unsatisfied Judgments prior to March 1, 1990 are found in Motor Vehicle Act commencing at §317.

The Motor Vehicle Act Unsatisfied Judgment Fund make monies available to persons who are unable to recover judgments from person or persons who are primarily liable. Insurers derive no benefit from fund. One can

bring action against Party Unknown if he can first satisfy court that there are reasonable grounds for bringing action, that reasonable efforts have been made to ascertain motor vehicle involved and owner and driver of vehicle and that action is not made on behalf of any insurer. (§330, Motor Vehicle Act) If any of these are not proved to satisfaction of Court, person's application for such action will be refused; *Re Beaulieu* (1977), 16 N.B.R. (2d) 512.

Payment from Fund may be made in amount in respect to which judgment creditor is entitled if Court is satisfied that judgment creditor meets several requirements that are set out in §324 of Motor Vehicle Act. Maximum paid out for one accident will not be more than \$200,000, exclusive of costs for injury to or death of one or more persons or damage to property. Payments for damage to property is limited to claims in excess of \$250. If judgment creditor receives anything from other sources, amount he is entitled to receive from Fund may be reduced accordingly. §336 (1) (c).

For accidents on or after March 1, 1990, victims of uninsured or unidentified automobiles will now look to their own automobile insurer under Section D of the Standard Automobile Policy (based on former Subsection 3 of Section B) or from the Uninsured Automobile Fund. Uninsured automobile coverage is compulsory 1st party insurance at a statutory minimum of \$200,000. Bodily injury claims have priority to \$180,000 and property damage has priority to \$20,000. Damage to an automobile and its contents is subject to a \$250 deductible. For uninsured automobiles coverage extends both to property damage and bodily injury and death but unidentified automobiles coverage applies only to bodily injury and death.

Where victims are not covered by uninsured automobile coverage or other insurance, application may be made to the Uninsured Automobile Fund (§266.2 (2) of the Insurance Act). Where it is an uninsured automobile the fund covers property damage, bodily injury and death. But for unidentified automobiles only bodily injury and death are allowed. The maximum payable is \$200,000 from one accident and a \$250 deductible for property damage applies. The application process is similar to the Unsatisfied Judgment Fund.

### WAIVER AND ESTOPPEL

No term or condition of insurance contract shall be deemed to be waived by insurer in whole or in part unless waiver is stated in writing and signed by person authorized for that purpose by insurer.

Generally, law of estoppel and waiver in respect to contracts in general, applies to insurance contracts, subject to provisions expressly set out in policy.

### WARRANTIES

See "REPRESENTATIONS AND WARRANTIES."

### WORKERS' COMPENSATION

This topic is governed by Workers' Compensation Act, R.S.N.B., 1973, Ch. W-13, and amendments thereto.

Act is divided into two parts.

Part I applies generally to all employees and workers in or about any industry in New Brunswick, except persons whose employment is of casual nature and otherwise than for the purposes of the industry, members of employer's family under age 16 residing with the employer, out workers and domestic servants. (§2).

Compensation. Compensation shall be paid to worker or to his dependents, when personal injury or death is caused to worker by accident arising out of and in course of his employment in an industry within the scope of this Part. (§7.)

Election. Where accident occurs to worker in circumstances which entitle him or his dependents to bring action against some person other than his employer, the worker or his dependents may elect to either claim compensation or to bring action. This election shall be made within three months of accident or such longer period if allowed by Board. If he elects to bring action and recovers less than he would be entitled to from compensation, he shall be entitled to compensation for difference. §10 (1) (3) (8).

Subrogation. When worker or his dependents claims compensation, Board shall be subrogated to all rights of that worker in respect of injuries to him as against person against whom action lies, and may maintain action in his name, and where more is recovered than amount of compensation, excess less administrative charges and costs is given to worker or his dependents. This amount shall be deducted from the amount of any future compensation or benefits to which he or they become entitled in respect of the accident. §10 (10).

Negligence. When action is brought and person at fault or who was negligent is employer of worker, or any worker of that employer, damages are not recoverable for portion of loss caused by fault or negligence of that employer or worker. §10 (12). There shall not be any right of action against any employer or worker of that employer, where workers of both employers were in

course of their employment at time of accident, unless negligence is proved. Exception is where worker is injured or killed (a) while being transported in course of his employment by any mode of transportation or (b) as result of accident involving use of motor vehicle by worker or any other person. §11.

Course of employment. To entitle worker to fall under provisions of this Act, he must at time of mishap or accident, be acting in course of his employment as worker of employer. This is question of fact which must be determined in each case. *N.B.C.A. in Crothers v. Martin et al* (1982), 44 N.B.R. (2d) 59 held that appellant was not "workman" under act as he did not have contract of service with company. In *Kinney v. Workmen's Comp. Board* (1973), 5 N.B.R. (2d) 784, where employees of car dealer agreed to pick up car for their employer after working hours and were involved in accident, court said that employees were performing duty in course of special contract of employment and were considered workmen for purposes of Act. Similarly, defendant in such action must not be worker acting in course of employment, or action will be banned. See *Workmen's Comp. Board v. Greer* (1973), 5 N.B.R. (2d) 592.

Waiver. Worker shall not agree with his employer to waive or forego any of benefits to which he or his dependents are entitled or may become entitled and every agreement to that end is void. §13.

Limitation Period. No compensation is payable in respect of any accident, unless made within one year after accident, or in case of death, within 6 months from time of death. Notwithstanding, Board may pay the claim if in its opinion it is a just one and ought to be allowed. §16.

Workers' Compensation Board. This Board shall consist of 10 members, six of which constitutes quorum. Board has jurisdiction to determine who is employer, what is considered industry and any other matters and questions arising in this Part of Act. However, no decision or ruling of Board is binding on it as precedent for any other decision or rulings. Board (under §34) has exclusive jurisdiction in determining: (a) Existence and degree of disability. (b) Permanence of disability. (c) Amount of average earnings. (d) Degree of diminution of earning capacity by reason of any injury. (e) Existence of relationship of "member of family." (f) Existence of dependency. (g) Character and class of any industry. (h) Whether employment of person in industry is that of worker, sub-contractor or independent contractor. (i) Whether personal injury or death has been caused by accident. (j) Whether accident arose out of and in course of employment.

Appeal lies to Court of Appeal from any order, ruling or decision of Board involving any question as to its jurisdiction or any question of Law. §36 (2). Scales of Compensation: These are laid down in §37 and 38 of Act.

Part II applies to industries to which Part I does not apply, except farm laborers, domestic or menial servants, or their employers or fishermen. Under this part worker may sue his employer for injuries received by reason of

any defect in ways, works, machinery, plant, building or premises used in his employer's business, or by reason of negligence of his employer or any person employed by employer. This right of action survives to personal representative of worker. Worker shall not be deemed to have voluntarily incurred risk of injury by reason only of his continuing in employment of employer, with knowledge of defect or negligence that caused his injury.

