

DIGEST OF INSURANCE LAW

NEWFOUNDLAND AND LABRADOR

Not revised for this Edition

CIVIL JUDICIAL SYSTEM

Provincial Court. Judges of Provincial Court have power to hear all civil actions for recovery of debts or damages to amount not exceeding \$3,000. There is also right of appeal from Court of summary jurisdiction on point of law by way of case stated to Supreme Court of Newfoundland, Trial Division. Small Claims Act, R.S.N. 1990, c. S-16.

Supreme Court of Newfoundland. Supreme Court, Trial Division, has jurisdiction in all matters. There is provision for appeal from Supreme Court, Trial Division to Supreme Court, Appeals Division. Judicature Act, R.S.N. 1990, c. J-4.

ACCIDENT AND SICKNESS INSURANCE

Pursuant to Accident and Sickness Insurance Act, R.S.N. 1990, c. A-2, "Accident Insurance" means insurance by which the insurer undertakes, otherwise than incidentally to some other class of insurance, to pay insurance money in event of accident to the person insured, but does not include insurance by which insurer undertakes to pay insurance money both in event of death by accident and in event of death from any other cause. "Sickness Insurance" means insurance by which insurer undertakes to pay insurance money in event of sickness of person insured, but does not include disability insurance. Act does not apply to: (a) accidental death insurance; (b) creditors group insurance; (c) disability insurance; (d) limited accident insurance provided under AIA.

"Group Insurance" under Act means insurance whereby lives or well-being of number of persons are insured individually under single contract between insurer and employer or other person, but "Group Insurance" does not include creditors' group insurance or family group insurance.

In contract of group insurance made with insurer authorized to transact insurance in Newfoundland and Labrador, Act applies in determining rights and status of beneficiaries and personal representatives as recipients of insurance money, and rights and obligations of group

person insured, provided however that group person was resident in Province at time he became insured. Insurer must set forth in policy every exception or deduction affecting amount payable under contract, either in provision affected by exception or reduction, or under heading such as "Exceptions" or "Deductions." Where exception or deduction affects only one provision in policy, it must be set forth in that provision. Where exception or deduction is contained in endorsement, insertion or rider, endorsement, insertion or rider must, unless it effects all amounts payable under contract, make reference to provisions in policy affecting exception or deduction. With certain exceptions conditions set forth in Act will be deemed to be part of every contract other than contract of group insurance and must be printed on or attached to policy with heading "Statutory Conditions."

In policy of accident insurance of non-renewable type issued for term of six (6) months or less or in relation to ticket of travel, statutory conditions need not be printed on or attached to policy if policy contains following notice printed in conspicuous type: "Notwithstanding another provision herein contained, this contract is subject to statutory conditions in Accident and Sickness Insurance Act, R.S.N. 1990, respecting contracts of accident insurance."

Act states that person has insurable interest in the life and well-being of himself and of: (a) his child or grandchild; (b) his spouse; (c) any person upon whom he is wholly or in part dependant for, or from whom he is receiving support or education; (d) his officer or employee; and (e) any person in whom he has pecuniary interest.

In *Ryan v. Canada Life Assurance*, 1999 Carswell Nfld 249, 179 Nfld. & P.E.I.R. 306, 546 A.P.R. 306, 14 C.C.C.I.(3d) 31 (Nfld. C.A.), the Newfoundland Court of Appeal held that trial judge erred in law in finding significant deterioration in appellant's vision in itself amounted to change in facts concerning accident and sickness insurance without inquiring whether change entailed increase in risk to insurer. Leave to appeal to Supreme Court of Canada not allowed.

ADJUSTERS

Insurance Adjusters, Agents and Brokers Act R.S.N. 1990, c. I-9, provides for issuance by Superintendent of Insurance of licenses to adjusters, agents and brokers, and student representatives.

Licenses remain in effect, subject to annual reports, paying fees and meeting prescribed qualifications and requirements until suspended, revoked or cancelled. It is offense under act to hold oneself out as adjuster without valid license.

AGE

Age of Majority Act, S.N. 1995, c. A-4.2, provides every person who attains 19 years of age has attained age of majority and ceases to be a minor. A person attains a particular age on commencement of the relevant anniversary of the person's birth. Under Accident and Sickness Insurance Act, R.S.N. 1990, c. A-2, minor at age 16 years has capacity of person who has reached majority to make enforceable contract. Beneficiary has capacity to receive insurance money payable at age 18.

AGENTS AND BROKERS

Pursuant to Insurance Adjusters, Agents, and Brokers Act, R.S.N. 1990, c. I-9, "Agent" means a corporation or partnership which, for compensation, solicits insurances on behalf of insurer or transmits an application for insurance or acts in the negotiation of insurance or holds itself out as an insurance consultant or examines, appraises, reviews or evaluates an insurance policy, plan or program or gives advice regarding any of above.

"Broker" under the Act means a corporation or partnership, other than an agent, which for compensation deals with the public and helps form a contract of insurance regardless of whether it has an insurer arrangement to bind coverage and countersign insurance documents. Broker also provides risk management services, where required to a corporation other than itself and holds itself out as an insurance consultant or examines, appraises, reviews or evaluates an insurance policy, plan, or program or gives advice regarding same.

The Superintendent may revoke, suspend or cancel a license issued under this Act, where, after investigation, the Superintendent determines that licensee has contravened this Act or regulations.

An agent, broker or representative is liable to the insured on all contracts of insurance unlawfully made through the agent, broker or representative, directly or indirectly, with an insurer not licensed to undertake insurance in the province in the same manner as if that agent, broker or representative were the insurer.

ARBITRATION

Under the Arbitration Act, R.S.N. 1990, c. A-14, an arbitrator is the person who under the Act or in an arbitration agreement, who hears and decides an arbitration. A submission is a written agreement to submit present or future differences to arbitration, a direction by Act that a person appoint arbitrators or proceed to arbitration or order made by the Court with respect to arbitration under this Act.

Where a party to a submission, or a person claiming through or under a party, in respect of a matter agreed to be referred, a party to the legal proceedings may, after appearance and before delivering pleadings or taking other steps in proceedings, apply to court for an order staying proceedings.

In *N.A.P.E. v. Memorial University*, 1998 Carswell Nfld 219, 167 Nfld. & P.E.I.R. 72, 513 A.P.R. 72, 7 Admin. L.R. (3d) 273, 26 C.P.C.(4th) 225 (Nfld. C.A.), the Newfoundland Court of Appeal held that the amendment to section 14 of the Arbitration act providing for 60 day limitation period did not have retroactive effect.

AUTOMOBILE

Highway Traffic Act, R.S.N. 1990, H-3, makes third party liability insurance compulsory. NR 110/98 – Highway Traffic Driver Regulations, 1999 sets out licensing requirements for different classes of license. Automobile Insurance Act, R.S.N. 1990 c. A-22, requires that every contract evidenced by motor vehicle liability policy must insure to limit of two hundred thousand dollars (\$200,000) in respect of any one accident, exclusive of interest and costs and against liability resulting from bodily injury to or death of one or more persons and loss of or damage to property.

CNLR 999/1996 Ambulance, Bus, School Bus, Taxi and Commercial Vehicles Insurance Regulations under Highway Traffic Act state that in case of ambulance, bus or taxi, motor vehicle liability policy must insure to limit of at least one million dollars (\$1,000,000) where vehicle has capacity for less than 22 passengers or two million dollars (\$2,000,000) if vehicle has capacity for 22 or more passengers, against liability arising out of bodily injury or death of a person or loss or damage to property of passenger exclusive of interests and costs.

Act does not apply to contract providing insurance in respect of automobiles not required to be registered under Highway Traffic Act, R.S.N. 1990 unless it is insured under contract evidenced by form of policy approved under Act.

Every insured against whom action is commenced for damages occasioned by automobile must give written notice thereof to insurer within five (5) days after service of notice or process in action. Every insured against whom judgment has been entered must disclose to judgment creditor entitled to the benefit of any motor vehicle liability policy particulars of such contract within ten (10) days after written demand.

Where insurer provides accident insurance benefits, or medical expense coverage or uninsured motorist cover against loss resulting from bodily injury to or death arising out of an accident involving an automobile, the limitation period to commence an action against the insurer shall be as stated in the policy but in no case shall it be less than 1 year from date of accident.

Amendments to Automobile Insurance Act in force on July 1, 1994 repealed Judgement Recovery (Newfoundland) Act and claims arising in connection with uninsured automobiles governed by compulsory coverage under own automobile policy.

Section 33 of Automobile Insurance Act adds Uninsured Automobile Coverage as compulsory coverage in standard automobile policy which is first party insurance. Innocent victim can claim damages for bodily injury caused by uninsured or unidentified automobile. Innocent victim injured by uninsured automobile may also claim property damages.

Maximum coverage under Uninsured Automobile Coverage, regardless of number of persons injured or killed, or amount of property damage in any accident is the minimum limit for liability insurance in jurisdiction where accident occurs, but in no case shall exceed \$200,000. If person entitled to recovery also entitled to recovery under another valid policy with respect to loss or injuries (except monies recoverable upon death), insurer is not liable to pay a sum that exceeds the sum claimant legally entitled to under 2 (1) of CNR 985/96 Schedule. Bodily injury claims have priority to the extent of 90% and property damage has priority to the extent of 10% of total amount payable under contract. Insurer has right of subrogation.

Uninsured Automobile Coverage not available where innocent victim entitled to recover damages under third party liability section of automobile liability policy.

Person injured while passenger in uninsured automobile would recover under policy if he or she is named insured in the policy or the spouse or dependent relative of the named insured in the policy provided they reside with named insured.

Injured party must give written notice of claim to Chief Agency or Head Office of Insurer in Newfound-

land and Labrador within 30 days of accident or if notice cannot be given in said time, then must be given as soon as practicable. Proof of claim must be given within 90 days of accident or as soon as practicable thereafter. Where accident involved unidentified automobile, accident must be reported to police within 24 hours or as soon as practicable and must give insurer written notice setting out facts in support of cause of action against unidentified automobile within 30 days or as soon as practicable. Insurer must be given notice of commencement of legal proceedings against uninsured automobile.

Determination of coverage and amount of damages under Uninsured Automobile Coverage determined by (i) written agreement between insurer and claimant (ii) by arbitration or (iii) action against insurer (insurer has right to contest liability if insured has not already done so). Limitation period against insurer is two years from date cause of action arose.

Facility Association establishes fund to protect victims of uninsured or unidentified automobiles who are not protected by Uninsured Automobile Coverage. Maximum payable by Facility Association is \$200,000 per accident but payment received from collateral sources are accounted for in determining amount payable. Where driver is unidentified, claim for bodily injury only is made against nominal defendant designated Party Unknown.

Same priority for property damage and bodily injury as under §21 (2) of Automobile Insurance Act (\$180,000 bodily injury and \$20,000 property damage). Note that no claim for property damage can be made against Party Unknown.

Newfoundland approved for use a standard automobile policy incorporating no-fault insurance under Section B of policy. Section B benefits compensate insured for economic loss only, up to a maximum of \$25,000. Benefits payable to four years from date of accident. Subsection 1 benefits include necessary medical, surgical, dental, chiropractic, hospital, professional nursing and ambulance services and such other services and supplies in the opinion of insured's physician and insurer's medical advisor are essential for treatment, occupational retraining or rehabilitation. In case of death, insurer covers funeral expenses to limit of \$1,000. Subsection 2 provides weekly payment for loss of income from employment as a result of accident, for period during which insured suffered a substantial inability to perform essential duties of occupation for a period of not less than 7 days. Inability to perform essential duties must arise within 104 weeks from date of accident. If after 104 weeks, inability prevents insured from engaging in occupation for which insured is reasonably suited by education, training or experience to perform, benefits

continue for duration of such inability to perform essential duties. Weekly benefit is lesser of \$140/week and 80% of insured's gross weekly income. Subsection 2 also includes death benefits where death occurs within 180 days of accident or within 104 weeks if there has been continuous disability under that period. Payment based on status of deceased person at date of accident in a household where spouse or dependents survive. If head of household or spouse of head of household dies, principal sum payable is \$10,000. Principal sum payable on death of dependant is \$2,000. If head of household dies and two or more survivors remain, principal sum increased by \$1,000 for each survivor other than the first.

In *Lawlor v. Royal*, 1998 Carswell Nfld 307, 167 D.L.R.(4th) 1, 38 M.V.R.(3d) 185, [1998] 3 S.C.R. 260, the Supreme Court of Canada, reversing decision of Newfoundland Court of Appeal, held where driver paid full insurance premium to renew insurance and agent did not remit renewal premium, insurance company still liable to indemnify. Policy valid and in effect on date of accident.

Limitation period for filing written notice of claim is 30 days from date of accident or as soon as practicable thereafter. Provision of proof of claim required within 90 days from date of accident.

BURGLARY INSURANCE

No statutory laws on subject.

CROP INSURANCE

The Crop Insurance Act, R.S.N. 1990, c. C-39, establishes Newfoundland and Labrador Crop Insurance Agency which carries out crop insurance plan under direction, supervision and control of Department of Forestry and Agriculture.

EXECUTION OF JUDGMENT AGAINST JOINT TORT-FEASORS

See also "NEGLIGENCE."

Where joint tort-feasors are both named defendants, each is jointly and individually liable, unless court specifies otherwise. Application may be made to court under Contributory Negligence Act, R.S.N. 1990, c. C-33, by co-defendant to have court apportion degree of blame, thus giving each tort-feasor right to recovery against other.

FATAL ACCIDENTS

Fatal Accidents Act, R.S.N. 1990, c. F-6, provides that action must be brought within two (2) years of death by executor or administrator for benefit of spouse, parent

or child of person whose death is caused. If executor or administrator does not bring action within 6 months of death, then any of those entitled may commence action. If there is no executor or administrator, then any of those entitled may commence action immediately. Funeral expenses may be recovered if paid by person for whose benefit action is brought. Words "parent" and "child" have extended meanings set out in Act.

FIRE INSURANCE

Fire Insurance Act, R.S.N. 1990, c. F-10, applies to insurance policies made in Newfoundland and Labrador covering loss of or damage to property arising from peril of fire. Act does not apply to: (a) insurance policies falling within classes of aircraft, automobile, boiler and machinery, inland transportation, marine, plate glass, sprinkler leakage and theft insurance; (b) where subject matter of insurance is rents, charges or loss of profits; (c) where peril of fire is incidental peril to coverage provided; or (d) where subject matter of insurance is property that is insured by insurer or group of insurers primarily as nuclear risk under a policy covering against loss of or damage to property resulting from nuclear reaction or nuclear radiation. Contract considered to cover property against fire, lightning and explosion, subject to various exceptions. Insurer can give more extended insurance against above perils, but in that case, Act does not apply to extended insurance. Moreover where contract of insurance excludes any loss that would otherwise fall within coverage outlined above exclusion, stipulation, condition or warranty will not be binding upon insured if it is held to be unjust or unreasonable by court before which question relating thereto is tried.

Unless contract of insurance to which this Act applies otherwise specifically provides, contract does not cover insured property against loss or damages caused by contamination by radioactive material directly or indirectly resulting from fire, lightning or explosion within scope of immediately preceding paragraph.

Where property insured under contract governing specified location is necessarily removed to prevent loss or damage or further loss or damage thereto, part of insurance under contract that exceeds amount of insurers liability for any loss incurred will, for 7 days only, or for unexpired term of contract if less than 7 days, cover property removed and any property remaining in original location in proportions which value of property in each of respective locations bears to value of property in them all.

FRAUD

See also "REPRESENTATIONS AND WARRANTIES."

Fire Insurance Act, R.S.N. 1990, c. F-10, Automobile Insurance Act, R.S.N. 1990, c. A-22, and Life Insurance Act, R.S.N. 1990, c. L-14, contain statutory provisions which render contract of insurance voidable by insurer where there has been material misrepresentation or omission at time of executing contract.

HUSBAND AND WIFE

Rule at common law that spouse cannot commence action against spouse amended by Family Law Act, R.S.N. 1990, c. F-2. Married person has and shall be accorded legal capacity for all purposes and in all respects as if he or she were an unmarried person and has same right of action in tort against his or her spouse as if they were not married. No person is barred from bringing an action or other proceeding against another for the reason only that they are parent and child.

JUDGMENTS

According to Judgment Enforcement Act, S.N. 1996 c. J-1.1, judgments are valid for ten (10) years. Following expiration of 10 years, person shall not bring action to enforce judgment of court for payment of money or recovery of personal property.

Judgment Interest Act, R.S.N. 1990, c. J-2, allows the court to award interest on a judgment for payment of money or a judgment that money is owing. Prejudgment interest is calculated from day that cause of action arises to the day of judgment at the rate determined by averaging the interest rates in effect during that period. Post-judgment interest is calculated from the day on which it is payable under the judgment until it is satisfied at the interest rate in effect on the last day of each 3 month period beginning on the day on which the judgment debt is payable under the judgment. Interest rate is established by taking the average Bank of Canada rate for the period of October and November of each year, rounded to the next higher whole number where the average bank rate includes a fraction, minus 1%. Effective January 1, 2002, the interest rate is 3.0%. Interest is simple interest.

Where it is just to do so in the circumstances, judge may refuse to award interest on the whole or part of the judgement and may award interest at a rate and for a period other than the rate or period determined by the Act.

In *Young v. Dawe*, 1998 CarswellNfld 25, 156 D.L.R.(4th) 626, 160 Nfld. & P.E.I.R. 233, 494 A.P.R. 233, 27 C.P.C.(4th) 23 (Nfld. C.A.), the Newfoundland Court of Appeal reversed trial judge's decision to limit pre-judgment interest to 2 years because delay of 8 years unreasonable. Court of Appeal held length of delay does not impact interest entitlement, unless exceptional circumstances.

LIABILITY INSURANCE COVERAGE

See also "AUTOMOBILE."

With exception of Automobile Insurance Act, R.S.N. 1990, c. A-22, no statutory provision in Newfoundland compels purchase of third party liability insurance.

LIMITATION OF TIME FOR COMMENCEMENT ACTIONS

All limitation periods for commencement of actions governed by Limitations Act, S.N. 1995, c. L-16.1 (in force April 1, 1996) which not only consolidates former limitations legislation but also repeals and replaces specific limitation periods in most specialized legislation (e.g. professional negligence, motor vehicle negligence). Limitations Act also provides for "catch all" provision establishing six (6) year limitation period for actions not expressly provided for in Limitations Act or specialized statutes. Equitable limitation periods (laches, acquiescence) are preserved.

Special limitation periods applicable to Crown abolished by Limitations Act. Act applies to actions by or against Crown. "Crown" also broadly defined to include, to the extent constitutionally possible, the Crown in right of Canada and Crown in right of Newfoundland and Labrador.

No longer necessary to provide Crown, cities or municipalities with notice of intention to commence actions.

General regime establishes two (2) year limitation periods for actions involving personal injury, personal property damage, trespass to property, defamation, malicious persecution, false imprisonment; six (6) years for recovery of debts, personal property and enforcement of instruments under seal and statutory obligations; and ten (10) years for actions involving recovery of land, trust property and enforcement of court judgments for payment of money or recovery of personal property. Ten year limitation period on recovery of land does not apply with respect to Crown land.

Certain matters such as enforcement of injunctions, easements, declarations of title to land and redemption of property by mortgagor or power of sale by mortgagee not subject to limitation period.

Where sexual misconduct committed against person and that person was (a) under care or authority, (b) financially, emotionally, physically or otherwise dependent, or (c) beneficiary of a fiduciary relationship with the person, organization or agency, there is no limitation period for actions arising out of sexual misconduct.

Common law rules respecting time cause of action arises preserved by Limitations Act. Where action for damages based on breach of duty founded in tort, contract or statutory duty and damages claimed are in respect of personal injury or property damage (including economic loss, negligent misrepresentation or professional negligence), cause of action arises on date damage first occurred.

In actions for personal injury, property damage, professional negligence, relief from consequences of mistake, non-fraudulent breach of trust and Fatal Accidents Act, limitation period does not run until person knows or, considering circumstances, ought to know she has cause of action (i.e. discoverability rule). Burden of showing postponement or suspension of limitation period on party seeking benefit.

Notwithstanding postponement/suspension provisions, foregoing actions shall not be taken by a person after expiry of ten (10) years from the later of (a) act/omission on which action based or (b) last of series of acts/omissions or termination of a course of conduct where action based on series of acts/omissions or continuing course of conduct. Statutory discoverability rule therefore subject to ten (10) year stop cap, for actions listed in preceding paragraph

Limitations Act also provides for postponement or suspension of limitation period where person is under "disability" - defined as (a) under 19 years of age, (b) incapable of managing ones affairs due to physical/mental condition, and (c) incapable of commencing action due to sexual misconduct not arising from a trust/fiduciary relationship. Where person is under a disability, limitation period postponed and commences when person ceases to be under disability. If person becomes disabled while limitation period runs, limitation period suspended until person ceases to be under disability and an action may be brought before the later of (a) expiration of limitation period as it applied if no disability occurred or (b) one year after disability ceased.

Limitation Act provides for ultimate limitation period of thirty (30) years from the date on which the event which gave rise to the cause of action last occurred, notwithstanding whether person is under disability.

Limitations Act applies to causes of action arising before and after Act came into force (April 1, 1996). Transitional provisions provide that 1) where cause of action arising prior to April 1, 1996 not previously governed by limitation period or the limitation period fixed by Limitations Act is shorter than former limitation, and 2) limitation period fixed by Limitations Act would have expired on or before March 31, 1998, the governing expiry date of the limitation period is the shorter of (a) the

limitation period which formerly governed or (b) expiry of March 31, 1998.

Limitation and Notice periods under the Workplace Health, Safety and Compensation Act, Automobile Insurance Act (and Standard Auto Policy), Insurance Contracts Act, Accident and Sickness Insurance Act and Fire Insurance Act remain outside the Limitations Act.

With the exception of chiropractors, special limitation periods protecting professionals (including hospitals) have been repealed and governed by Limitations Act.

Whether based on tort, contract or statutory duty, action for personal injury, property damage and economic loss arising from professional negligence is subject to limitation period of two years from the time that the plaintiff knew, or in the circumstances, ought to have known, that damage occurred. Onus on plaintiff to show that he could not have reasonably known of damage if action commenced after two (2) years from date damage occurred. This discoverability rule is subject to ten (10) year cap. Consequently, action will be statute barred upon expiry of ten (10) years from the date of service or termination of services on which action based. Disability provisions of Limitations Act apply to professional negligence and no action can be commenced after thirty (30) years from date of service or termination of services, even where plaintiff under disability and had no knowledge of breach and damage.

In *Wheaton v. Palmer* (2001), 2001 CarswellNfld 233, 2001 NFCA 43, 205 Nfld. & P.E.I.R. 304, 615 A.P.R. 304, 10 C.P.C.(5th) 245 (Nfld. C.A.), the Newfoundland Court of Appeal held that for claim arising out of motor vehicle accident, admission of liability in letters within limitation period confirmed cause of action thus action not statute barred by limitation period.

NEGLIGENCE

Contributory Negligence Act, R.S.N. 1990, c. C-33, modifies common law rules as to negligence which remain in force in Newfoundland. Act provides that where accident is fault of two or more persons and damage or loss is caused to one or more of them, liability to make good damage or loss shall be in proportion to degree in which each person was at fault. If having regard to all circumstances of case, it is not possible to establish different degrees of fault then liability will be apportioned equally. Where negligence is apportioned among two or more defendants each shall be jointly and severally liable to Plaintiff, but between themselves, in absence of any contract expressed or implied, they shall be liable to make contribution to and indemnify each other in degree in which they are respectively found to have been at

fault. Nothing, however, will operate so as to render any person liable for any damage or loss to which his fault has not contributed. Degree of fault of two or more persons will be determined by Court.

Where an action has been commenced, the expiry of the limitation period is no bar to a counter claim, third party claim, set off or addition of new parties in respect of a claim relating to, or connected with the subject matter of the original action but court retains discretion to refuse relief on grounds unrelated to lapse of time for bringing action.

Highway Traffic Act, R.S.N. 1990, §200, provides that, without effect upon liability of driver, owner of vehicle is liable for loss or damage sustained by any person by reason of negligence in operation of vehicle unless vehicle was, without owner's consent, in possession of person other than owner, and that every person driving vehicle who is living with and is member of owner's family, is deemed to be in possession of vehicle with permission of owner, unless the contrary is proved.

NO-FAULT INSURANCE

Generally, No-fault Insurance does not exist in Newfoundland and Labrador. Automobile insurance claims are still paid out on basis of degree of fault, except for Section B benefits set out in standard automobile policy approved for use in Newfoundland and Labrador. See "AUTOMOBILE."

REPRESENTATIONS AND WARRANTIES

See also "ACCIDENT AND SICKNESS."

By virtue of Life Insurance Act, R.S.N. 1990, c. L-14, applicants for contracts of life insurance and person whose life is insured are required to disclose to insurer in application, and in written statements or answers furnished as evidence of insurability, every fact within their knowledge that is material to insurance. Failure to disclose, or misrepresentation of fact required to be disclosed renders life insurance contract voidable by insurer. If contract has been in effect for 2 years during lifetime of person whose life is insured, failure to disclose or misrepresentation of fact required to be disclosed will not, in absence of fraud, render contract voidable. Moreover in case of contract of group insurance failure to disclose or misrepresentation of, fact required to be disclosed does not, in absence of fraud, render contract voidable. If however evidence of insurability is specifically requested by insurer, insurance in respect of that person is voidable by insurer unless it has been in effect for 2 years during lifetime of that person in which event it is not, in absence of fraud, voidable.

Question of materiality in contract is one of fact for jury or for court if there is no jury and admission, term, condition, stipulation, warranty or proviso to contrary contained in a proposal or application for insurance or in an instrument of contract or in agreement or document relating thereto has no force or validity. Where, in case of contract of fire insurance, there has been imperfect compliance with statutory condition as to proof of loss to be given by insured or other matter or thing required to be done or omitted by insured with respect to loss insured against, resulting in consequent forfeiture or avoidance of insurance, in whole or in part, and court deems it inequitable that insurance be forfeited or voided on that ground, court may relieve against forfeiture or voidance on terms as it deems just, pursuant to §22 of Insurance Contracts Act, R.S.N. 1990, c. I-12.

By virtue of Automobile Insurance Act, where applicant for contract of automobile insurance gives false particulars of automobile to be insured to prejudice of insurer, or knowingly misrepresents or fails to disclose in application any fact required to be stated therein, claim by insured is invalid and right of insured to recover indemnity is forfeited. Where insured contravenes term of contract or commits fraud or insured willfully makes false statement in respect of claim under contract, claim by insured is invalid and right of the insured to recover indemnity is also forfeited. These vitiating factors are subject to powers of Court to grant relief from forfeiture under Insurance Contracts Act.

SERVICE OF PROCESS

A statement of claim shall be served as provided in Rules 6 (of the Supreme Court of Newfoundland and Labrador 1986), a defense, as provided in Rule 10.04; a counterclaim and defense thereto, as provided in Rules 11.01 and 11.02; and a third party notice and defense thereto, as provided in Rules 12.03 and 12.04. Rules of Supreme Court, 1986 under Judicature Act S.N. 1986 c. 42, Schedule D.

Unless personal service is expressly prescribed by a statute or rule or a Court so orders, a document need not be served personally. Personal Service of a document is effected on an individual by leaving a true copy of the document with the individual, and on a body corporate by leaving a true copy of the document with the president, chairman, mayor or other chief officer of the body corporate, or with the manager, secretary, city or town manager or clerk, or other similar officer thereof, or in the manner provided by The Companies Act.

Service outside of Newfoundland and Labrador of any document by which any proceeding is commenced may be allowed by the Court whenever relief is sought against a person domiciled or ordinarily resident within the Province, the proceeding is founded on a tort com-



mitted within the Province, or a person out of the Province is a necessary or proper party to a proceeding properly brought against another person served within the Province. The Court may, upon application under Rule 6.07 (1) supported by affidavit or other evidence stating that in the belief of the deponent the plaintiff has a good cause of action and showing in what place or country the defendant is or probably may be found, order that the originating document be served on the defendant in such place or country and make such other order as it thinks fit.

SUBROGATION

Under Fire Insurance Act, insurer, upon making any payment or assuming liability therefore under contract of fire insurance, will be subrogated to all rights of recovery of insured against any person, and may bring action in name of insured to enforce such rights. Where net amount recovered after deducting cost of recovery is not sufficient to provide complete indemnity for loss or damage suffered, that amount will be divided between insurer and insured in proportions in which loss or damage has been borne by them respectively. Similar provisions may be found in Automobile Insurance Act, §45 (2).

WAIVER AND ESTOPPEL

Except in contracts of life insurance and marine insurance no term or condition of contract will 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. Neither insurer nor insured shall be deemed to waive any term or condition of contract by any act relating to appraisal of amount of loss or to delivery of completion of proof, or to investigation or adjustment of any claim under contract. Similar provision is found in statutory conditions under Accident and Sickness Insurance Act.

WORKERS' COMPENSATION

Workplace Health, Safety and Compensation Act, R.S.N. 1990, c. W-11 applies to all workers and employers engaged in, about or in connection with any industry in Newfoundland and Labrador except those industries, employers or workers as Lieutenant-Governor in Council may exclude by regulation.

Compensation under Act is payable to worker who suffers personal injury arising out of and in course of his employment. Act contains provision prohibiting workers covered by act from maintaining action for damages which might flow from injury or death in work place, against employer. This provision of Act was struck down as unconstitutional in Supreme Court of Newfoundland and Labrador, Trial Division, decision *Pier-*

cey v. General Bakeries, (1986) 61 NPEIR 147. This decision, however, was reversed by the Newfoundland and Labrador Court of Appeal, which found that the impugned provisions of the Act were not unconstitutional; See Reference Re §32 and §34 of the Workers' Compensation Act (NFLD, 1987), 67 NPEIR 16. Appeal to Supreme Court of Canada dismissed (1989), 76 NPEIR 181. Provision will not apply where worker is injured or killed while being transported in the course of the worker's employment by a mode of transportation in respect of which public liability insurance is required to be carried, or as result of a motor vehicle accident occurring in the course of worker's employment. Where worker or his dependents are permitted to bring action against them, worker or dependent may, where entitled to compensation, elect compensation or bring an action but not both. Election must be made within 3 months of injury. Where party elects an action then no right to compensation. If party elects compensation, then party may commence action, but Workers' Compensation Commission is subrogated to the rights of the party in relation to the claims. Where Commission brings action on behalf of injured worker, it may recover amounts paid to or on behalf of a worker or his/her dependents by way of compensation including amounts paid as medical expenses, rehabilitation expenses and other expenses paid by the Commission to or on behalf of the worker or his/her dependents.

Where worker is excluded from coverage under Act, and is killed or injured as result from any defect present in work environment or by reason of negligence of employer, then action is maintainable against employer under Employers' Liability Act.

Compensation is not generally payable to nonresident injured within Newfoundland.

Depending on circumstances of either partial or total disability, Commission shall pay medical expenses, lump sum awards and compensation for loss of earning capacity.

Where injury to worker results in loss of earnings beyond day of injury, Commission shall estimate effect of injury on loss of earning capacity resulting from injury and shall ensure compensation to worker on basis of estimated loss. For periods of wage loss after December 31, 1997, the rate is 80% of the difference between worker's average weekly net earnings at the commencement of his or her loss of earnings resulting from the injury, subject to the maximum prescribed amount and the average weekly net earnings the worker is estimated capable of earning.

Commission may deem that worker is capable of working in occupation and estimate wage he could earn therein.