

DIGEST OF INSURANCE LAW

NEW HAMPSHIRE

Courtesy of
Wiggin & Nourie, P.A.
Manchester, New Hampshire

CIVIL JUDICIAL SYSTEM

Courts of Original Jurisdiction

Inferior courts of limited original civil (and criminal) jurisdiction are District and Probate courts.

District courts have exclusive civil jurisdiction of actions where damages are not alleged to exceed \$1,500, and concurrent jurisdiction with superior court of civil actions not exceeding \$25,000. District courts may not try title to real estate. N.H. Rev. Stat. Ann. §502-A:14. Venue lies in district where either plaintiff or defendant resides. R.S.A. §502-A:16. District courts may also try small claims not exceeding \$7,500, which do not involve title to real estate. R.S.A. §503:1.

Probate courts have limited, but exclusive jurisdiction over probate of wills, granting of administration of matters relating to composition, administration, sale, settlement, and final distribution of estates; adoption; termination of parental rights; change of name for those who reside in the county; interpretation and construction of wills and testamentary trusts; durable powers of attorney for health care; appointment and removal of guardians; partitioning of real estate where title is not in dispute, R.S.A. §547:3; appointment of administrator to bring suit against insurer within state who has undertaken obligation to indemnify deceased for liability arising from latter's misconduct. *Robinson v. Carroll*, 87 N.H. 114, 174 A. 772 (1934).

Superior Court, composed of chief justice and 28 associate justices appointed and commissioned as prescribed by the constitution, R.S.A. §491:1, has original civil (and criminal) jurisdiction in both law, R.S.A. §491:7, and equity. R.S.A. §498:1. Its jurisdiction encompasses trial of all actions, issuance of common law writs, actions against state involving express or implied contracts, R.S.A. §491:8, and those cases district courts are forbidden to try. Writ of summons shall not specify or allege amount of damages claimed. R.S.A. §508:4-c.

Appellate Courts

Final decisions of Probate, District and Superior Courts lie directly to Supreme Court. R.S.A. §490:4. In

2004, the Supreme Court extended automatic appeal rights to all Rule 7 final decision appeals. Sup. Ct. R. 3. Transfer of interlocutory questions in advance of final decision may be allowed at discretion of Supreme Court. Sup. Ct. R. 9. The court may, either on consideration of the notice of appeal or after briefing, refer a case to a judicial referee panel consisting of three justices, called 3JX panel. See Sup. Ct. R. 12-D. Court is composed of 5 justices appointed and commissioned as prescribed by the constitution. R.S.A. 490:1.

LAW

Abbreviations

A. – Atlantic Reporter.
A.2d – Atlantic Reporter, Second Series.
N.H. – New Hampshire Reports.
N.H. Evid. R. – New Hampshire Evidence Rule.
R.S.A. – New Hampshire Revised Statutes Annotated 1997.

ACCIDENT AND HEALTH INSURANCE

See “DISABILITY.”

ACCIDENTAL MEANS

Terms “accidental” death and death by “accidental means” as employed in life policies have different meanings. Accident alone refers to either cause or result, but use of word “means” in conjunction with accidental limits its meaning to “cause.” *McGinley v. Hancock Mut.*, 88 N.H. 108, 184 A. 593 (1936). Death caused by embolism induced by accidental wound, held due to accident. *Ricard v. Prudential*, 87 N.H. 31, 173 A. 375 (1934). Death caused by acute alcoholism after knowingly consuming alcoholic beverage held accidental but not caused by accidental means. *McGinley v. Hancock Mut.*, 88 N.H. 108, 184 A. 593 (1936). Death by drowning is effected by “accidental means” within meaning of life policy which provides double indemnity for death effected through accidental means. *Simoneau v. Prudential*, 89 N.H. 402, 200 A. 385 (1938).



Whether death of party from mutual fight was “accidental,” held unnecessary to decide, since even if “accidental,” death was not “caused directly, independently and exclusively of all other causes” within meaning of policy. *Newell v. Hancock Life Ins.*, 94 N.H. 26, 45 A.2d 579 (1946).

ADJUSTERS

No statutory or common law definition. See R.S.A. §402-B. Anyone satisfying licensing requirements under R.S.A. §402-B constitutes an insurance adjuster.

Licensing requirements. It is unlawful for any person, whether as agent or employee, to act directly or indirectly as an insurance claims adjuster in this state for any insurance company unless licensed as provided in this chapter. R.S.A. §402-B:1. The Commissioner of Insurance shall issue original claims adjuster’s licenses to those satisfying a written examination. R.S.A. §402-B:4. The Commissioner may suspend or revoke an insurance claims adjuster’s license or subject the adjuster to an administrative fine not to exceed \$2,500 for good cause shown. R.S.A. §402-B:12. Anyone acting as an insurance claims adjuster without being licensed shall be subject to penalty not to exceed \$2,500, R.S.A. §402-B:13, and be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person. R.S.A. §402-B:13 (I).

AGE

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

Age of majority is 18 years. R.S.A. §21-B:1. Age of consent is 18 years. R.S.A. §457:5. Males are marriageable at 14 years, females at 13 years. R.S.A. §457:4.

AGENTS AND BROKERS

Definition; Agent. “[I]nsurance producer license to act as an agent shall be issued to any eligible person or business entity pursuant to the provisions of R.S.A. §402-J.” R.S.A. §405:15; see also R.S.A. §408:5, 7.

Fraud. Company not bound by fraudulent act of agent who knowingly inserts false statements in application when such false statements are unknown to company. *Fisher v. Prudential*, 107 N.H. 101, 218 A.2d 62 (1966); *Boucouvalas v. Hancock Mut.*, 90 N.H. 175, 5 A.2d 721 (1939). Where omission or error immaterial, company is not bound but misstatement is harmless or ineffective. R.S.A. §415:9; see also *Ford v. United Life & Accid. Ins. Co.*, 107 N.H. 114, 218 A.2d 67 (1966).

Applicant may rely on agent’s assurances that certain medical history need not be mentioned in application. *Taylor v. Metropolitan Life*, 106 N.H. 455, 214 A.2d 109 (1965).

Knowledge of Agents. Company is charged with its agent’s knowledge of facts relating to property insured (fire insurance) as if stated in application. R.S.A. §407:10. “Companies [foreign] issuing policies through their agents on applications from brokers shall be charged with the broker’s knowledge of facts to the same extent as if he were their agent.” R.S.A. §405:43. Generally company is charged with its agent’s knowledge in regard to such matters as come within scope of agent’s employment. *Great American Indem. v. Richard*, 90 N.H. 148, 5 A.2d 674 (1939). Company is bound by agent’s knowledge of facts not contained in application despite provision in contract to contrary. *Taylor v. Metropolitan Life*, 106 N.H. 455, 214 A.2d 109 (1965).

Company is bound by representations, omissions, and warranties of its agent. *Olszak v. Peerless Ins.*, 119 N.H. 686, 406 A.2d 711 (1979). Agent’s knowledge of insured’s expectations are imputable to company. *Id.*

License and Regulation. Must pass written examination to become agent or broker, R.S.A. §402-J:6, (exception for individuals licensed in other state, see R.S.A. §402-J:9) and must be licensed. Insurance producer shall not act as agent of insurer unless appointed by that insurer. No company shall issue insurance through unlicensed person. R.S.A. §402-J:14. Foreign insurance company cannot write insurance except through licensed resident agent. R.S.A. §405:17-b. Agent of foreign company must render monthly account of all business done to commissioner. R.S.A. §405:25. Life insurance agent subject to fine not more than \$500. R.S.A. §408:8. All others and those acting without license up to \$2,500, R.S.A. §405:31, or have license suspended or revoked or shall be both fined and have any license suspended or revoked. R.S.A. §402-J:12. In controversy between insured, beneficiary, and company, any person soliciting life insurance shall be agent of company and not agent of insured. R.S.A. §408:7. Statute merely creates agency, but leaves its scope and extent to be determined by common law. *Boucouvalas v. Hancock Mut.*, 90 N.H. 175, 5 A.2d 721 (1939).

Both domestic and foreign insurance companies must obtain license from insurance commissioner before doing business. R.S.A. §402:10, 405:1. Foreign insurance companies must sign written stipulation agreeing that service upon commissioner shall have same effect as personal service. R.S.A. §405:10. Companies not licensed to do business, but which have been approved by Insurance Commissioner, possess and maintain surplus to policy holders of at least \$500,000 and have not been



in impaired condition within preceding 24 months, may have agents who must be licensed and who must make returns showing business done. No business shall be placed with unadmitted company until agent has first satisfied insurance commissioner that he cannot place insurance with admitted company. R.S.A. §405:24-31.

ARBITRATION

The arbitration of disputes is governed by R.S.A. §542, Super. Ct. R. 170. Pursuant to R.S.A. §542:3-a, civil proceedings may be resolved pursuant to arbitration by filing a stipulation with the trial court prior to trial in any case pending in Superior Court, agreeing to submit the matter to arbitration. An arbitration panel's decision is subject to modification on extremely limited grounds. To modify an arbitration award, the moving party must show plain mistake, fraud, and corruption or misconduct by the parties or by the arbitrators or on the ground that the arbitrators have exceeded their powers within one year after the award. R.S.A. §542:8.

Absent agreement of the parties, New Hampshire's pre-judgment interest statute, R.S.A. §524:1-b, is inapplicable to arbitration matters. *Leach v. O'Neill*, 132 N.H. 665, 568 A.2d 1189 (1990). *But see Metropolitan v. Ralph*, 138 N.H. 378, 640 A.2d 763 (1994).

ATTORNEYS

Appointment and Authority. All attorneys admitted to practice must graduate from an ABA accredited law school, must take and pass the New Hampshire Bar Exam and establish their moral character and fitness for practice, be at least 18 years of age. R.S.A. §311:2; *See also* Sup. Ct. R. 42. Requirements for admission by motion listed in Sup. Ct. 42. Out of state counsel may appear in special cases pro hac vice by permission of the court. The authority of an attorney at law to appear will be presumed. *Beckley v. Newcomb*, 24 N.H. 359 (1852). Attorney is agent of a client provided his acts are within the scope of his authority and client is bound by acts of attorney, including acts of omission or neglect. *Paras v. City of Portsmouth*, 115 N.H. 63, 335 A.2d 304 (1975).

Conflict of Interest. Potential conflicts governed by New Hampshire Rules of Professional Conduct 1.7-1.9. Lawyers retained by an insurance company to represent insureds must be zealous advocates for the appointed clients, even though such representation would work to the detriment of the insurance company. If a conflict arises, then full disclosure should be made. If written consent can not be obtained the lawyer should withdraw. Ethic Opinion 1982 -3/2.

Legal Malpractice. See "MALPRACTICE."

Fees. May be recovered from other parties only by contract or in limited instances provided by statute. If insured prevails in declaratory judgment action involving insurance coverage dispute, insured shall receive court costs and reasonable attorney's fees from the insurer. R.S.A. §491:22-b.

AUTOMOBILES

See Law Digest Tables.

See "NEGLIGENCE."

Age. Minimum age for automobile operation is 18 years, but minimum age is 16, if applicant has successfully completed approved driver education course. R.S.A. §263:16, 19. Youth Operator's license given to 16 year or older and under 21 years. The holder of a youth operator's license shall not operate a vehicle between the hours of 1:00 a.m. and 5:00 a.m., nor when the number of occupants exceeds the number of safety restraints in the vehicle. During the first 6 months after issuance of the license, the holder of a youth operator's license shall not operate a motor vehicle with more than one passenger less than 25 years of age who is not a member of the holder's family unless accompanied by a licensed responsible adult who is at least 25 years of age. R.S.A. §263:14

Operator under statutory age not barred from recovery for injuries sustained as result of another's negligence where failure to have license not contributing cause of accident. *Vassillion v. Sullivan*, 94 N.H. 97, 47 A.2d 115 (1946).

Agency. Owner not liable for negligence of operator unless relationship of principal and agent or master and servant exists.

Comparative negligence adopted by statute in 1969. R.S.A. §507:7-a; *repealed effective* July 1, 1986. Replaced by Comparative Fault Statute: R.S.A. §507:7-d. Plaintiff is not barred from recovery unless he is more than 50 percent negligent. Plaintiff's conduct is to be compared against conduct of all defendants found liable. *Hurley v. P.S.C. of N.H.*, 123 N.H. 750, 465 A.2d 1217 (1983). Failure to wear seatbelt does not, by itself, create unreasonable risk of injury for purposes of negligence. *Thibeault v. Campbell*, 136 N.H. 698, 622 A.2d 212 (1993).

Family Purpose Doctrine. Not followed. *Pickard v. Morris*, 91 N.H. 65, 13 A.2d 609 (1940); *Grimes v. Labreck*, 108 N.H. 26, 226 A.2d 787 (1967).

Guest Cases. Guest may maintain action for ordinary negligence against owner and/or operator of automobile whether or not related by blood or marriage.

Gross negligence need not be shown. *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966).

Service of Process Upon Non-resident Motorists. Non-residents who personally, or by their agents or servants, operate motor vehicles within state thereby agree to appointment of motor vehicles commissioner to be their attorney for receipt of process in actions arising out of accidents within state. R.S.A. §260:67, 68.

Definition. Snowmobile is "automobile" not covered by insurance policy which excluded coverage of automobile not subject to motor vehicle registration and designed for use principally off public roads. *Vaillancourt v. Concord Gen. Mut.*, 117 N.H. 48; 369 A.2d 208 (1977).

Uninsured Motorist. Policy provision which provided that no UM coverage available when liability excluded was valid and enforceable. *Wegner v. Prudential Prop. & Cas. Ins. Co.*, 148 N.H. 107, 803 A.2d 598 (2002).

AVIATION

Uniform Act. New Hampshire repealed the Uniform Aircraft Financial Responsibility Act. R.S.A. §422-A *et seq.*, repealed 2003, effective July 29, 2003. The New Hampshire Aeronautics Act, R.S.A. §422 *et seq.*, repealed and reenacted effective July 1, 2002, vests Commissioner of Transportation with authority to supervise state funded airports, assisting state and Federal officials in investigating all aircraft accidents within state, enforce aeronautics statutes and rules, and adopt uniform rules consistent with federal regulations. R.S.A. §422:7. The Department of Transportation controls approval of airport sites, R.S.A. §422:16; governs issuance of airport registrations, R.S.A. §422:17; and governs issuance, suspension and revocation of aircraft registration certificates. R.S.A. §422:21-25. The Act defines unlawful aeronautic practices, R.S.A. §422:28, 28-a and establishes penalties. R.S.A. §422:29.

Action for Wrongful Death. Liability arising from operation of aircraft is to be determined by ordinary rules of negligence and due care. *Hoebbe v. Howe*, 98 N.H. 168, 97 A.2d 223 (1953). "No person owning a civil aircraft...shall be liable other than by application of the doctrine of respondeat superior." R.S.A. §422:13; *see also* R.S.A. §422:3 (XXIII).

Limits to Liability. Owner, lessee or occupant of private non-commercial air navigation facility owes no duty to keep premises safe for public use or to give any warnings to willful users of the premises of hazardous conditions. R.S.A. §422:12; *Kearsarge Soaring v. Kearsarge Valley Golf Club*, 123 N.H. 263, 459 A.2d 290 (1983); no actions against state or municipality in or

about the construction, maintenance, operation, superintendence or management of air navigation facility. R.S.A. §422:11.

BROKERS

See "AGENTS AND BROKERS."

BURGLARY INSURANCE

No cases on coverage.

CANCELLATION

In Accident and Health insurance, insurer must reduce premiums and return excess pro rata unearned premiums when insured changes to less hazardous occupation. R.S.A. §415:6 (II) (1). Insurer may cancel at any time, to become effective 30 days thereafter, by written notice, if there is provision for cancellation in policy. R.S.A. §415:6 (II) (8). Policy of fire insurance may be canceled at any time by company by giving to insured five days' written notice of cancellation. R.S.A. §407:22. *See also* R.S.A. §417-C: 1, 2. Authority of agent to cancel fire policy on behalf of insured pursuant to insured permission. *Lavoie v. North British & Mercantile Ins.*, 85 N.H. 550, 161 A. 376 (1932). Cancellation of auto liability insurance after 60 days from policy inception limited to non-payment of premium specific request by insured, or failure to sign residency form. R.S.A. §417-A:4. Mailing of notice of cancellation of auto liability policy to insured at address on policy, as policy language required, is sufficient to cancel policy even if no actual receipt by named insured. *Gerard v. Mass. Bonding Ins.*, 106 N.H. 1, 203 A.2d 279 (1964). Cancellation agreement upheld. *Storms v. USF&G*, 118 N.H. 427, 388 A.2d 578 (1978).

CHATTEL MORTGAGE

See "FIRE INSURANCE."

CONSTRUCTION

By statute, burden on issue of coverage is on insurance company. R.S.A. §491:22-a. Intent of parties is guiding principle of interpretation. *Trombly v. Blue Cross/Blue Shield*, 120 N.H. 764, 423 A.2d 980 (1980). Policy of insurance should be interpreted as whole, which means that various parts of contract should be read together. *See id.* *See also Commercial Union v. Gollan*, 118 N.H. 744, 394 A.2d 839 (1978); *Pro Con Construction v. Acadia Ins. Co.*, 147 N.H. 470, 794 A.2d 108 (2002).

Insurance policy is ambiguous when parties reasonably differ as to policy's meaning. *Commercial Un-*

ion v. Town of Derry, 118 N.H. 469, 387 A.2d 1171 (1978), *overruled on other grounds*, *American Home Assur. Co. v. Fish*, 122 N.H. 711, 451 A.2d 358 (1982). Court will not create ambiguity simply to resolve that ambiguity against insurer. *Robbins Auto Parts v. Granite State Ins.*, 121 N.H. 760, 435 A.2d 507 (1981). Policies are interpreted from standpoint of insured, *Town of Epping v. St. Paul Ins.*, 122 N.H. 248, 444 A.2d 496 (1982), and all ambiguities are construed strictly in favor of insured. *Trombly v. Blue Cross/Blue Shield*, 120 N.H. 764, 423 A.2d 980 (1980).

Court will honor reasonable expectations of policyholder. *Town of Epping v. St. Paul Ins.*, 122 N.H. 248, 444 A.2d 496 (1982). Yet construction and existence of ambiguity within insurance policy is for court to decide pursuant to objective standard. *Connolly v. Galvin*, 120 N.H. 219, 412 A.2d 428 (1980).

CONTRIBUTION

Contribution among joint tort-feasors is now allowed. R.S.A. §507:7-f. See "FIRE INSURANCE." Effective date defined in *Jaswell Drill v. Gen. Motors*, 129 N.H. 341, 529 A.2d 875 (1987).

DAMAGES

No punitive damages are allowable at common law. R.S.A. §507:16. Compensatory damages may reflect aggravating circumstances when act is wanton, malicious or oppressive. *Morris v. Ciborowski*, 113 N.H. 563, 311 A.2d 296 (1973); *Vratsenes v. New Hampshire Auto*, 112 N.H. 71, 289 A.2d 66 (1972). Act of operating motor vehicle while under influence is not malice. *Johnsen v. Fernald*, 120 N.H. 440, 416 A.2d 1367 (1980).

Insured can stack coverages of uninsured motorist policies that are applicable to him to extent of his total damages, notwithstanding existence of "Other Insurance" clauses. *Courtemanche v. Lumbermen's Mut. Cas.*, 118 N.H. 168, 385 A.2d 105 (1978).

Insurer may preclude stacking of medical payments coverage by including "clear and unambiguous policy language" to that effect. *Descoteaux v. Liberty Mut. Ins.*, 125 N.H. 38, 42, 480 A.2d 14, 17 (1984). Insurer may preclude intra- and inter-policy stacking by including "clear and unambiguous policy language." *Cacavas v. Maine Bonding*, 128 N.H. 204, 207, 512 A.2d 423, 425 (1986); *State Farm Mut. Auto. Ins. v. Desfosses*, 130 N.H. 260, 536 A.2d 205 (1987).

In wrongful conception action, damages are limited to hospital and medical expenses of pregnancy, cost of sterilization, pain and suffering connected with pregnancy, and loss of mother's wages during pregnancy. *Kingsbury v. Smith*, 122 N.H. 237, 442 A.2d 1003

(1982). In wrongful birth action, a parent's damages include all extraordinary costs in raising impaired child. *Smith v. Cote*, 128 N.H. 231, 513 A.2d 341 (1986).

Parents may recover for loss of society of minor child killed as result of negligent or intentional conduct, R.S.A. §556:12, and for loss of services. New Hampshire does not recognize wrongful life action. *Smith v. Cote*, 128 N.H. 231, 513 A.2d 341 (1986).

DEATH

See Law Digest Tables.

Presumption of unexplained absence for 7 years raises presumption of death. *Voliotes v. Ventoura*, 86 N.H. 52, 162 A. 921 (1932). By statute, after unexplained absence for 6 months, administration may be granted. Distribution may be made 4 years after granting administration. R.S.A. §553:18, 553:19.

DISABILITY

Inability to carry on regular trade or profession will constitute total disability, although insured can do other work. Insured need not show complete physical or mental incapacity to satisfy total disability provision. *Canney v. Massachusetts Bonding*, 88 N.H. 325, 189 A. 168 (1937). To be permanently disabled, insured need not show condition of utter hopelessness. *Langelier v. Metropolitan Life*, 91 N.H. 529, 17 A.2d 92 (1940).

FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables.

What constitutes Motor Vehicle Liability Policy under New Hampshire Financial Responsibility Law is defined in R.S.A. §259:61.

FIRE INSURANCE

Assignment. "If a policy has been transferred or assigned by the insured to a person to hold absolutely or as collateral security, with the assent of the insurer, the assignee may bring an action thereon in his own name or in that of the assignor, and may recover the full amount due upon the policy for the benefit of whom it may concern." R.S.A. §407:20. Standard Fire Insurance Policy has been incorporated into statute. R.S.A. §407:22. Standard Fire Policy provides that assignment of policy shall not be valid except with written consent of insurer.

Cancellation. See "CANCELLATION."

Contribution. Standard Fire Insurance Policy provides that insurer shall not be liable for greater proportion of any loss than amount named in policy shall bear

to whole insurance covering property against peril involved, whether collectible or not. R.S.A. §407:22.

Exculpatory Provision in Lease. Provision in lease relieving lessor from liability for loss by fire, held not to include loss by fire caused by affirmative acts of negligence in which landlord acquiesced. *Nashua Gunned & Coated Paper Co. v. Noyes Buick Co.*, 93 N.H. 348, 41 A.2d 920 (1945).

Limitation of Action. Unless the insurer shall notify the insured that any action will be forever barred by law if writ is not served on the insurance company within 12 months next after such notification, the insured may bring action at any time. R.S.A. §407:15; *Maguire v. Merrimack Mut. Fire Ins.*, 125 N.H. 269, 480 A.2d 112 (1984).

Mortgage Clause. Where insurer is obligated by contract to pay mortgagee despite violation of "other insurance" clause by mortgagor, it will be subrogated to rights of mortgagee and may collect amount due from proceeds of other valid insurance in effect at time of loss. *Papandrou v. Caledonian Ins.*, 91 N.H. 84, 13 A.2d 735 (1940).

Proof of Loss. Standard Fire Insurance Policy requires immediate written notice and sworn proof of loss within sixty days. Proof of loss shall contain time and origin of loss, interest of insured and of all others in property, actual cash value of each item thereof and amount of loss thereto, all encumbrances and other insurance. R.S.A. §407:22.

Reformation. Where insured, who owned premises jointly with wife, mistakenly obtained policy in his sole name, he is not entitled to reformation to include name of joint owner. *Currier v. North British*, 98 N.H. 366, 101 A.2d 266 (1953). Where, because of unilateral mistake, principal of restaurant owner rather than owner was named as mortgagee in fire policy. Fact that principal spoke English poorly did not, by itself, warrant reformation of policy. *Hellas Family Restaurants v. G&P Family Restaurants*, 120 N.H. 818, 423 A.2d 613 (1980).

Repairs and Replacement. Company has option of rebuilding or repairing within 20 days of adjusting loss instead of paying money. R.S.A. §407:13.

Standard Policy Provisions. Standard provisions contained in fire policy form provided by R.S.A. §407:22. This fire policy is similar to those used in majority of states.

GUEST CASES

See "AUTOMOBILES."

HOSPITALS

Evidence-Records. Hospital records are admissible under the business records exception to the hearsay rule. *Aubert v. Aubert*, 129 N.H. 422, 529 A.2d 909 (1987). Former New Hampshire statute providing for admissibility of business records broadly construed to include hospital and medical records, R.S.A. §521:2, *repealed* 1986, current business records rule does not change prior law. Official Comment to N.H. Evid. R. 803 (6).

Liens. Every hospital licensed in New Hampshire is entitled to lien for reasonable value of medical or other services provided to patient injured in accident not covered by workers' compensation, against recovery by patient, responsible person, heirs, or personal representatives, whether by judgment, settlement or compromise. R.S.A. §448-A:1. Notice of lien must be filed with clerk of town or city in which provider is located not later than ten days after patient's discharge from care and prior to payment to patient or his legal representative. Notice of lien and statement of date of lien filing must be mailed to tort-feasor and to tort-feasor's insurance carrier. R.S.A. §448-A:2. Lien enforceable against tort-feasor or tort-feasor's insurance carrier for one year after date of payment to patient. R.S.A. §448-A:3.

Immunity. Hospital has no immunity from liability for negligence. *Dowd v. Portsmouth Hosp.*, 105 N.H. 53, 193 A.2d 788 (1963).

See "WARRANTIES."

HUSBAND AND WIFE

See Law Digest Tables.

Community Property. New Hampshire is not a community property state.

Interspousal Immunity. Doctrine of interspousal immunity is not recognized in New Hampshire. *Lundberg v. Hagen*, 114 N.H. 110, 316 A.2d 177 (1974).

Loss of Consortium. Either spouse may recover damages for loss or impairment of right of consortium in negligence or intentional tort. Where fault on the part of claimant or claimant's spouse causes or contributes to injury from which loss of consortium claim arises, damages are reduced by proportion of fault by claimant or spouse. R.S.A. §507:8-a.

INFANTS

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

Action maintainable by unborn child from time capable of independent life apart from mother. *Poliquin v. MacDonald*, 101 N.H. 104, 135 A.2d 249 (1957). If in-



fant is born alive, action is maintainable even though infant at time of accident was not capable of independent life apart from mother. *Bennett v. Hymers*, 101 N.H. 483, 147 A.2d 108 (1958). Infant born alive may maintain negligence action against mother for injuries infant received in utero. *Bonte v. Bonte*, 136 N.H. 286, 616 A.2d 464 (1992). Action on behalf of or by unemancipated minor may be maintained against estate of deceased parent for injury inflicted as result of negligent operations of motor vehicle. *Briere v. Briere*, 107 N.H. 432, 224 A.2d 588 (1966); *Dean v. Smith*, 106 N.H. 314, 211 A.2d 410 (1965). Parent's negligence does not reduce recovery by deceased minor's estate. *In re Estate of Infant Fontaine*, 128 N.H. 695, 519 A.2d 227 (1986).

In wrongful conception action, damages are limited to hospital and medical expenses of pregnancy, cost of sterilization, pain and suffering connected with pregnancy, and loss of mother's wages during pregnancy. *Kingsbury v. Smith*, 122 N.H. 237, 442 A.2d 1003 (1982). In wrongful birth action, a parent's damages include all extraordinary costs in raising impaired child. *Smith v. Cote*, 128 N.H. 231, 513 A.2d 341 (1986).

Parents may recover for loss of society of minor child killed as result of negligent or intentional conduct, but recovery is capped at \$50,000.00. R.S.A. §556:12. New Hampshire does not recognize wrongful life action. *Smith v. Cote*, 128 N.H. 231, 513 A.2d 341 (1986).

LIABILITY INSURANCE

Compromise of claims. Where insurer is given option of settling or defending (as provided in standard policy) it will only be liable for verdict in excess of policy limit if it negligently or fraudulently failed to settle within policy limits. *Gelinas v. Metropolitan*, 131 N.H. 154, 551 A.2d 962 (1988); *Dumas v. Hartford Acc. & Indem. Co.*, 94 N.H. 484, 56 A.2d 57 (1947); *Douglas v. USF&G*, 81 N.H. 371, 127 A. 708 (1924). Application of extent of excess liability determined by insurer and insured's capacity for loss in circumstances. *Dumas v. State Farm Mut. Auto. Ins. Co.*, 111 N.H. 43, 274 A.2d 781 (1971). Where insurer has negligently failed to settle within policy limits, insured may assign his cause of action to party who obtained excess verdict. *Dumas v. State Farm*, 111 N.H. 43, 274 A.2d 781 (1971).

Cooperation of Insured. Standard policy provides insured must cooperate. Breach must be material, but actual harm need not be proven. Insured's deliberate absence from trial violates cooperation clause justifying repudiation of liability by insurer. *Glens Falls Indem. Co. v. Keliher*, 88 N.H. 253, 187 A. 473 (1936). Failure of insured to give notice of accident to insurer will not relieve insurer of liability to pay up to statutory minimum for damages to third person. *Milwaukee Ins. Co. v.*

Morrill, 100 N.H. 239, 123 A.2d 163 (1956) (decided under prior law); R.S.A. §264:18.

Every automobile liability policy issued in this State must include coverage "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or drivers of uninsured motor vehicles." R.S.A. §264:15; *Matarese v. N.H. Mun. Assoc. Ins. Trust*, 147 N.H. 396, 791 A.2d 175 (2002). Policy must be approved by commissioner before use and must contain limits of \$25,000/\$50,000 coverage for personal injury, R.S.A. §259:61, and \$25,000 for property damage, R.S.A. §259:61, and \$1,000 per person for medical costs incurred within one year from date of injury. R.S.A. §264:16. Approved form covers named insured, residents of named insured's household and anyone using vehicle with permission of named insured. *Travelers v. Kipp*, 105 N.H. 200, 196 A.2d 48 (1963). In case of death, policy covers named insured's spouse and legal representatives. *Ass'n Canado-Americaine v. Marquis*, 90 N.H. 125, 5 A.2d 37 (1939). Policy may be canceled by named insured by written notice stating effective date of cancellation. R.S.A. §415:6(I)(14) Company must give at least 10 days' written notice. R.S.A. §417-B:4 Company is bound to pay expense of investigation and defense; company has option to settle or defend. *A.B.C. Builders v. American Mut. Ins. Co.*, 139 N.H. 745, 661 A.2d 1187 (1995). Policy does not cover while car is used as public or livery conveyance. R.S.A. §259:80, 264:16. Conditions - insured agrees to reimburse company for any payment made by company which it would not have been obligated to make except for financial responsibility law of any state. *Milwaukee Ins. Co. v. Morrill*, 100 N.H. 239, 123 A.2d 163 (1956). No action against company until insured's obligation has been finally determined. *Merchants Mut. Ins. Co. v. Transformer Serv.*, 112 N.H. 360, 298 A.2d 112 (1972). If there is other insurance, company is to be liable only pro rata. *Liberty Mut. Ins. Co. v. Home Ins. Indem. Co.*, 117 N.H. 269, 371 A.2d 1171 (1977) (interpreting R.S.A. §491:22-b). Company is subrogated upon payment. R.S.A. §264:15(IV).

Carrier responsible for verdict plus pre-judgment interest up to policy limits, and for post-judgment interest on entire judgment regardless of policy limits. *Laplant v. Aetna Cas.*, 107 N.H. 183, 219 A.2d 283 (1966).

Required provisions R.S.A. §264:18 as follows: Sub-sec. I. Liability of any company under motor vehicle liability policy shall become absolute whenever loss or damage covered by said policy occurs, and satisfaction by insured of final judgment for such loss or damage shall not be condition precedent to right or duty of company to make payment. No agreement between the company and the insured after loss shall defeat com-



pany's liability. Judgment creditor of insured debtor is entitled to have insurance money applied to satisfaction of judgment.

II. Policy, application, rider and endorsement which do not conflict with act to constitute entire contract.

III. No statement made by insured or on his behalf, and no violation of terms of policy, shall operate to defeat or avoid policy so as to bar recovery within statutory limits.

IV. Policy to cover for unexpired term in case of death, insolvency or bankruptcy of insured.

V. Damages not to be assessed except by special order of court in tort action, where payment of judgment secured by motor vehicle liability policy and where defendant has been defaulted for failure to enter appearance, until expiration of 30 days after plaintiff has given notice of such default to company issuing such policy or bond by mail postage prepaid and has held affidavit thereof, such notice to be given to company or agent who issued policy. Upon receipt of information and being satisfied that insured failed to comply with terms of policy in regard to his notice to company, commissioner may revoke license and registration for such period as he determines.

VI. Insurance applies to any person who obtains possession or control of motor vehicle of insured with his express or implied consent. Secondary permittee, who operates motor vehicle without express permission of insured owner but with permission of primary permittee, operates with insured owner's "implied consent," thereby requiring insurance coverage up to the limits of state's Financial Responsibility law for injuries caused by negligent operation of motor vehicle, despite policy terms excluding coverage. *Gov't Employees Ins. v. Johnson*, 118 N.H. 899, 396 A.2d 331 (1978).

VII. No liability insurer shall require that bodily injury claim be settled or adjudicated as condition precedent to settlement of property damage claim arising out of same accident. No evidence of settlement of property damage claim shall be admissible as evidence of liability in trial of any other cause of action arising out of same accident.

LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables. 3 years in absence of policy provision. 3 years on Accident & Health policies. R.S.A. §415:6 (I) (11).

Fire Insurance. Unless company shall notify insured that any action will be forever barred by law if his writ is not served on company within twelve months next after

such notification, he may bring his action at any time. R.S.A. §407:15; *Hebert Mfg. v. Northern Assurance*, 108 N.H. 381, 236 A.2d 701 (1967). Notice to insured must specifically use word "service." *Maguire v. Merrimack Mut. Fire Ins.*, 125 N.H. 269, 480 A.2d 112 (1984).

R.S.A. §507-D:2 (II) (a), requiring products liability action to be brought not later than twelve years after manufacturer of final product parted with its possession and control or sold it, whichever occurred last, and R.S.A. §507-D:2 (I), requiring products liability plaintiff to bring suit within three years from time injury is or should have been discovered, declared unconstitutional. *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 464 A.2d 288 (1983).

MALPRACTICE

Statutory Requirements. Physicians, Hospitals and Other Health Care Providers. Statute governing medical injury actions applies to any adverse, untoward, or undesired consequences arising out of or sustained in course of professional services rendered by medical care provider, including physician, physician's assistant, registered or licensed practical nurse, hospital, clinic or other health care agency licensed by state or otherwise lawfully providing medical care. R.S.A. §507-E:1 (II), (III). Statute of limitations is three years from time injury was discovered or should have been discovered, whichever is later. R.S.A. §508:4.

Expert testimony required to prove standard of care, breach of standard of care, and that injuries were proximately caused by breach of standard of care. R.S.A. §507-E:2 (I). Absence of expert testimony as to proximate cause is grounds for non-suit or dismissal. *Martin v. Wentworth-Douglass Hosp.*, 130 N.H. 134, 536 A.2d 174 (1987). Requirements are not satisfied by evidence of loss of opportunity for a better outcome. Does not bar claims based on negligent conduct by provider(s), caused the ultimate harm, regardless of the chances.

Absence of informed consent must be proved affirmatively by plaintiff, and plaintiff must prove by expert testimony that physician failed to provide information that reasonable physician would have provided to a person in plaintiff's position. R.S.A. §507-E:2 (II) (a). Statute lists factors for determining whether plaintiff has met burden of proof on informed consent. R.S.A. §507-E:2 (II) (b).

Standard of care is that of reasonable professional practice in the provider's profession or specialty, if any, at the time care was rendered. R.S.A. §507-E:2 (I) (a).

Wrongful Birth. Damages are recoverable in action for wrongful birth where doctor breaches duty to inform

of or test for possible birth defects and plaintiff can show that, but for physician's negligent failure to inform her of risks of bearing child with birth defects, she would have obtained an abortion. *Smith v. Cote*, 128 N.H. 231, 513 A.2d 341 (1986).

Wrongful Life. New Hampshire does not recognize wrongful life action. *Smith v. Cote*, 128 N.H. 231, 513 A.2d 341 (1986).

Hospital is "medical care provider" within meaning of medical injury actions statute. R.S.A. §507-E:1 (II). Hospitals enjoy no charitable immunity from negligence actions. *Dowd v. Portsmouth Hosp.*, 105 N.H. 53, 193 A.2d 788 (1963).

Damages. Statutory limitation of amount of damages for pain and suffering or other non-economic loss violates New Hampshire Constitution. *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980), but see *Cnty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 917 A.2d 707 (2007) (overruling the standard of intermediate scrutiny used in *Carson* to find the limitation unconstitutional).

Legal Malpractice. See "ATTORNEYS."

Other Professionals. Privity not required for plaintiff to recover from accountant in negligence, as long as third party plaintiff's reliance on accountant's representations was foreseeable by accountant. *Spherex v. Alexander Grant*, 122 N.H. 898, 451 A.2d 1308 (1982).

NEGLIGENCE

See Law Digest Tables.

See "AUTOMOBILES."

Age. Negligence and contributory negligence of infants discussed. *Grogan v. York*, 93 N.H. 184, 38 A.2d 295 (1944).

Attractive Nuisance. To children, doctrine discussed. *Ouellette v. Blanchard*, 116 N.H. 552, 364 A.2d 631 (1976); *Labore v. Davison Constr. Co.*, 101 N.H. 123, 135 A.2d 591 (1957).

Land Owners. Distinction between invitee, licensee, and trespasser abolished in favor of standard of reasonable care under all circumstances in maintenance and operation of property. *Ouellette v. Blanchard*, 116 N.H. 552, 364 A.2d 631 (1976).

Doctrine of comparative negligence adopted as of Aug. 12, 1969. R.S.A. §507:7-a, repealed effective July 1, 1986. Replaced by R.S.A. §507:7-d, Comparative Fault, effective July 1, 1986.

Doctrine of contribution among joint tort-feasors effective as of July 1, 1986. R.S.A. §507:7-f. Effective

date defined in *Jaswell Drill v. Gen. Motors*, 129 N.H. 341, 529 A.2d 875 (1987).

Definition and Discussion of Negligence. *Sweeney v. Boston & Maine R.R.*, 87 N.H. 90, 174 A. 676 (1934).

Imputed Negligence. If wife owns and is riding in car, she having full power to control his actions, and no relationship of bailor and bailee, negligence of husband, driver, is imputed to wife. *Freeman v. Scahill*, 92 N.H. 471, 32 A.2d 817 (1943). But see *Baker v. Lord*, 119 N.H. 868, 409 A.2d 789 (1979). Negligence of claimant spouse can be imputed in consortium actions, reducing any verdict proportionally. R.S.A. §507:8-a.

Liquor Liability. One who is injured as a result of a social host's service of alcohol may maintain an action against that social host so long as the plaintiff can allege that the service was reckless. *Hickingbotham v. Burke*, 140 N.H. 28, 662 A.2d 297 (1995).

Last Clear Chance. Doctrine discussed. *Page v. Gard*, 109 N.H. 494, 256 A.2d 503 (1969).

Proximate Cause. Test of defendant's liability is not found by ascertaining first cause or occasion leading up to injury, but by determining whether injury was natural and foreseeable result of defendant's fault in failing to exercise due care. *Maxfield v. Maxfield*, 102 N.H. 101, 151 A.2d 226 (1959). Conduct is proximate cause if it is substantial factor in bringing about harm. See *id.*

Negligent Infliction of Emotional Distress. An individual who has a close relationship with an injured party may recover even if plaintiff is not a blood relative or spouse of injured party. *Graves v. Estabrook*, 149 N.H. 202, 818 A.2d 1255 (2003).

NO-FAULT INSURANCE

New Hampshire is not a "No-Fault" state.

PENALTY AND ATTORNEYS' FEES

Penalty for violation of insurance law is generally fine of \$2,500 and revocation of license. Administrative fine up to \$2,500 in lieu of suspension or revocation for violation of statute or rule, regulation or order of Insurance Commissioner. R.S.A. §402-B:12. See also R.S.A. §402:42, 48, 50. Unfair insurance trade practices include, but are not limited to the following types of activities or practices: rebating, political contribution, misrepresentation, false advertising, defamation, boycott, unfair claim settlement, coercion in requiring insurance, underestimating the value of a claim, and discrimination. R.S.A. §417:4.

If insured prevails in declaratory judgment suit which seeks to determine coverage of insurance policy

pursuant to R.S.A. §491:22, he shall receive court costs and reasonable attorneys' fees from insurer. R.S.A. §491:22-b.

Bad faith denial of payment may result in award of attorneys fees. *Harkeem v. Adams*, 117 N.H. 687, 377 A.2d 617 (1977). Insured is entitled to attorney's fees if insurer acts in bad faith in promoting unnecessary litigation. R.S.A. §507:15. See also *Johnson v. Phenix Mut. Fire Ins.*, 122 N.H. 389, 445 A.2d 1097 (1982). Under bad faith standard, insurer is not allowed to delay payment to coerce insured into accepting less than true value of his compensable losses. *Drop Anchor Realty Trust v. Hartford Fire Ins.*, 126 N.H. 674, 496 A.2d 339 (1985).

PRIVILEGED COMMUNICATIONS

Attorney/Client. The attorney/client evidentiary privilege is governed by N.H. Evid. R. 502. Confidential communications between client and attorney are privileged and protected from inquiry. *Riddle Spring Realty v. State*, 107 N.H. 271, 220 A.2d 751 (1966). Privilege is not absolute where there is a compelling need for the information and no alternative source is available. *McGranahan v. Dahar*, 119 N.H. 758, 408 A.2d 121 (1979). Privilege does not extend to communications between guardian ad litem and minor child because guardian ad litem is a party to proceedings. *Ross v. Gadwah*, 131 N.H. 391, 554 A.2d 1284 (1988). Attorney/client privilege can be waived only by client or his legal representatives. *Riddle Spring Realty v. State*, 107 N.H. 271, 220 A.2d 751 (1966).

Clergy/Penitent. A priest, rabbi, ordained or licensed minister of any church or duly accredited Christian Science practitioner not required to disclose confession or confidence made in professional character as spiritual advisor unless confessor waives privilege. N.H. Evid. R. 505. Privilege is waived by presence of third person. *State v. Melvin*, 132 N.H. 308, 564 A.2d 458 (1989).

Physician/Patient. Scope of patient's privilege is same as that between attorney and client. N.H. Evid. R. 503 (a). Privilege partially waived by commencement of medical malpractice action, but defendant still must go through discovery to interview plaintiff's treating physician. *Nelson v. Lewis*, 130 N.H. 106, 534 A.2d 720 (1987). Same privilege extends to confidential relations and communications between certified psychologist or pastoral counselor and client. N.H. Evid. R. 503 (b).

Spousal Privilege. Husband and wife are competent witnesses for or against each other in all cases, but unless otherwise specifically provided, neither can testify against the other as to any statement, conversation,

letter or other communication made to the other or to another person, nor testify at all if testimony would lead to violation of marital confidence. Marital confidence includes thing confided by one to the other, simply and specially as husband or wife, and not what would be communicated to any other person under the same circumstances. *Clements v. Marston*, 52 N.H. 31 (1872).

No privilege except that of attorney and client will relieve any person of absolute duty to report a suspected case of child abuse or neglect. R.S.A. §169-C:29, 32.

PRODUCTS LIABILITY

If sale is made of defective product unreasonably dangerous to intended user or consumer, strict liability is imposed. However, this does not make manufacturer or seller an insurer nor does it impose absolute liability. *Buttrick v. Arthur Lessard & Sons Inc.*, 110 N.H. 36, 260 A.2d 111 (1969). Since employer and lessor are not sellers or suppliers of product, neither strict liability in tort, nor liability under implied warranty theory, can be imposed. *DePaolo v. Spaulding Fibre*, 119 N.H. 89, 397 A.2d 1048 (1979); *Brescia v. Great Road Realty Trust*, 117 N.H. 154, 373 A.2d 1310 (1977). Strict liability does not apply to supplier of service, such as amusement park ride. *Siciliano v. Capital City Shows*, 124 N.H. 719, 475 A.2d 19 (1984); *Bolduc v. Herbert Schneider Corp.*, 117 N.H. 566, 374 A.2d 1187 (1977).

Proof. In strict liability action alleging defective design, plaintiff must prove: first, existence of defective condition unreasonably dangerous to user; second, that unreasonably dangerous condition existed when product was purchased and caused injury; and third, that purpose and manner of use of product was foreseeable by manufacturer. Courts should consider product's social utility, whether risk of danger could be reduced without significant impact on product's effectiveness, and whether warning was present. *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978).

Defenses. "Plaintiff's misconduct" is defense to strict liability in tort and to warranty liability. *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978). Cf. *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676 (D.N.H. 1972). New Hampshire manufacturer is entitled to indemnification from party who alleges injury caused by manufacturer's product, if injury would not have occurred if safety devices applied with product had not been rendered inoperative by purchaser, or if product had been installed and maintained in accordance with manufacturer's recommended instructions. R.S.A. §359-F:2.

Affirmative defense that risk not discoverable using prevailing research as measured by "state of art" at time



of distribution or sale is permitted. *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 464 A.2d 288 (1983). See also R.S.A. §507:8-g. Manufacturer's compliance with a legislative enactment or administrative regulation does not prevent a finding of negligence if a reasonable man would take additional precautions. *Tebbetts v. Ford Motor Co.*, 140 N.H. 203, 665 A.2d 345 (1995).

Defendant only liable for harm that would ensue from product in its unaltered condition and shall not be held liable for harm arising in any part from alteration of product by another. *Buttrick v. Lessard & Sons Inc.*, 110 N.H. 36, 260 A.2d 111 (1969). Limitation. See "LIMITATION OF TIME FOR COMMENCEMENT OF ACTION."

Theory of successor liability rejected. *Simoneau v. South Bend Lathe, Inc.*, 130 N.H. 466, 543 A.2d 407 (1988).

RELEASE

See Law Digest Tables.

Release given by insured will not affect insurer's right to subrogation where claimant has knowledge of such insurance. R.S.A. §264:15(IV).

When release or covenant not to sue is given in good faith to one of two or more persons liable in tort for same injury, it does not discharge any of other tortfeasors liable upon the same claim unless its terms expressly so provide; but it reduces claim against others in amount of consideration paid for it. R.S.A. §507:7-h. Release of one joint tort-feasor is presumed not to be release of all pursuant to R.S.A. §507:7-h. *Waters v. Hedberg*, 126 N.H. 546, 496 A.2d 333 (1985) (citing R.S.A. §507:7-b, repealed 1986, current version at R.S.A. §507:7-h (1986)).

Release may be rescinded if insurer's adjuster acted in bad faith in obtaining it or if there was deception. *Dawe v. American Universal Ins.*, 120 N.H. 447, 417 A.2d 2 (1980).

REPRESENTATIONS AND WARRANTIES

Whether statements in application are representations or warranties depends on agreement of parties. If insured expressly warrants fact to be true and it is false it will void contract. Otherwise statements will be held to be representations and will not void contract if false unless as matter of fact they were material. *Dwyer v. Mutual Life Ins.*, 72 N.H. 572, 58 A. 502 (1904).

For misstatement to be warranty it must so expressly appear on face of policy. Otherwise it will be held to be representation. If warranty is false, it will void policy. If misstatement is representation it will not void

policy unless it is material to risk. *Davidson v. Am. Cent. Ins. Co.*, 80 N.H. 552, 119 A.707 (1923).

Falsity in application for accident and health insurance shall not bar right to recovery unless made with actual intent to deceive, or unless it materially affected either acceptance of risk or hazard assumed by insurer. R.S.A. §415:9.

Standard fire policy states that it shall be void if, whether before or after loss, insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or subject thereof, or interest of insured therein, or in case of any fraud or false swearing by insured relating thereto. R.S.A. §407:22. Proof of intent to defraud is required but may lie in nature of false statement itself or false statements made to jury. *Hall v. Merrimack Mut. Fire Ins. Co.*, 91 N.H. 6, 13 A.2d 157 (1940).

SERVICE OF PROCESS

Upon Corporation. Service on domestic corporation may be made upon clerk, treasurer, cashier, or one of the directors, trustees, or managers within state, and otherwise upon any principal member or stockholder, agent, overseer or other person having care of any property or in charge of any business of the corporation. R.S.A. §510:14. Service on foreign corporation may be made on registered agent within the state. If there is no registered agent or registered agent cannot be served, or corporation has withdrawn from state or has had certificate of authority revoked, corporation may be served by registered or certified mail, return receipt requested, addressed to secretary of corporation at its principal office. R.S.A. §293-A:15.10.

On Insurance Commissioner. Foreign insurer must stipulate as prerequisite of doing business in state that process served on insurance commissioner is of same effect as personal service on company within state. Service effected by leaving a copy in commissioner's office and paying fee. R.S.A. §405:10.

On Non-Resident Motorist. Long-arm statute permits service on non-resident committing tort within state by leaving copy with Secretary of State and mailing notice and copy of process by registered mail, postage prepaid, to defendant at last known abode or place of business in state or country in which defendant resides. R.S.A. §510:4.

Personal Service. All process can be served on natural person by giving attested copy to defendant in hand or leaving at his abode, unless statute specifically provided otherwise. R.S.A. §510:2. Apart from in-hand service within state, service can be effected only as pro-

vided by statute. *Hutchins v. Del Rosso*, 116 N.H. 421, 365 A.2d 127 (1976).

SUBROGATION

Insurer by policy terms is subrogated against third party after payment of claim to insured. Payment in full to mortgagee of his claim against insured gives insurer mortgage debt and its security under Standard Fire Insurance Policy. R.S.A. §407:22.

See "RELEASE."

WAIVER AND ESTOPPEL

Generally waiver and estoppel will be applied strictly against insurance company. Insurance company will be estopped by knowledge whether its own or that of agent. Provision in policy may be waived orally. Generally very slight change of position is required to support waiver or estoppel. *A.W. Therrien Co. v. Maryland Cas. Co.*, 97 N.H. 180, 84 A.2d 179 (1951).

WORKERS' COMPENSATION

Statutory Reference. R.S.A. §281-A.

Original Jurisdiction. New Hampshire's Workers' Compensation Act is administered by the New Hampshire Department of Labor. R.S.A. §281-A:43 (I) (a) provides for hearings to be held, in the first instance, under the auspices of the Commissioner of Labor.

Appellate Jurisdiction. Appeals from decisions made by the Department of Labor following a hearing are lodged with the Compensation Appeals Board. See R.S.A. §281-A:43 (I) (b) and R.S.A. §281-A:42-a. Appeal hearings are conducted on a de novo basis. Appeals from decisions rendered by the Compensation Appeals Board may be taken to the New Hampshire Supreme Court. R.S.A. §281-A:43 (I) (c).

Benefits. Wages. In general, the average weekly wage is compensated on the basis of the average of compensation for the 26 full weeks immediately preceding the date of injury and the compensation rate is calculated at 60% of the average weekly wage for injuries occurring on or after February 8, 1994. For injuries occurring prior to February 8, 1994, the compensation rate is calculated at two-thirds of the average weekly wage. The average weekly wage may include earnings from concurrent employment. R.S.A. §281-A:15, 281-A:28-a.

Medical. The employer or insurance carrier is required to pay causally related, reasonable and necessary medical, surgical and hospital expenses, including chiropractic expenses. R.S.A. §281-A:23. Unless the employer is covered by a managed care program as set forth

in R.S.A. §281-A:23-a, the claimant has the right to select his or her own physician.

Disability. Disability benefits may be paid for total or partial disability. Disability is understood to be loss or impairment of earning capacity. Disability may be temporary or permanent. See R.S.A. §281-A:28, 28-a, 31, 31-a. Total disability benefits are not limited in duration. Partial disability benefits are limited to 262 weeks for injuries occurring on or after February 8, 1994, the 262 week period to include any periods of total disability. R.S.A. §281-A:31. Permanent partial impairment is compensable for the total or partial loss of physical function of certain scheduled body parts. R.S.A. §281-A:32. Party requesting change in level of benefits based upon "change of conditions" bears burden of proving the change of condition. *Appeal of Elliott*, 140 N.H. 607, 675 A.2d 204 (1996).

Death. Benefits payable at the total disability rate are available to dependents of an employee whose death arises out of and occurs in the course of employment. R.S.A. §281-A:26. Burial expenses not to exceed \$10,000 are compensable. R.S.A. §281-A:26 (IV) (Eff. Jan. 1, 2010).

Employment Defined. An "employee" is broadly presumed to be "any person, other than a direct seller or qualified real estate broker or agent or real estate appraiser, or person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, who performs services for pay for an employer..." R.S.A. §281-A:2 (VI)(b)(1). "Employer" is defined as "[a] person, partnership, association, corporation, or legal representative of [same] who employs one or more persons whether in one or more trades, businesses, professions, or occupations and whether in one or more locations." R.S.A. §281-A:2 (VIII)(a).

Dual Capacity. The dual capacity doctrine is recognized in New Hampshire, but rarely found. See *Ryan v. Hiller*, 138 N.H. 348, 639 A.2d 258 (1994).

Exclusive Remedy. New Hampshire's Workers' Compensation Act contains a conclusive presumption that employees have accepted the provisions of the Workers' Compensation Act and waived rights of action against the employer and workers' compensation insurer and against officers, directors, agents, servants or employees of the employer with the exception of intentional torts. R.S.A. §281-A:8 (I).

Arising out of and in the Course of. R.S.A. §281-A:2 (XI) defines "injury" as "accidental injury or death arising out of and in the course of employment..." "In the course of employment" requires that the claimant prove that the injury occurred within the time and space

boundaries created by the terms of employment and occurred in the performance of an activity related to employment. The claimant is also required to prove that the injury arose out of employment by demonstrating that the injury resulted from a risk created by employment. See generally *Cook v. Wickson*, 135 N.H. 150, 600 A.2d 918 (1991). An employee whose work includes travel away from the employer's premises is held to be continuously within the scope of employment except when a distinct departure on a personal errand can be shown. *Appeal of Griffin*, 140 N.H. 650, 671 A.2d 541 (1996).

Occupational Disease. Defined as "an injury arising out of and in the course of the employee's employment and due to causes and conditions characteristic of and peculiar to the particular trade, occupation or employment." R.S.A. §281-A:2 (XIII). Excluded from the definition of occupational disease are those diseases "which existed at commencement of the employment." In general, cumulative physical trauma, or repetitive motion disorders, are defined as injuries as opposed to occupational diseases.

Mental Injury. "[D]iseases or death resulting from stress without physical manifestation" are excluded from the definition of injury. R.S.A. §281-A:2 (XI). Nevertheless, mental disability resulting from a causally-related physical injury may be compensable. Physical injury and disability connected with emotional or mental stress may be compensable.

Pre-Existing Injury. When work-related activities are the medical and legal cause of the activation of dis-

abling symptoms, compensation will be due without regard to the cause of the underlying physical condition. *Appeal of Briand*, 138 N.H. 555, 664 A.2d 47 (1994).

Fellow Employee Rule. Co-employees are provided with immunity from suit for work-related injuries that are not the result of intentional torts. R.S.A. §281-A:8 (I) (b).

Liens. An employer or insurance carrier has lien rights to the extent of medical, disability and permanent impairment benefits paid on account of a work-related injury if the injured employee obtains recovery from a third party, including an uninsured motorist carrier. R.S.A. §281-A:13 (I) (b); see *Beaudoin v. Marchand*, 140 N.H. 269, 665 A.2d 745 (1995). The employer or insurance carrier is required to pay its pro rata share of attorney's fees and costs of action. An employer or workers' compensation insurer has subrogation rights against third parties. R.S.A. §281-A:13 (III) (b) (1). All settlements of third party actions involving lien or subrogation rights are subject to approval by the New Hampshire Department of Labor or the court in which the action is pending. R.S.A. §281-A:13 (III)-(IV).

Attorney's Fees. All attorney's fees in workers' compensation matters in New Hampshire are subject to approval by the Department of Labor. R.S.A. §281-A:44 (VI). In the event of an appeal to the Compensation Appeals Board or the Supreme Court, the employer or workers' compensation carrier is required to pay claimant's attorney's fees and costs if claimant prevails. R.S.A. §281-A:44 (I).