

DIGEST OF INSURANCE LAW

NEW JERSEY

Courtesy of
Hardin, Kundla, McKeon & Poletto, P.A.
Springfield, New Jersey

CIVIL JUDICIAL SYSTEM

State Constitution adopted November 4, 1947. Judicial Article (Art. VI) and fully effective September 15, 1948. Completely reorganized court system by vesting judicial power in Supreme Court, Superior Court, and inferior courts of limited jurisdiction. Effective December 7, 1978, jurisdiction and powers of county court transferred to Superior Court, Law Division. Supreme Court has rule-making power to govern administration of all courts of state, subject to substantive law, practice and procedure and has promulgated Rules of Court governing all State court practice. *Winberry v. Salisbury*, 5 N.J. 240, 74 A.2d 406, cert. denied, 340 U.S. 877 (1950).

By 1983 amendment, with exception of municipal courts and Tax Court, single unified and integrated Superior Court system, exercising statewide original trial jurisdiction over all causes, was created and two new parts added: Family Part and Special Civil Part. Special Civil Part is court of limited jurisdiction when amount in controversy does not exceed \$15,000, small claims actions (up to \$3,000), summary landlord/tenant actions, summary proceedings for the collection of statutory penalties.

Courts of Original Jurisdiction

Superior Court consists of two trial divisions, Law Division and Chancery Division, and has original jurisdiction throughout state in all causes, criminal and civil, including cases in law, equity, probate and matrimony. Relief is obtained by instituting suit for damages in action at law in Law Division on action for equitable relief in Chancery Division. Constitution provides that, subject to rules of Supreme Court, one trial division shall exercise powers and functions of other division when ends of justice so require and legal and equitable relief may be granted in any cause so that controversy may be completely determined in one action. N.J. Const. Art. VI, § 3, par. 4. Appeals are taken to Appellate Division or, in certain exceptional cases, directly to Supreme Court.

Tax Court was re-created effective March 12, 1993. N.J.S.A. 2B:13-1 *et seq.* Tax appeals previously within

jurisdiction of Division of Tax Appeals of New Jersey Department of Treasury have been transferred to Tax Court. Tax Court has initial review jurisdiction of actions or regulations with respect to tax matters of following: 1) state agency or official; 2) county board of taxation; 3) county or municipal official. Tax Court has jurisdiction over actions cognizable in Superior Court which raise issues where expertise in taxation is desirable and those provided by statute. Municipal Courts exercise limited civil and criminal jurisdiction, N.J. Stat. Ann. § 2B:12-1, *et seq.*

Case reporters are: "New Jersey Reports" ("N.J.") containing opinions of Supreme Court, "New Jersey Superior Court Reports" ("N.J. Super.") containing opinions of Appellate Division, Law and Chancery Divisions of Superior Court, and "New Jersey Tax Court Reports" ("N.J. Tax") containing opinions of Tax Court.

Appellate Courts

Supreme Court consists of Chief Justice and six Associate Justices and is State court of last resort in all causes. Appeals may be taken to Supreme Court as of right: (a) in cases determined by Appellate Division involving substantial federal or state constitutional question; (b) in cases where there is dissent in Appellate Division; (c) directly from trial courts in cases where death penalty imposed and in post-conviction proceedings in such cases; and (d) as may be provided by law. Rule 2:2-1. Appeals may be taken to the Supreme Court from final judgments on certification to the Appellate Division (Rule 2:2-1) or by its leave from interlocutory orders (Rule 2:2-2). Chief Justice of Supreme Court is administrative head of all courts in state and has appointed administrative director to serve at his pleasure.

Appellate Division consists of such parts as Chief Justice of Supreme Court designates, with each part to consist of such numbers of judges as assigned by Chief Justice. Rule 2:13-2. Appellate Division jurisdiction is prescribed by rules of Supreme Court. Under these rules appellate jurisdiction as of right includes review of causes final judgments of Law and Chancery Divisions, Tax Court and final decision or actions of or rules promulgated by State administrative agencies. Rule 2:2-3.



Appeal may be taken to the Appellate Division by leave granted in extraordinary cases and in the interest of justice, from final judgments of a court of limited jurisdiction or from decisions of administrative agency or officer. Rule 2:2-3.

LAW

Abbreviations

A. – Atlantic Reporter.
 A.2d – Atlantic Reporter, Second Series.
 F. – Federal Reporter.
 F.2d – Federal Reporter, Second Series.
 F.3d – Federal Reporter, Third Series.
 F. Supp. – Federal Supplement.
 N.J. – New Jersey Reports.
 N.J. Eq. – New Jersey Equity Reports.
 N.J. Misc. – New Jersey Miscellaneous Reports.
 N.J. Super. – New Jersey Superior Court Reports.
 N.J.A.C. – New Jersey Administrative Code.
 N.J.L. – New Jersey Law Reports.
 N.J.L.J. – New Jersey Law Journal.
 N.J. Stat. Ann. – New Jersey Statutes Annotated.
 P.L. – Pamphlet Laws of New Jersey.
 R. – Rules promulgated by Supreme Court governing Courts.
 R.P.C. – Rules of Professional Conduct.
 R.S. – New Jersey Revised Statutes 1937.
 R.S. Cum. Supp. – New Jersey Revised Statutes, Cumulative Supplement.
 Citation references to court in which case was heard: E. & A. – Court of Errors and Appeals; Ch. – Court of Chancery; Sup. Ct. – former Supreme Court; App. Div. – Appellate Division; Ch. Div. – Chancery Division; Law Div. – Law Division; Cty. – County Court.

ACCIDENT AND HEALTH INSURANCE

See “DISABILITY.”

Double Indemnity. *See Weiss v. Union Indem.*, 107 N.J.L. 348, 153 A. 508 (E. & A. 1931). Death from sunstroke is “accident” resulting from “external violence” within double indemnity clause. *Lower v. Metropolitan*, 111 N.J.L. 426, 168 A. 592 (E. & A. 1933). One seeking recovery under double indemnity clause bears burden of proving death resulted from accidental causes. *Burney v. Washington Nat'l*, 68 N.J. Super. 373, 172 A.2d 449 (App. Div. 1961).

Disease Induced by Accident. Where accident aggravates pre-existing disease which had been dormant, and both combine to result in disability, disability is

caused by accident. *Kievit v. Loyal Protective*, 34 N.J. 475, 170 A.2d 22 (1961); *Gottfried v. Prudential*, 82 N.J. 478, 414 A.2d 544 (1980).

Notice of Claim. Standard Provisions N.J. Stat. Ann. § 17B:26-8. Written notice must be given to insurer within 20 days after occurrence or as soon thereafter as is reasonably possible. Substantially the same standard provision for group policies, N.J. Stat. Ann. § 17B:27-40. Written proof of loss must be furnished within 90 days; failure to furnish within 90 days will not invalidate claim if it was not reasonably possible to give proof within such time. N.J. Stat. Ann. § 17B:26-10. Proof of loss under group policies: Claim for loss of time for disability 30 days; Claim for any other loss within 90 days. N.J. Stat. Ann. § 17B:27-41.

Statute of Limitations. Three years from the time proof of loss was required to be furnished. N.J. Stat. Ann. § 17B:26-14; N.J. Stat. Ann. § 17B:27-46.

Excepted Risks. Passenger in airplane fell within exception for injuries or death occurring while participating in “aeronautics.” *Bew v. Travelers*, 95 N.J.L. 533, 112 A. 859 (E. & A. 1921). Death from septicemia due to pyogenic infection resulting from actions contrary to physician’s advice, was not accidental and therefore fell within exception for death caused by bacterial infection except pyogenic infection occurring “with and through accidental cut or wound.” *Wiley v. Travelers*, 119 N.J.L. 22, 194 A. 59 (E. & A. 1937). Policy may contain exclusion for loss resulting from use of intoxicants or non-prescription narcotics. N.J. Stat. Ann. § 17B:26-27. Policy may contain exclusion for loss contributed by commission or attempted commission of a felony by insured or insureds engaged in an illegal occupation. N.J. Stat. Ann. § 17B:26-26.

Employer effecting group coverage for its employees, acted for itself and its employees, and not as agent of insurer. *Mosior v. INA*, 193 N.J. Super. 190, 473 A.2d 86 (App. Div. 1984).

Cancellation. Policyholder may cancel within 10 days of receipt of policy and receive premium refund, including policy fees or other charges. N.J. Stat. Ann. § 17B:26-3.1. Any policy containing cancellation provision must provide grace period for payment of premium of 7 days for weekly premium policies, 10 days for monthly premium policies and 31 days for all other policies. N.J. Stat. Ann. § 17B:26-6. Insurer may cancel with at least five days notice. Insured may cancel at any time. N.J. Stat. Ann. § 17B:26-24.

Renewal. Payment of renewal premiums on accident policy after expiration date held to continue policy in force one year from date of payment, rather than one



year from expiration date. *Eisenberger v. North America*, 11 N.J. Misc. 217, 165 A. 295 (Sup. Ct. 1933).

ACCIDENTAL MEANS

Means are accidental if, in common and popular sense, there is something accidental in cause of resulting injury, *i.e.*, in events preceding and leading up to it. *Harris v. John Hancock Mut. Life*, 41 N.J. 565, 197 A.2d 863 (1964); *Linden Motor Freight Co. v. Travelers*, 40 N.J. 511, 193 A.2d 217 (1963). Heart attack caused by exertion of normal work activities not involving unusual or unforeseen occurrence held not to be "accident." *Harris, supra*. Issue for fact-finder is whether average policyholder would consider that there was something about preceding acts and events, in light of unexpected injurious result and at same time having in mind limiting language of insuring clause, which would lead one to reasonably call means "accidental," even though strictly speaking, nothing unexpected or unforeseen occurred in course of preceding acts. *Perrine v. Prudential*, 56 N.J. 120, 265 A.2d 521 (1970). Where healthy 44-year old insured died of heart attack following voluntary strenuous physical activity, and attack was due to latent unknown heart or vascular condition, death was caused by "accidental bodily injury." Insured's wife was entitled to recover accidental death benefits under life policies which provided coverage for death by "accidental bodily injury" rather than by "accidental means." *Gottfried v. Prudential*, 82 N.J. 478, 414 A.2d 544 (1980).

ADJUSTERS

"Public Adjuster" or "Adjuster" means individual, firm, association or corporation who, for money, commission or other thing of value, acts or aids in any manner on behalf of an insured in negotiating for, or effecting, settlement of claims for loss or damage resulting from accident, incident, or occurrence covered under property insurance policy, including flood, transit, inland marine or ocean marine policy; or who advertises or solicits employment as adjuster of those claims. N.J. Stat. Ann. § 17:22B-2. The term includes any individual who, for money, commission or other thing of value, solicits or adjusts those claims on behalf of public adjuster.

Adjusters must be licensed pursuant to N.J. Stat. Ann. § 17:22B-1, *et seq.*, Public Adjusters Licensing Act. Act does not apply to employee, agent or other representative of authorized insurer undertaking adjustment of claims. N.J. Stat. Ann. § 17:22B-4. Insurer may be held liable for fraud perpetrated by adjuster if insurer adopts fraudulently induced release. *Hagen v. Galliano*, 66 N.J. Super. 319, 169 A.2d 186 (App. Div. 1961).

AGE

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

Age of majority is 18. N.J. Stat. Ann. § 9:17B-1, 3.

AGENTS AND BROKERS

N.J. Stat. Ann. §§ 17:22A-1 to 17:22A-25 repealed by L.2001, c.210, para.27, effective August 15, 2001. See now N.J. Stat. Ann. § 17:22A-26, *et seq.*

"Insurance agent" represents insurance company and acts on behalf of company in providing insurance for another. *TWBC III v. Certain Underwriters*, 323 N.J. Super 60 (App. Div. 1999). New Jersey regards insurance agent as occupying fiduciary position with his insurance company. *Strawbridge v. New York Life*, 504 F. Supp. 824 (D.N.J. 1980). Insurer is bound by unauthorized fraud of agent if applicant reasonably relied upon act of agent who falsely recorded answers that applicant answered truthfully. *Heake v. Atlantic Cas.*, 15 N.J. 475, 105 A.2d 526 (1954).

"Insurance Producer" means a person required to be licensed under laws of this State to sell, solicit or negotiate insurance. N.J. Stat. Ann. § 17:22A-28. Definition of "Insurance Broker" repealed by L. 2001, ¶ 28 eff. August 15, 2001.

Broker acts as agent for insured, and if coverage is materially deficient because of broker's failure to exercise requisite skill or diligence, he will be liable to insured for loss sustained thereby. *Rider v. Lynch*, 42 N.J. 465, 201 A.2d 561 (1964); *Bates v. Gambino*, 72 N.J. 219, 370 A.2d 10 (1977); see *Aden v. Fortsh*, 169 N.J. 64, 776 A.2d 792 (2001) (involving misrepresentation by broker, and insured's failure to read policy was not comparative fault and not available as defense to agent's negligence). Insurance agent owes duty to principal to exercise diligence in obtaining coverage. *Werrmann v. Aratusa*, 266 N.J. Super. 471, 630 A.2d 302 (App. Div. 1993). Broker who is authorized to deliver policies has implied or apparent authority to collect premiums for those policies. N.J. Stat. Ann. § 17:22-6.2a; *Roman v. American Fire & Marine*, 281 N.J. Super. 355, 657 A.2d 897 (App. Div. 1995). Contributory negligence is not defense in action against broker for failure to procure insurance. *Winan's Carter Corp. v. Jay & Benisch*, 103 N.J. Super. 389, 247 A.2d 361 (Law Div. 1968), *aff'd*, 107 N.J. Super. 268, 258 A.2d 31 (App. Div. 1969). Broker procuring policy for fully disclosed principal does not become liable for premium unless he pledges his credit expressly or by course of dealing showing his intention to do so. *John Roach v. Pingpank*, 39 N.J. Super. 336, 121 A.2d 32 (App. Div. 1956).



“Insurance consultant” means person who, for commission, brokerage fee, or other consideration, acts or holds himself out to public or any licensee as offering any advice, counsel, opinion or service with respect to benefits, advantages or disadvantages under any insurance policy or contract that is or could be issued in State, but shall not include bank trust officers, attorneys-at-law and certified public accountants who negotiate contracts on behalf of others or provide general financial counsel if no commission or brokerage fee is paid for services. N.J. Stat. Ann. § 17:22A-28.

“Insurer” means business entity authorized to transact business of insurance pursuant to subtitle 3, Title 17 and Title 17B, New Jersey Statutes.

N.J. Stat. Ann. § 17:22A-29 *et seq.* provides for licensing of insurance producers; examination of applicant; temporary licenses; renewals, revocations; certificates of authority, etc.

ARBITRATION

Arbitration is favored by Courts and submission to arbitration is essentially a contract. *Public Utility Const. v. PSE&G*, 44 N.J. Super. 316, 130 A. 2d 421 (Law Div. 1957), *rev'd on other grounds*, 26 N.J. Super. 145, 139 A.2d 1 (App. Div. 1958). Provision in written contract to arbitrate disputes is valid except upon such grounds as exist at law or equity for revocation of contract. N.J. Stat. Ann. § 2A:24-1. Award must be in writing. N.J. Stat. Ann. § 2A:24-7. Arbitration awards can be vacated on grounds of fraud, corruption, undue influence or misconduct. N.J. Stat. Ann. § 2A:24-8; *PBA Loc. 292 v. Bor. of N. Haledon*, 158 NJ 392, 730 A.2d 320 (1999). Courts can modify or correct arbitration awards on such grounds as evident miscalculation of figures or evident mistake in describing person or property. N.J. Stat. Ann. § 2A:24-9.

Party may move to confirm, modify or vacate award by summary action brought within three months after award is delivered. N.J. Stat. Ann. § 2A:24-7. Thereafter, prevailing party may not avail itself of summary action and must institute common law plenary action to confirm award. Losing party may not institute action to vacate arbitration after expiration of three months. *PBA Loc. 292 v. Bor. of North Haledon*, 158 N.J. 392, 730 A.2d 320 (1999). Once confirmed award is as conclusive as court judgment.

Court action shall be stayed pending resolution of arbitration. N.J. Stat. Ann. § 2A:24-4. Where contract makes arbitration condition precedent to suit and arbitration is ordered to proceed, dismissal rather than stay would be appropriate. *Gothic Const. Group, Inc. v.*

PATH, 312 N.J. Super. 1, 711 A.2d 312 (App. Div. 1998).

Arbitration Act did not abolish common law arbitration. *Mills v. J. Daunoras Const. Inc.*, 278 N.J. Super. 373 (App. Div. 1995).

Compulsory State sponsored arbitration exists for civil actions involving personal injury where the amount in controversy is \$20,000 or less, N.J. Stat. Ann. § 2A:23A-20(a); R.4:21 A-1 *et seq.*, and automobile negligence, N.J. Stat. Ann. § 39:6A-24, *et seq.* Arbitration is mandatory for applicable cases on Tracks I, II, and III (including declaratory judgment, UM/UIM and PIP actions) and as required by the managing judge for Track IV cases. R. 4:21A-1.

ASSIGNMENT

See “FIRE INSURANCE.”

ATTORNEYS

Appointment and Authority. Attorney must be more than 18 years of age, have received Juris Doctorate degree or equivalent from law school approved by American Bar Association, have passed bar examination, complied with skills and methods course requirement, be in good standing, and maintain bona fide office for the practice of law. R.1:21-1; R. 1:24-1; R. 1:24-2; R. 1:26; R. 1:27-1.

Conflict of Interest. Governed by R.P.C. 1.7; 1.8; 1.9; 1:10.

Legal Malpractice. Elements of legal malpractice are existence of an attorney-client relationship creating duty of care on attorney, breach of duty and proximate causation. *Albright v. Burns*, 206 N.J. Super. 625, 503 A.2d 386 (1986). Attorneys owe a duty to their clients to provide services with reasonable knowledge, skill, and diligence. *Ziegelheim v. Apollo*, 128 N.J. 250, 607 A.2d 1298 (1992). Lawyer is not guarantor of his opinions, and his standard of care is measured by knowledge and skill ordinarily possessed by others in the profession. *Transamerica v. Keown*, 451 F. Supp. 397 (D.N.J. 1978). Attorney is responsible for loss proximately caused client by negligence. *Hoppe v. Ranzini*, 158 N.J. Super. 158, 385 A.2d 913 (App. Div. 1978). Where attorney breaches duty owed to client they are answerable in damages only for losses proximately caused by their negligence, and client has burden of proving proximate causation. *Lamb v. Barbour*, 188 N.J. Super. 6, 455 A.2d 1122 (App. Div. 1982), *cert. denied*, 93 N.J. 297 (1983); *Lieberman v. Employers*, 84 N.J. 325, 419 A.2d 417 (1980). Whether attorney owes duty to non-client third party depends on balancing attorney's duty to represent clients vigorously with duty not to provide misleading



information on which third parties foreseeably will rely. *Petrillo v. Bachenberg*, 139 N.J. 472, 655 A.2d 1354 (1995).

Attorney has ethical obligation to advise client that they might have claim against attorney. R.P.C. 1.7(b); R.P.C. 1.4(b). Entire controversy doctrine does not compel assertion of legal malpractice claim in underlying action that gives rise to claim. *Olds v. Donnelly*, 150 N.J. 424, 696 A.2d 633 (1997).

Fees. Contingent fees in tort actions are circumscribed by R. 1:21-7. Retainer agreements in family actions governed by R. 5:3-5.

AUTOMOBILES

See Law Digest Tables.

See "NEGLIGENCE," "NO-FAULT," "LIABILITY INSURANCE."

Age. 18 years for basic license. N.J. Stat. Ann. § 39:3-10. 17 for learner's permit or 16 years for use in an approved driver education course. Applicant required to provide proof of identity, age and residence authorized under federal law. N.J. Stat. Ann. §§ 39:3-13 and 13.1. 18 years for certain public conveyances. N.J. Stat. Ann. § 39:3-10.1.

Conflict of Laws. *Lex loci delicti* not applied when other state has paramount interest in issue in question. *Mellk v. Sarahson*, 49 N.J. 226, 229 A.2d 625 (1967). See *Cirelli v. Ohio Cas.*, 72 N.J. 380, 371 A.2d 17 (1977) holding New Jersey benefits applicable where insured is a New Jersey resident, automobile policy was issued in New Jersey but accident occurred in New York. See *State Farm v. Estate of Simmons*, 84 N.J. 28, 417 A.2d 488 (1980) for discussion of governmental interest analysis of choice of law questions.

Liability of Owner. Liability of owner must be founded on negligence of owner directly, or vicariously through respondeat superior. *Eggerding v. Bicknell*, 20 N.J. 106, 118 A.2d 820 (1955). Rebuttable presumption that owner of car was in possession and control if not personally then through his servant driver who was acting within scope of his authority. *Coopersmith v. Kalt*, 119 N.J.L. 474, 196 A. 649 (E. & A. 1938). Under N.J. Stat. Ann. § 2A:53A-6, however, contributory negligence of agent or employee of bailee of vehicle is imputed to bailor even where agent acting beyond scope of his employment. *Motorlease v. Mulrooney*, 9 N.J. 82, 86 A.2d 765 (1952). Owner not liable for injury caused by vehicle borrower's negligent driving if vehicle was not in use on owner's business at time of accident. *Schimek v. Gibb Truck*, 69 N.J. Super. 590, 174 A.2d 641 (App.

Div. 1961). But, bailor liable for negligence in renting to irresponsible bailee. *Id.*

Family Purpose Doctrine. Operation of automobile, owned by head of household, by member of family for "family purpose" within scope of family obligation of owner, is presumptive evidence of necessary agency to predicate liability. *Missel v. Hayes*, 86 N.J.L. 348, 91 A. 322 (E. & A. 1914); *but see, Paul v. Flannery*, 128 N.J.L. 438, 26 A.2d 553 (E. & A. 1942). Plaintiff is entitled to rebuttable presumption of agency upon proof of family relationship between driver and owner. *Venghis v. Nathanson*, 101 N.J.L. 110, 127 A. 175 (E. & A. 1925). Agency presumption may be rebutted as a matter of law under appropriate circumstances. *Harvey v. Craw*, 110 N.J. Super. 68, 264 A.2d 448 (App. Div.), *cert. denied*, 56 N.J. 479, 267 A.2d 61 (1970).

Negligent Entrustment. Owner of an automobile may be liable for operation by one that owner knows or ought reasonably to know is incompetent to operate it. *Mead v. Wiley M.E. Church*, 4 N.J. 200, 72 A.2d 183 (1950). Neither corporate accommodation signer nor co-lessee of vehicle has any duty to determine competence of lessee to operate vehicle and is not liable for injuries caused by lessee in the absence of knowledge of lessee's incompetence as a driver. *Baran v. Clouse Trucking*, 225 N.J. Super. 230, 542 A.2d 34 (App. Div.), *cert. denied*, 113 N.J. 353, 550 A.2d 463 (1988). Comparative negligence is applicable. N.J. Stat. Ann. § 2A:15-5.1 *et seq.*

Compulsory Insurance Coverage. Mandatory liability coverage in minimum amount of \$15,000 for standard automobile policies. Liability coverage is not mandatory for basic automobile policies. It is an option available in the amount of \$10,000 exclusive of interest and cost on account of injury to or death of one or more persons in any one accident. N.J. Stat. Ann. § 39:6A-3, 3.1. Personal injury protection (no-fault) benefits mandated. N.J. Stat. Ann. § 39:6A-4. Special automobile policies, available only to qualified low-income individuals, provide for limited emergency room no-fault benefits only, and do not offer any liability, collision, uninsured or underinsured coverage. N.J. Stat. Ann. § 39:6A-3.3. Recovery of noneconomic loss may be limited by election of tort option pursuant to N.J. Stat. Ann. § 39:6A-8 *et seq.* Uninsured motorist coverage mandated in minimum amounts of \$15,000/30,000/5,000 for standard automobile policies. For basic automobile policies, this coverage is optional. N.J. Stat. Ann. § 17:28-1.1(a). Underinsured motorist coverage is optional and available at additional premiums. N.J. Stat. Ann. § 17:28-1.1. Additional uninsured/underinsured motorists coverage shall be offered by every insurer up to at least \$250,000/500,000/100,000 or \$500,000 single limit subject to an exclusion of the first \$500 of property damage.



N.J. Stat. Ann. § 17:28-1.1(b). Limits for uninsured and underinsured motorists coverage shall not exceed the insured's liability limits. *Id.* Stacking is prohibited and pro rata contribution among all available coverages remains in effect with the highest applicable of multiple policies being that amount to which insured is entitled. N.J. Stat. Ann. § 17:28-1.1(c).

Alcohol/Driving While Intoxicated. If blood alcohol 0.08% or more, driver is considered under the influence. Increased fines/penalties of 0.10% or higher. N.J. Stat. Ann. § 39:4-50, *et seq.* Intoxication may be proven by police officer's observations of driver. *State v. Morris*, 262 N.J. Super. 413, 621 A.2d 74 (App. Div. 1993). A driver found to be intoxicated and convicted of such an offense or who pleads guilty to N.J. Stat. Ann. § 39:4-50.4a or similar statute from any jurisdiction in connection with accident, is barred from bringing a cause of action for economic or non-economic losses as a result of the automobile accident. N.J. Stat. Ann. § 39:6A-4.5. Operator who is under legal age to purchase alcohol presumed intoxicated with blood alcohol concentration over .01%. Lesser penalties imposed for underage driver with blood alcohol over .01% and less than .08% N.J. Stat. Ann. § 39:4-50.14.

Guest Cases. Duty of driver of automobile to social guest passenger is same, regardless of whether driver-host initiated invitation, or whether guest or another on her behalf asked for ride. Duty is one of reasonable care in either case. No distinction between "invitees" and "licensees" in automobiles with regard to duty of care owed to each. *Cohen v. Kamnitsky*, 36 N.J. 276, 176 A.2d 483 (1961). The Unsatisfied Claim and Judgment Fund Law (N.J. Stat. Ann. § 39:6-60) requires, as a precondition to payment from fund, that claimants exhaust all alternate sources of payment for losses caused by uninsured motorist. *Crocker v. Transport of New Jersey*, 169 N.J. Super. 498, 404 A.2d 1293 (Law Div. 1979). Passenger in automobile injured in collision with uninsured motorist must look to owner's liability insurance policy and may not pursue payment from Unsatisfied Claim and Judgment Fund. *Id.* See N.J. State. Ann. § 39:6-64C abolishing Unsatisfied Claim and Judgment Fund Board and transferring all powers, functions, assets and liabilities to New Jersey Property Liability Insurance Guaranty Association. Any reference to Unsatisfied Claim Judgment Fund in any law, rule, or regulation shall mean and refer to the New Jersey Property Liability Insurance Guaranty Association.

Motorized Bicycles. Operator of motorized bicycle must be at least 15 years of age and possess driver's license or motorized bicycle license. N.J. Stat. Ann. § 39:4-14.3. Learner's permit may be issued to operator age 15 or older. *Id.* Owner must maintain liability insur-

ance. N.J. Stat. Ann. § 39:4-14.3e. Motor vehicle laws governing driving under influence applicable to operator of motorized bicycle. N.J. Stat. Ann. § 39:4-14.3g.

Ownership/Title. Possessor of motor vehicle must have certificate of ownership and registration certificate. N.J. Stat. Ann. § 39:10-6. To effectively transfer title of motor vehicle, including for purposes of insurance, there must be strict compliance with statutory requirements. *Martin v. Nager*, 192 N.J. Super. 189, 469 A.2d 519 (Ch. Div. 1983). For insurance coverage purposes, there may be more than one owner. *Verriest v. INA*, 142 N.J. 401, 662 A.2d 967 (1995). Despite lack of legal title, the true owner is the person who maintains possession and control of the automobile. *Id.*

Seat Belts. Passenger automobile manufactured after July 1, 1966 must have two sets of seat belts for the front seat. N.J. Stat. Ann. § 39:3-76.2. Injured motorists' failure to use seat belt may reduce recovery for injuries that motorist could have avoided through use of seat belt. *Waterson v. General Motors Corp.*, 111 N.J. 238, 544 A.2d 357 (1988). See also *Dunn v. Durso*, 219 N.J. Super. 383, 530 A.2d 387 (Law Div. 1986). All children under 8 and less than 80 pounds to use prescribed child safety seat when in passenger vehicle other than school bus. N.J. Stat. Ann. § 39:3-76.2a. Driver, front seat passengers, and children over 80 pounds or between 8 and 18 required to wear seat belt. N.J. Stat. Ann. § 39:3-76.2f. The driver is charged with the responsibility of properly securing passengers between 8 and 18. *Id.* Failure to use child restraint system or use booster seat is not considered contributory negligence, and shall not be admissible as evidence in any civil action. N.J. Stat. Ann. § 39:3-76.2a.

Service of Process Upon Non-resident Motorists. In civil suit arising out of operation in New Jersey of automobile either not registered in State or operated by non-resident, service may be made by serving Director of Motor Vehicles, who must forward copy of summons and complaint by registered mail to defendant. N.J. Stat. Ann. §§ 39:7-2, 39:7-3. See *Lindsey v. Teddy's*, 18 N.J. 61, 112 A.2d 529 (1955). Where all other methods of service upon insured non-resident defendant are ineffective, service may be made upon insurance carrier of such defendant if court finds good cause. *Young v. Bunny Bazaar*, 107 N.J. Super. 320, 258 A.2d 158 (Law Div. 1969); *Ledbetter v. Schnur*, 107 N.J. Super. 479, 259 A.2d 237 (Law Div. 1969); R. 4:4-4.

When plaintiff is unable to effect service upon uninsured defendant in any other manner, substituted service may be made by ordinary mail to last known address of defendant and by notice to Unsatisfied Claim and Judgment Fund. Service on Fund shall not be used to achieve service of process, but only to apprise Fund of



situation of which it may be concerned. *Feuchtbaum v. Constantini*, 59 N.J. 167, 280 A.2d 161 (1971). See N.J. Stat. Ann. § 39:6-64C, abolishing Unsatisfied Claim and Judgment Fund, and transferring all powers, functions, assets and liabilities to New Jersey Property Liability Insurance Guaranty Association.

Weight Limits. Dimensional restrictions of vehicles set forth in N.J. Stat. Ann. § 39:3-84 *et seq.*

Uninsured Motorist Coverage. Claim for uninsured motorist benefits is contract right against insurer for contractual liability derived from errant driver's negligence and failure to carry insurance. *Prudential v. Monmouth*, 141 N.J. 235, 661 A.2d 785 (1995). To collect uninsured motorist coverage, insured must prove liability against uninsured motorist. *Riccio v. Prudential*, 108 N.J. 493, 531 A.2d 717 (1987). Where insured's loss exceeds uninsured motorist limit of host vehicle, "other insurance" clause of insured's own policy precluding additional recovery therefrom is invalid as repugnant to uninsured motorist statute. *Motor Club of America v. Phillips*, 66 N.J. 277, 330 A.2d 360 (1974). See also, *New Jersey Mfrs. Ins. Co. v. MacVicar*, 307 N.J. Super. 507, 704 A.2d 1343 (App. Div. 1998), *cert. denied*, 156 N.J. 381, 718 A.2d 1210 (1998). Stacking of UM policy limits not permitted. *Rider Ins. v. First Trenton*, 354 N.J. Super. 491, 808 A.2d 143 (App. Div. 2002).

Where insured acquired statutory minimum amount of automobile liability insurance coverage, fact that claims of injured parties far exceeded coverage amount, effectively precluding each injured party from receiving statutory minimum, did not render vehicle uninsured. Therefore injured parties could not recover additional monies under uninsured motorist endorsements of their respective policies. *Gorton v. Reliance*, 77 N.J. 563, 391 A.2d 1219 (1978). Exhaustion of bodily injury liability limits does not render automobile "uninsured." N.J. Stat. Ann. § 17:28-1.1e.

Passenger can collect UM benefits under policy issued in trade name of vehicle owner's unincorporated business and is not precluded from doing so merely because he settled with host driver for less than driver's full policy limits. *American Bankers v. Stack*, 208 N.J. Super. 75, 504 A.2d 1219 (Law Div. 1984). Adult female cohabitating with male insured was neither "spouse," "relative," nor "family member" so as to entitle her to UM coverage. *State Farm v. Pizzi*, 208 N.J. Super. 152, 505 A.2d 160 (App. Div. 1986). Cohabitant that participated in marriage ceremony with insured and lived as husband and wife, without marriage license, not "family member." *Lee v. General Acc. Ins. Co.*, 337 N.J. Super. 509, 767 A.2d 985 (App. Div. 2001). Insurer cannot restrict uninsured motorist coverage to accidents occurring in the State of New Jersey, such provision being

void as violative of statute governing uninsured motorist coverage. *Colangelo v. Bankers & Shippers Ins.*, 185 N.J. Super. 205, 447 A.2d 1356 (Law Div. 1982).

Clause in uninsured motorist endorsement of automobile insurance policy requiring corroboration of facts in hit-and-run non-contact accident held invalid. *Perez v. American Bankers Ins.*, 81 N.J. 415, 409 A.2d 269 (1979).

Despite that injured party's damages exceed statutory minimum, injured party not entitled to UM benefits if coverage available to negligent party exceeds statutory minimum. *Taft v. Sweeney*, 149 N.J. Super. 282, 373 A.2d 712 (App. Div.), *cert. denied*, 75 N.J. 529, 384 A.2d 508 (1977).

Clause in automobile policy reducing available coverage limits under uninsured motorist coverage by amounts paid, on behalf of uninsured motorist and anyone else jointly liable, would not prevent injured party from recovering under uninsured motorist coverage even where there has been settlement of personal injury action, subject to restriction that injured party could not recover amount in excess of damages sustained. *Ciecka v. Transamerica*, 81 N.J. 421, 409 A.2d 272 (1979). See also *Jaworski v. Motor Club of America Ins.*, 182 N.J. Super. 651, 442 A.2d 1091 (Law Div. 1981).

Settlement by negligent party's insurers deducted pro tanto from uninsured motorist award to non-negligent UM claimant, resulting in insured receiving difference between award and settlement. *Childs v. New Jersey Mfrs.*, 108 N.J. 506, 531 A.2d 723 (1987).

In evaluating uninsured motorist coverage, question of "accident" versus intentional wrong is considered from view point of insured as well as legislative intent in enacting the statute. *Shaw v. Jersey City*, 174 N.J. 567, 811 A.2d 404 (2002). See also *Sciascia v. American Ins.*, 183 N.J. Super. 352, 443 A.2d 1118 (Law Div. 1982), *aff'd*, 189 N.J. Super. 236, 459 A.2d 1198 (App. Div. 1983) (Firing of gun from moving vehicle, striking pedestrians standing outside parked vehicle, was unintended happening and recovery under uninsured motorist coverage is allowed.)

Injured party is permitted to settle with underinsured motorist, even where settlement is less than underinsured driver's limits of liability, but in arbitration against underinsured motorist carrier, full limits of underinsured motorist's liability will be deducted from arbitration award. *Longworth v. Van Houten*, 223 N.J. Super. 174, 538 A.2d 414 (App. Div. 1988). Subrogation and consent to settle clauses in UIM endorsements contravene public policy because they hamper insured's ability to dispose of his claim against underinsured tortfeasor, however, insured must notify his UIM carrier

prior to accepting settlement offer from underinsured tortfeasor to protect insurer's subrogation rights. *Id.*

Violation of Law. No standard provisions required to be in policy that insurer not liable for injuries sustained while automobile operated by person under age permitted by law but practically all policies written in state contain such provision.

Omnibus Provision. *See* N.J. Stat. Ann. §§ 39:6A-3, *et seq.*; 39:6B-1 *et seq.* All parties subject to omnibus coverage requirements, including self-insurers and those with liability policies, must provide such coverage. *Ryder v. Harbor Bay*, 119 N.J. 402, 575 A.2d 416 (1990). "Legally operating" as used in Omnibus Provision must be construed by reference to operations particularized in "exclusions" contained in policy. *Osborn v. New Amsterdam*, 111 N.J.L. 358, 168 A. 416 (E. & A. 1933); *Saffore v. Atlantic Cas. Co.*, 21 N.J. 300, 121 A.2d 543 (1956). Car being operated with unauthorized license plates is not being operated "illegally" within meaning of clause. *Steinrock v. Hartford*, 115 N.J.L. 180, 178 A. 806 (E. & A. 1935); *See* annotation, 51 A.L.R.2d 924 (1957).

In *Matits v. Nationwide Mut.*, 33 N.J. 488, 166 A.2d 345 (1960), initial permission rule adopted. If one is given permission to use automobile in first instance, and subsequent use by permittee short of "theft or like" results in injury, claim is within coverage of Omnibus clause of liability insurance policy. *Id.*

Initial permission to be passenger user of vehicle is not revoked where disturbed passenger forcibly seized control and ousted owner and took wheel. Words "theft or like" not applicable where no indication of intent to permanently deprive owner of use or possession and owner's policy covered this former passenger for accident while he operated vehicle. *Motor Club Fire & Cas. Co. v. New Jersey Mfrs.*, 73 N.J. 425, 375 A.2d 639, *aff'd*, 71 NJ 352, 365 A.2d 195 (1976) *cert. denied*, 434 U.S. 923 (1977). *But see*, *Jacquez v. National Continental Ins.*, 178 N.J. 88, 835 A.2d 309 (2003) (disapproving of majority decision in *Motor Club* and partially overturning *Motor Club* majority decision). Intent to permanently deprive is no longer test. *French v. Hernandez*, 370 N.J. Super. 104, 850 A.2d 585 (App. Div. 2004), *cert. granted*, 182 N.J. 142, 861 A.2d 846 (2004), *rev'd on other grounds*, 184 N.J. 144, 875 A.2d 943 (2005).

Insurance policy with restrictive omnibus coverage is void as against public policy, violative of financial responsibility laws, and deemed amended to conform to statutory standard, which furnishes coverage in accordance with initial permission rule. *Selected Risk Ins. Co. v. Zullo*, 48 N.J. 362, 225 A.2d 570 (1966); N.J. Stat. Ann. § 39:6-48. Omnibus coverage is also afforded, un-

der initial permission rule, to second permittee, even where first permittee is specifically directed not to permit another to use automobile. *Odolecki v. Hartford*, 55 N.J. 542, 264 A.2d 38 (1970). Test of use reasonably believed to be with permission of owner is reaction of reasonable person to driver's age, personality and social milieu. *State Farm v. Zurich*, 62 N.J. 155, 299 A.2d 704 (1973). No coverage where underaged driver, who had limited permission from parents, operated vehicle without parents' knowledge, and contrary to parents' direction and on public highway. *Nicholas v. Sugar Lo Co.*, 192 N.J. Super. 444, 471 A.2d 44 (App. Div. 1983), *cert. denied*, 96 N.J. 284, 475 A.2d 582 (1984).

Exclusionary clause in liability policy for leased vehicles was void as being illegal escape clause. *American Home Assur. v. Hartford Ins. Co.*, 190 N.J. Super. 477, 464 A.2d 1128 (App. Div. 1983). "Step Down" or "Cut Back" endorsement clause reducing amount of coverage to "rentee" for less than 1 year is valid. *General Acc. Group v. Liberty Mut.*, 191 N.J. Super. 530, 468 A.2d 430 (App. Div.), *cert. denied*, 95 N.J. 192, 470 A.2d 416 (1983).

Arising Out of Vehicle "Use." Act of towing a vehicle was a "use" of the towed vehicle within meaning of policy insuring the towed vehicle, thereby making operator of the tow truck "insured" under the towed vehicle's policy. *Hartford v. Travelers*, 167 N.J. Super. 335, 400 A.2d 862 (Law Div. 1979).

Injuries sustained by bicyclist when hit by a stick thrown by a passenger from a moving automobile were injuries "arising out of the ownership, maintenance or use of the owned automobile" within automobile liability policies issued to father of driver and passenger, despite contention automobile was merely situs of accident, or vehicle was employed for purposes of transportation, that is, to carry those in it from one place to another. Though act of passenger in throwing stick from vehicle may not have been foreseen or expected, it was a sufficiently foreseeable consequence of use of vehicle to mandate coverage under policies. *Westchester Fire v. Continental*, 126 N.J. Super. 29, 312 A.2d 664 (App. Div. 1973), *aff'd*, 65 N.J. 152, 319 A.2d 732 (1974).

Loading and Unloading Clauses. *See* N.J. Stat. Ann. § 39:6b-1. Obligation to provide coverage in a "loading and unloading" accident that arises from statute cannot be limited by contract. *Ryder v. Harbor Bay*, 119 N.J. 402, 575 A.2d 416 (1990). "Use" of a motor vehicle has been judicially construed to include both the loading and unloading of vehicle by crane sufficient to extend coverage to negligent crane operator under vehicle liability policy. *Bellafronte v. General Motors Corp.*, 151 N.J. Super. 377, 376 A.2d 1294 (App. Div.), *cert. denied*, 75 N.J. 533, 384 A.2d 513 (1977).

New Jersey recognizes the doctrine of “completed operation.” *Streeter v. Henry Heide*, 171 N.J. Super. 58, 407 A.2d 1265 (App. Div. 1979). Completed operation has been judicially construed to include all activities causally connected to the operation of loading or unloading of a vehicle. *Id.*

Loading and unloading clause of truck owner’s vehicle policy applies and covers owner of premises where defective docking plate malfunctioned and plaintiff truck driver who was preparing loading platform was injured. *Id. But see, Forsythe v. Teledyne Turner Tube*, 209 N.J. Super. 608, 508 A.2d 1156 (App. Div. 1986), which declined to follow *Streeter* and held that owner of premises where loading dock collapsed, injuring truck driver preparing to unload, was not entitled to coverage under truck insurer’s “loading and unloading” provision. Similarly, debris on the loading platform which caused the plaintiff to fall and sustain injury was unrelated to the loading process. *Wakefern Food v. General Accident*, 188 N.J. Super. 77, 455 A.2d 1160 (App. Div. 1983).

Owner of gasoline plant, which did not control tank trailer being loaded or unloaded, not covered under “loading and unloading” provision of policy on tank trailer where driver of trailer was injured when he fell off top of trailer. *Lesniakowski v. Amerada Hess*, 225 N.J. Super. 416, 542 A.2d 940 (App. Div. 1988).

AVIATION

New Jersey adopted Uniform Aeronautics Law (N.J. Stat. Ann. § 6:2-1 *et seq.*). N.J. Stat. Ann. § 6:2-7 imposes absolute liability on owners and lessees of aircraft operated over the land and waters of this State for injuries inflicted on persons and property on land below who are without negligence. Owners of stolen aircraft are not excluded from absolute liability imposed by statute. *Torchia v. Fisher*, 95 N.J. 43, 468 A.2d 1061 (1983). Airman who is neither owner nor lessee of aircraft is liable solely for own negligence. N.J. Stat. Ann. § 6:2-7. N.J. Stat. Ann. § 6:5-1 *et seq.* provides for substituted service on nonresident parties who shall operate or cause aircraft to be operated in airspace of New Jersey by serving Secretary of State. Constitutionality has been upheld in *Adler’s Quality Bakery, Inc. v. Gaseteria, Inc.*, 32 N.J. 55, 159 A.2d 97 (1960).

BROKERS

See “AGENTS AND BROKERS.”

BURGLARY INSURANCE

Loss of insured property by theft may be established through circumstantial evidence. *Ferdinand v. Agricultural Ins.*, 22 N.J. 482, 126 A.2d 323 (1956). Un-

der burglary policy protecting members of named insured’s family of the same household, people may be deemed members of same household even though they are not living under the same roof. *Crossfield v. Phoenix Ins.*, 77 N.J. Super. 476, 187 A.2d 20 (App. Div. 1962). Watchman warranty breached, voiding burglary policy, where armed watchman had not been on duty for three weeks. *Smith v. Fidelity & Deposit Co.*, 98 N.J.L. 534, 120 A. 322 (E. & A. 1923). Where only record of amount of money kept in hotel safe was notation on envelope in which money was kept, and safe was stolen, hotel could not recover from insurer where policy obligated it to keep records from which insurer could accurately determine amount of loss. *Green’s Hotel v. Commercial Cas.*, 4 N.J. 517, 73 A.2d 349 (1950). Where outer door of safe was opened by manipulation of combination, but inner door of safe was broken, loss was covered under burglary policy insuring for loss occasioned by felonious entry by actual force and violence. *Vailsburg Motor Corp. v. Fidelity & Cas.*, 110 N.J.L. 209, 164 A. 408 (E. & A. 1933). Where entry to insured’s second floor premises was gained by forcibly entering another’s first floor premises and proceeding to second floor through hole in ceiling caused by earlier fire, insured’s premises were not entered by “force and violence” within burglary insurance policy. *Professional Metals v. Maryland Cas. Co.*, 31 N.J. Super. 172, 106 A.2d 17 (App. Div. 1954). Where daughter of named assured had no coverage for her jewelry under wording of her father’s jewelry and fur floater policy after she married and moved, retention of premium by insurance agent for daughter’s jewelry after marriage did not estop insurer from denying coverage when new domicile was burglarized. *Goldberg v. Commercial Union*, 78 N.J. Super. 183, 188 A.2d 188 (App. Div. 1963). But, where there is reasonable detrimental reliance by insured on words or conduct by insurer, insurer may be estopped from denying coverage for otherwise excluded claim. *Doto v. Russo*, 140 N.J. 544, 659 A.2d 1371 (1994).

CANCELLATION

Generally, insurance policies shall include provisions for cancellation upon 30 days written notice to insured and any designated mortgagee. N.J. Stat. Ann. § 17:29C-1. Automobile policy requires 20 days notice but 15 days notice for failure to pay premium. N.J. Stat. Ann. § 17:29C-8. Cancellation of auto policy shall be based on (a) non-payment of premium, (b) suspension or revocation of license, (c) providing knowingly false information on application, or (d) failure to meet underwriting rules within 60 days of issuance of policy. N.J. Stat. Ann. § 17:29C-7.

“Cancellation” is term ordinarily applicable to procedure by which policy already issued and in force is

terminated under conditions specified either by JUA rules, if it is JUA policy, or by statute, if it is voluntary market policy. *Lopez v. New Jersey Ins. Underwriting Ass'n*, 239 N.J. Super. 13, 570 A.2d 994 (App. Div.), cert. denied, 122 N.J. 131, 584 A.2d 206 (1990); N.J.A.C. § 11:3-33.2.

Notice of cancellation of automobile policy may be sent via regular or certified mail. If sent via regular mail, insurer must obtain date stamped proof of mailing from post office and must retain duplicate copy certified to be true copy. N.J. Stat. Ann. § 17:29C-10; *Valley Nat'l Bancorporation v. American Motorists Ins. Co.*, 316 N.J. Super. 152, 719 A.2d 1038 (N.J. 1998).

Sufficient proof that notice of cancellation was mailed renders cancellation effective regardless of insured's receipt of cancellation notice. *Celino v. General Acc.*, 211 N.J. Super. 538, 512 A.2d 496 (App. Div. 1986). Proof of mailing, not proof of receipt, is determinative factor. *Valley National v. American Motor Ins.*, 316 N.J. Super. 152 (App. Div. 1998). Insured need not actually receive cancellation notice for it to be effective, provided statutory proof of mailing has been satisfied. *Celino and Valley National, supra*. N.J. Stat. Ann. § 17:29C-10.

Although proof of mailing may be sufficient proof of notice of cancellation, non-receipt of notice is admissible for purpose of refuting hypothesis of mailing. *Needham v. New Jersey Ins. Underwriting Ass'n*, 230 N.J. Super. 358, 553 A.2d 821 (App. Div. 1989). In fact, where receipt of notice is undisputed, strict compliance with statutory requirements is not necessarily required. *Public Service Elec. & Gas v. Uphold*, 316 N.J. Super. 168, 719 A.2d 1268 (N.J. App. Div. 1998).

CHATTEL MORTGAGE

Where policy insuring chattel expressly provides that insured is the sole owner of chattel and that there are no encumbrances against chattel unless stated in policy, breach of that provision permits insurer to disclaim liability. *Atlantic Cas. Ins. Co. v. Interstate Ins. Co.*, 28 N.J. Super. 81, 100 A.2d 192 (App. Div. 1953). Consistently, where insurer issued policy based on application in which insured supplied no information regarding encumbrances, notwithstanding express request in application for such information, insurer waived claim that policy was void for inadequate answers in application. *Mattia v. Northern Ins. Co. of New York*, 35 N.J. Super. 503, 114 A.2d 582 (App. Div. 1955).

CONSTRUCTION OF POLICY

Ambiguity of Terms. Clear basic terms and particular provisions of insurance contract may not be disre-

garded at will and new contract judicially made for parties. *Linden Motor Freight v. Travelers*, 40 N.J. 511, 193 A.2d 217 (1963). Fundamental principle of insurance law is to fulfill objectively reasonable expectations of parties to insurance contract, however, even unambiguous insurance contracts may be interpreted contrary to plain meaning so long as to fulfill the reasonable expectations of the insured. *Werner v. First State*, 112 N.J. 30, 548 A.2d 188 (1988); *Doto v. Russo*, 140 N.J. 544, 659 A.2d 1371 (1995). Insurance contract not ambiguous simply because it is complex. *Transamerica Ins. v. Keown*, 451 F. Supp. 397 (D.N.J. 1978). When policy is clear and unambiguous, court must enforce contract as written, not try to make better contract for either party. *Vantage v. American Env. Tech.*, 251 N.J. Super. 516, 598 A.2d 948 (Law Div. 1991); *State v. Signo Trading Int'l*, 130 N.J. 51, 63, 612 A.2d 932 (1992); *Erdo v. Torcon*, 275 N.J. Super. 117, 645 A.2d 806 (App. Div. 1994). Ambiguity in insurance policy resolved against insurer particularly when insured is unsophisticated party, *Sparks v. St. Paul*, 100 N.J. 325, 495 A.2d 406 (1985); *Werner v. First State*, 112 N.J. 30, 548 A.2d 188 (1988), but not where clear that parties negotiated and jointly drafted. *First Nat'l Bank v. Motor Club*, 310 N.J. Super. 1, 708 A.2d 69 (App. Div. 1997); and interpretation should be sensible and conform with expressed intent of parties. Insurers seeking to limit scope of liability and exclude specific risks and hazards must use precise, express language. *Fidelity & Cas. v. Carll & Ramagosa*, 243 F. Supp. 481 (D.N.J. 1965), appeal dismissed, 365 F.2d 303 (3rd Cir. 1966). Exclusions in an insurance policy should be narrowly construed, nevertheless, if the exclusion is specific, plain, clear, prominent and not contrary to public policy, it will be enforced as written. *NAV-ITS, Inc. v. Selective Ins. Co.*, 183 N.J. 110, 869 A.2d 929 (2005). If controlling language of policy will support two meanings, one favorable to insurer, other to insured, interpretation favoring coverage should be applied. *Butler v. Bonner & Barnewell*, 56 N.J. 567, 267 A.2d 527 (1970); *Watson v. Agway*, 291 N.J. Super. 417, 677 A.2d 788 (App. Div. 1996), cert. denied, 146 N.J. 500, 683 A.2d 202; *Sears Roebuck v. Allstate*, 340 N.J. Super. 223, 774 A.2d 526 (App. Div. 2001), cert. denied, 169 N.J. 608, 782 A.2d 426 (2001).

Conditional Receipt of Application and Binders. When conditional receipt given upon issuance of check by insured for first annual premium on life policy purported to state terms under which policy would be effected, it was not unambiguous as to average layman. *Allen v. Metropolitan Life*, 44 N.J. 294, 208 A.2d 638 (1965). Binder is temporary insurance policy enforced until it expires by its own terms, by replacement with permanent policy, or rejection, and is agreement that the party covered will accept policy when issued. *Miney v.*



Baum, 170 N.J. Super. 282, 406 A.2d 234 (Law Div. 1979). Binder generally means contract, oral or written, providing for interim insurance effective at date of application and terminating at either completion or rejection of principal policy. *Shannon v. Prudential*, 90 N.J. Super. 592, 218 A.2d 880 (Law Div. 1966). Where insurer's agent failed to confirm oral binder of insurance by written confirmation, agent is responsible for any unpaid premiums, as may be insured, but insurer is liable nonetheless to insured for the loss. *Regino v. Aetna*, 200 N.J. Super. 94, 490 A.2d 362 (App. Div. 1985), superseded by statute as stated in *Strube v. Travelers Indem. Co. of Ill.*, 277 N.J. Super. 236, 649 A.2d 624 (App. Div. 1994); see N.J. Stat. Ann. § 17:28-1.9(a). Written binder can not continue in effect beyond 60 days, N.J. Stat. Ann. § 17:36-5.16, but purpose is to benefit insured and not meant to void action against insurance purchaser. *Restaurant Enterprises v. Sussex Mut.*, 52 N.J. 73, 243 A.2d 808 (1968). When premium receipt accepted and given to insured when application is signed, and contained language to induce payment in advance of acceptance, coverage afforded on interim basis prior to rejection of application. *Life Ins. Co. of North Am. v. DeChiaro*, 68 N.J. Super. 93, 172 A.2d 30 (Ch. Div. 1961).

DAMAGES

Appellate Review. Excessive Verdicts. In analyzing reasonableness of jury verdicts on damages, test is whether damages assessed are "so disproportionate to the injury and resulting disability, as to shock the [judge's] conscience and to convince him that to sustain the award would be manifestly unjust." *Baxter v. Fairmount Food Co.*, 74 N.J. 588, 596, 379 A.2d 225 (1977); *Lemaldi v. DeTomaso of America, Inc.*, 156 N.J. Super. 441, 383 A.2d 1220 (Law Div. 1978).

When damage award is so excessive that it "shocks" conscience of court and demonstrates prejudice, partiality or passion on part of jury award may taint entire verdict and compel new trial on all issues because no part of verdict is salvageable and remittitur is improper. *Taweel v. Starn's Shoprite*, 58 N.J. 227, 276 A.2d 860 (1971); *Tronolone v. Palmer*, 224 N.J. Super. 92, 539 A.2d 1224 (App. Div. 1988). Size of damage award alone does not invalidate otherwise sound liability verdict. *Fertile v. St. Michaels Med. Ctr.*, 169 N.J. 481 (2001). Use of remittitur to reduce excessive damage award to highest figure supported by evidence is appropriate. *Id.*

Arbitration. Arbitration award fully made is not subject to collateral attack, although for sufficient reason it may be set aside in law or equity and, until vacated, is conclusive between parties. *Kearns v. Fireman's Ins.*, 133 N.J.L. 50, 42 A.2d 581 (1945). Judicial interference

with arbitrator's role to be strictly limited. *County College of Morris Staff Assoc. v. County College of Morris*, 100 N.J. 383, 495 A.2d 865 (1985). There are limitations to deference given arbitrator's decision. *Id.* Arbitrator's awards shall be vacated where: (a) it was procured by corruption, fraud or undue means; (b) either partiality or corruption in the arbitrator's decision was evident; (c) arbitrator was guilty of misconduct in refusing to postpone hearing or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior prejudicial to rights of any party; or (d) arbitrator exceeded or so imperfectly executed their powers that mutual, final and definite award upon subject matter submitted was not made. N.J. Stat. Ann. § 2A:24-8. See *New Jersey Tpk. Auth. v. Local 196, I.F.P.T.E.*, 190 N.J. 283, 293, 920 A.2d 88 (2007).

Indemnification. Principle of indemnity operates to transfer entire losses imposed upon one tortfeasor to another who, in justice and equity, ought to bear it. 41 Am. Jur. 2d Indemnity, § 1. Basic distinction between indemnity and right of contribution lies in fact that indemnity involves shifting of entire loss, while contribution involves sharing of loss. In *Public Service Elec. & Gas Co. v. Waldroup*, the court first articulated well-established rule that right of indemnity is granted only to those without active fault, *i.e.*, whose negligence is not morally culpable but is merely "constructive, technical, imputed or vicarious." 38 N.J. Super. 419, 119 A.2d 172 (App. Div. 1955); *but see overruling suggested by Seibel v. Singh*, 1990 WL 72084 (D.N.J. 1990), and *implied overruling suggested by Hood v. Sheak & Karzun, P.C.*, 1997 WL 597707 (E.D. Pa. 1997). See also *Domanski v. Rapid-American Corp.*, 330 N.J. Super. 241, 749 A.2d 399 (App. Div. 2000). See also, *Tormo v. Yormark*, 398 F. Supp. 1159, (D.N.J. 1975); *Adler's Quality Bakery, Inc. v. Gaseteria, Inc.*, 32 N.J. 55, 159 A.2d 97 (1960); *Daily v. Somberg*, 28 N.J. 372, 146 A.2d 676 (1958); *but see Deemer v. SilkCiry Textile Machinery Co.*, 193 N.J. Super. 643 (1984); *Arcell v. Ashland Chem. Co., Inc.*, 152 N.J. Super. 471, 378 A.2d 53 (Law Div. 1977); *Cacioppo v. The Boeing Company*, 153 N.J. Super. 355, 379 A.2d 862 (Law Div. 1977).

Two types of indemnification are: 1) contractual indemnification, premised upon an express contractual undertaking and 2) indemnification implied by law. *George M. Brewster & Son v. Catalytic Constr. Co.*, 17 N.J. 20, 109 A.2d 805 (1954). Implied indemnification concept is founded upon principle that one whose liability is only constructive, *i.e.*, not resulting from active fault, should not bear ultimate liability for conduct of actual tortfeasor. *Schramm v. Arsenal Esso Station*, 124 N.J. Super. 135, 305 A.2d 83 (App. Div.), *aff'd*, 63 N.J. 593, 311 A.2d 178 (1973); *Cacioppo*, 153 N.J. Super. at 360.



Common-law doctrine of implied indemnification requires party seeking indemnification to be without personal fault, whether based on failure to insure that a product fulfills warranty, absolute liability for ultra-hazardous activity imposed by statute or intentional infliction of injury. *Port Auth. of New York & New Jersey v. Honeywell, Inc.*, 222 N.J. Super. 11, 535 A.2d 974 (App. Div. 1987); see Restatement, Restitution § 96 (2000); see also *Cartel Capital Corp. v. Fireco*, 81 N.J. 548, 410 A.2d 674 (1980); *Adler's*, 32 N.J. at 79; *Schramm*, 124 N.J. Super. at 138. Therefore, negligent party may not obtain indemnification from another wrongdoer. *Schramm*, 124 N.J. Super. at 139 (jury finding both defendants negligent bars action for indemnity); *Cacioppo*, 153 N.J. Super. at 359. New Jersey rejects rule that permits "passive" wrongdoer to be indemnified by "active" wrongdoer. *Adler's*, 32 N.J. at 81; *Arcell*, 152 N.J. Super. at 489. If party is found to be at fault, whether "active" or "passive," he cannot obtain indemnification. See *Tormo*, 398 F. Supp. 1159 (D.N.J. 1979).

Implied indemnification is available only between tortfeasors. Party whose liability springs from contractual obligation may not maintain action for implied indemnification against alleged tortfeasor. *Cacioppo*, 153 N.J. Super. at 360. Party who is not himself tortfeasor may not maintain claim for implied indemnification. Party seeking implied indemnification must satisfy three requirements: 1) must be tortfeasor, *i.e.*, liability must be founded upon tort rather than breach of contract; 2) liability must be merely "constructive, technical, imputed or vicarious" (*i.e.*, not based on fault but on some legal relationship or obligation); and 3) must be free from personal fault. *Ramos v. Browning Ferris Indus.*, 103 N.J. 177, 510 A.2d 1102 (1986).

Contract Indemnification. Through indemnification clauses, parties to contract are free to negotiate the allocation of tort liability regardless of fault. *Gulf Oil Corp. v. ACF Industries*, 221 N.J. Super. 420, 534 A.2d 1025 (App. Div. 1987), *cert. denied*, 111 N.J. 613, 546 A.2d 532 (1988). "Indemnity contracts are interpreted in accordance with the rules governing the construction of contracts generally. When the meaning of the clause is ambiguous, however, the clause should be strictly construed against the indemnitee." *Ramos*, 103 N.J. at 191.

In order for Indemnification Agreement. In order for negligent indemnitee to be brought within indemnification agreement, agreement must specifically reference negligence or fault of indemnitee. *Azurak v. Corporate Property*, 175 N.J. 110, 112-13, 814 A.2d 600 (2003). Indemnification clauses in construction contracts governed by statutory law. N.J. Stat. Ann. § 2A: 40A-1. Statute states in contracts for "the construction, alteration, repair, maintenance, servicing or security of a

building, structure, highway, railroad, appurtenance and appliance, including moving, demolition, excavation, grading, clearing, site preparation or development of real property connected therewith, purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents, or employees is against public policy and is void and unenforceable; provided that this action shall not affect the validity of any insurance contract, workers' compensation or agreement issued by an authorized insurer." N.J. Stat. Ann. § 2A: 40A-1 renders void and unenforceable use of indemnification clauses by contractors in particular circumstances set forth in statute. Statute does not invalidate indemnification against liability caused by the indemnitee's negligence jointly with the negligence of others. *Secallus v. Muscarelle*, 245 N.J. Super. 535, 586 A.2d 305 (App. Div.), *aff'd*, 126 N.J. 288, 597 A.2d 1083 (1991).

Psychic Injuries - Mental Pain and Suffering. Emotional distress damages in New Jersey follows Restatement of Torts view that emotional disturbance, to be compensable at all, must be sufficiently substantial to result in physical illness or serious psychological sequelae. *Eyrich v. Dam*, 193 N.J. Super. 244, 473 A.2d 539 (App. Div. 1984), *aff'd*, 203 N.J. Super. 144, 495 A.2d 1375 (App. Div. 1985). Damages are recoverable where person is put in reasonable fear of his own immediate safety which results in substantial bodily injury, if the injury would be proper element of damages if caused by direct physical injury rather than by fright. *Falzone v. Busch*, 45 N.J. 559, 214 A.2d 12 (1965). Damages are recoverable by bystander who witnesses injury to another, even if not in physical danger himself, if: 1) physical injury or death of victim was actually perceived by bystander at the scene of the victim's injury; 2) bystander and victim were bound by a marital or intimate familial relationship; 3) observation of the death or injury at the scene of the accident; and 4) resulting emotional distress of bystander is substantial. *Portee v. Jaffee*, 84 N.J. 88, 417 A.2d 521 (1980), *modified*, *Frame v. Kothari*, 115 N.J. 638, 649, 560 A.2d 675 (1989). Emotional distress resulting from physician malpractice, See *Vasilik v. Federbush*, 327 N.J. Super. 6, 742 A.2d 591 (App. Div. 1999).

Punitive Damages. "Punitive Damages Act," N.J. Stat. Ann. § 2A:15-5.9, applies to cases filed after October 29, 1995 and imposes limitations on amount of punitive damages in certain civil cases. Act caps punitive damage awards in all civil cases except those involving discrimination, bias crimes, AIDS testing, disclosure, sexual abuse and injuries caused by drunk drivers. *Id.* In all other civil cases punitive damages are limited to \$350,000 or five time compensatory damages, which-

ever is greater. All other aspects of Act apply to all civil cases. Act sets forth standard for awarding punitive damages and provides plaintiff must prove by clear and convincing evidence that harm suffered was result of defendant's acts or omissions, coupled with willful wanton disregard of persons who may be harmed or by actual malice. Factors for jury's consideration of punitive damage award: 1) likelihood serious harm would arise from defendant's conduct 2) defendant's awareness or reckless disregard such harm would occur 3) defendant's actions upon learning its initial conduct would likely cause harm 4) duration of conduct or concealment of it by defendant. When assessing amount of punitive damages jury may consider: profitability of misconduct to defendant, when misconduct terminated, and defendant's financial condition. Act provides defendant with right to bifurcated trial upon request.

Collateral Source Rule. Premise of former "collateral source" rule is that receipt of benefits from collateral source, though lessening effect of financial losses to plaintiff, will not diminish damages otherwise recoverable from wrongdoer in tort case. *Sporn v. Celebrity, Inc.*, 129 N.J. Super. 449, 324 A.2d 71 (Law Div. 1974). Purpose of collateral source rule is to prevent double recovery. *Parker v. Esposito*, 291 N.J. Super. 560, 677 A.2d 1159 (App. Div. 1996), *cert. denied*, 146 N.J. 566, 683 A.2d 1162.

Effective December 18, 1987, in any civil action for personal injury or death, except action governed by PIP law, if plaintiff receives or is entitled to benefits for injuries from any other source other than joint tortfeasor, workers compensation or life insurance, such benefits shall be disclosed to court and amounts that duplicate any benefit contained in award shall be deducted from plaintiff's award. N.J. Stat. Ann. § 2A:15-97. Evidence of benefits from collateral source is admissible. *Id.* However, this statute does not apply to reimbursable benefits paid by Medicaid. *Lusby v. Hitchner*, 273 N.J. Super. 578, 642 A.2d 1055 (App. Div. 1994). See *Perreira v. Rediger*, 169 N.J. 399, 758 A.2d 650 (2000) (while N.J. Stat. Ann. § 2A:15-97 prevents double recovery it does not alter equitable remedy of subrogation/reimbursement by which one who pays damages caused by fault of another is entitled to recoup payment - also addressing health insurer's reimbursement rights.) Statutory provision allowing for damages duplicating workers compensation award does not apply to claims against public entities. N.J. Stat. Ann. § 59:9-2; see *Furey v. Ocean Cty.*, 273 N.J. Super. 300, 641 A.2d 1091 (App. Div. 1994), *cert. denied*, 138 N.J. 272, 649 A.2d 1291 (1995).

DEATH

See Law Digest Tables.

Abatement and Survival of Action. All rights of action for tortious injury or damage to deceased or his property incurred prior to death survive. *Alfone v. Sarno*, 168 N.J. Super. 315, 403 A.2d 9 (App. Div. 1979), *modified on other grounds*, 87 N.J. 99, 432 A.2d 857 (1981). New Jersey survival statute does not permit recovery for decedent's prospective lost earning capacity. *Pollack v. Barrickman*, 610 F. Supp. 878 (D.N.J. 1985). *But see Amoroso v. Burdette Tomlin Mem. Hosp.*, 901 F. Supp. 900, 903 (D.N.J. 1997) (declining to follow *Pollock* on grounds that New Jersey Legislature in providing limited recovery under the survival act "was expressing its interest in protecting New Jersey defendants.") Right of action against any person who has committed a trespass survives against such person's executors or administrators; and also against heirs and next of kin of deceased tortfeasor. Word "trespass" means "tort." *Primmer v. Baldwin*, 1 N.J. Misc. 95 (1923), N.J. Stat. Ann. §§ 2A:15-3, 2A:15-4, 2A:26-16, 2A:64-1.

Action for Wrongful Death. N.J. Stat. Ann. § 2A:31-1 *et seq.* Purpose of Wrongful Death Act is to provide compensation for pecuniary losses suffered by survivors of those killed by wrongful acts. *DeFelice v. Beall*, 274 N.J. Super. 592, 644 A.2d 1136 (App. Div. 1994), *cert. denied*, 138 N.J. 268, 649 A.2d 1288. Must be brought within two years after death. N.J. Stat. Ann. § 2A:31-3. Discovery rule not available to toll running of statute of limitations in wrongful death action. *Presslaff v. Robins*, 168 N.J. Super. 543, 403 A.2d 939 (App. Div. 1979). But Wrongful Death Act statute of limitations can be equitably tolled for patient's minor children. *La Fage v. Jani*, 166 N.J. 412 (2001). Wrongful death action instituted within 2 years of death is not barred by statute of limitations even though underlying survival action would have been so barred. *Silverman v. Lathrop*, 168 N.J. Super. 333, 403 A.2d 18 (App. Div. 1979); *Miller v. Estate of Sperling*, 166 N.J. 370 (2001). Where fictitious defendants are named in complaint, substitution of true defendants would relate back to original complaint. *Hernandez v. St. James Hosp.*, 214 N.J. Super. 538, 520 A.2d 773 (App. Div. 1986).

Where injured person dies as result of accident, his cause of action for injuries action passes to his estate, while new and separate cause of action, with its own statute of limitations, arises for beneficiaries named in Act. *Kotkin v. Caprio*, 65 N.J. Super. 453, 168 A.2d 69 (App. Div. 1961), *cert. denied*, 34 N.J. 470, 169 A.2d 745 (App. Div. 1961). Unborn fetus is not a "person" within the meaning of Wrongful Death Act. *Giardina v. Bennett*, 111 N.J. 412, 545 A.2d 139 (1988). *But see Gendek v. Poblete*, 139 N.J. 291, 654 A.2d 970 (1995)



(declining to extend on grounds “no need exists,...to impose on the mother..., the added requirement that she ‘be contemporaneously aware of the malpractice and the injury of her fetus’ or be ‘shocked’ by the malpractice,” however, not overruling the proposition that an unborn fetus is not a “person”). Unmarried cohabitant of decedent not entitled to benefits under Wrongful Death Act. *Sykes v. Propane Power Corp.*, 224 N.J. Super. 686, 541 A.2d 271 (App. Div. 1988).

Where plaintiff recovered judgment for personal injury in prior medical malpractice action and subsequently died as result of same malpractice, representatives of estate were not barred from bringing subsequent wrongful death action. *Alfone*, 168 N.J. Super. at 323. However, no element of damages may be sought in wrongful death action that were or could have been claimed in decedent’s prior personal injury action. *Id.*

Parents of decedent receiving improper emergency care following suicide attempt where prompt attempts were not made to revive him could recover on showing defendant’s neglect negated substantial possibility that prompt rescue efforts would have been successful. *Hake v. Manchester Township*, 98 N.J. 302, 486 A.2d 836 (1985). *But see Scafidi v. Seiler*, 119 N.J. 93, 574 A.2d 398 (1990), medical malpractice action for improper treatment of preexisting condition causing premature birth and death of 7 month old infant where court held damages limited to extent plaintiffs’ ultimate harm would have resulted from preexisting condition, without regard to physician’s intervening negligence and physician’s liability should be adjusted to reflect likelihood of that outcome. *See also McKenney ex rel. McKenney v. Jersey City Medical v. Jersey City Medical Ctr.*, 165 N.J. 607, 762 A.2d 221 (2000), *cert granted in part*, 165 N.J. 670, 762 A.2d 221 (2000), *rev’d*, 167 N.J. 359, 771 A.2d 1153 (2001).

Only pecuniary injury can be considered in wrongful death action, and nothing can be included for grief of the parents. *Capone v. Norton*, 11 N.J. Super. 189, 78 A.2d 126 (App. Div.), *aff’d*, 8 N.J. 54, 83 A.2d 710 (1951). Deceased’s next of kin may not recover for mental anguish caused by death of deceased. *Burd v. Ver-cruyssen*, 142 N.J. Super. 344, 361 A.2d 571, *cert. denied*, 72 N.J. 459, 371 A.2d 64 (1976); *DeSanto v. Babino*, 168 N.J. Super. 582, 403 A.2d 959 (App. Div. 1979), *cert. denied*, 81 N.J. 350, 407 A.2d 1224 (1979). But even in absence of showing any dependency upon deceased infant, survivors may recover damages for prospective loss of decedent’s services and companionship. *Green v. Bittner*, 85 N.J. 1, 424 A.2d 210 (1980). *But see Tynan v. Curzi*, 332 N.J. Super. 263, 753 A.2d 187, N.J. Super. A.D. (2000) (Parent could not maintain action for per quod damages, including loss of society and com-

panionship, as result of injury sustained by her child after child had reached age of majority.)

Claim for negligent infliction of emotional distress can be brought even where actual impact is not seen by next of kin, but where e.g., deceased’s mother learns of accident minutes later, rushes to scene of accident, and sees son in street, severely injured and unconscious. *Mercado v. Transport of New Jersey*, 176 N.J. Super. 234, 422 A.2d 800 (Law Div. 1980); *Mealy v. Marella*, 328 N.J. Super. 129, 744 A.2d 1226 (App. Div. 1999); *but see Tynan v. Curzi*, 332 N.J. Super. 267. Where child killed by circus leopard while in custody of neighbors who stood in close relationship to child, court declined to create cause of action for emotional distress for neighbor, who was merely spectator to incident but was not physically involved. *Eyrich v. Dam*, 193 N.J. Super. 244, 473 A.2d 539 (App. Div. 1984), *cert. denied*, 97 N.J. 583, 483 A.2d 127 (1984), and *appeal following remand*, 203 N.J. Super. 144, 495 A.2d 1375 (App. Div. 1985). However, neighbor who struggled with leopard and seized child from leopard in attempt to rescue him, could recover for emotional distress and grief he experienced which was reasonably foreseeable from episode as a whole, even though attributable to child’s death and not his own minor injuries based upon fact that he was in the zone of danger. *Id.*

Parents not entitled to recovery for emotional distress, as result of malpractice of treating physician, as mere failure to treat infant plaintiff does not constitute “incident” as required by *Frame v. Kotheri*, 218 N.J. Super. 537, 528 A.2d 86 (App. Div. 1987), *aff’d*, 115 N.J. 638, 560 A.2d 675 (1989). If family member witnesses physician’s malpractice, observes effect of malpractice on patient, and immediately connects malpractice with injury, that may be sufficient to allow recovery for family member’s emotional distress. *Polikoff v. Calabro*, 209 N.J. Super. 110, 506 A.2d 1285 (App. Div. 1986); *Mealy v. Marella*, 328 N.J. Super. 129, 744 A.2d 1226 (App. Div. 1999). However, when parents were unaware of and did not witness any professional negligence that resulted in infant’s death, parents could not recover for emotional distress suffered. *Gendek v. Poblete*, 139 N.J. 291, 654 A.2d 970 (1995).

In wrongful death actions, proper to instruct jury that recovery is not subject to income taxation. *Tenore v. NuCar Carriers*, 67 N.J. 466, 341 A.2d 613 (1975), *criticized by DeHanes v. Rothman*, 158 N.J. 90, 727 A.2d 8 (1999). Survivor’s losses in wrongful death action are limited to deceased’s net income after taxes. *Id.* Total future economic loss must be reduced to present value. *Id.* Economic testimony as to inflationary wage trend is admissible, although expert should not be per-

mitted to present conclusion as to damages in aggregate dollar terms. *Id.*

Presumption of Death. After 5 years absence, death of resident or non-resident is presumed. N.J. Stat. Ann. § 3B:27-1 *et seq.* Married person guilty of bigamy unless at time of subsequent marriage actor and prior spouse had been living apart for 5 consecutive years throughout which prior spouse was not known to be alive. N.J. Stat. Ann. § 2C:24-1. Special peril may show circumstances creating presumption in favor of death before 5 year period. *In Re Bencel*, 78 N.J. Super. 545, 189 A.2d 733 (App. Div. 1963).

DISABILITY

Disability benefits are granted by insurer if insured becomes totally and permanently disabled from bodily injury or disease to such extent as to be incapable of engaging in any occupation for remuneration or profit. Distinction drawn between policy provisions defining total disability as inability to work in usual occupation (“occupational disability insurance”) and provisions defining it as inability to work in any occupation (“general or total disability insurance”). *Dittmar v. Continental Cas. Co.*, 29 N.J. 532, 150 A.2d 666 (1959). Under Temporary Disability Benefits Law, claimant not entitled to benefits for any period during which work is performed for remuneration or profit. N.J. Stat. Ann. § 43:21-39(g). No benefits available unless claimant’s treating health care provider can certify disability. N.J. Stat. Ann. § 43:21-39(d). *See also Kazala v. Prudential Ins. Co. of Am.*, 12 N.J. 75, 95 A.2d 747 (1953).

EMPLOYMENT LAW

Employee at-will has cause of action for wrongful discharge when discharge is contrary to clear mandate of public policy. *Pierce v. Ortho Pharm. Corp.*, 84 N.J. 58, 417 A.2d 505 (1980). Employee has common law right of action for wrongful discharge based on alleged retaliatory firing attributable to filing of Workers’ Compensation claim. *Lally v. Copygraphics*, 85 N.J. 668, 428 A.2d 1317 (1981). Conscientious Employee Protection Act, N.J. Stat. Ann. § 34:19-1, *et seq.*, has codified common law cause of action first recognized in *Pierce*, as its purpose is to protect employees who report illegal or unethical workplace activities and establishes significant statutory exception to general rule that at-will employee may be terminated with or without cause. *Higgins v. Pascack Valley Hosp.*, 158 N.J. 404, 730 A.2d 327 (1999).

New Jersey civil rights statute, Law Against Discrimination (“LAD”), imposes broad limitation upon employment at-will doctrine. N.J. Stat. Ann. § 10:5-1, *et seq.* Under LAD, it is unlawful employment practice to

discriminate on basis of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, sex, atypical hereditary cellular or blood trait, or because of liability for service in Armed Forces or nationality. N.J. Stat. Ann. §§ 10:5-4, 10:5-12. LAD also makes unlawful discrimination on basis of physical disability. N.J. Stat. Ann. §§ 10:5-4.1, 10:5-29.1. Employee may state cause of action for sexual harassment under LAD by alleging harassing conduct occurred due to their sex and that reasonable person would consider conduct sufficiently severe such that conditions of employment are altered and working environment is hostile. *Lehman v. Toys-R-Us*, 132 N.J. 587, 626 A.2d 445 (1993).

Under LAD, all remedies available at common law are available to prevailing plaintiffs. N.J. Stat. Ann. § 10:5-13. Where injuries sustained in workplace are ordinarily limited to workers’ compensation, bodily injuries derived from workplace acts in violation of LAD may be brought in common law court. *Schmidt v. Smith*, 155 N.J. 44, 49, 713 A.2d 1014 (1998). Punitive damages not capped in LAD actions. N.J. Stat. Ann. § 2A:15-5.14(c). Prevailing party may be awarded attorneys’ fees in LAD action, but no fees awarded to defendant unless determined that claim was made in bad faith. N.J. Stat. Ann. § 10:5-27.1.

Absent clear and prominent disclaimer, implied promise in employment manual that employee may be fired only for cause is enforceable against employer even where employee was otherwise employed at-will. *Woolley v. Hoffman-LaRoche, Inc.*, 99 N.J. 284, 491 A.2d 1257 (1985), *modified on other grounds*, 101 N.J. 10, 999 A.2d 515 (1985).

FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables. See “NO-FAULT.”

For standard automobile policies, every owner of automobile registered or principally garaged in New Jersey is required to maintain minimum automobile liability insurance of \$15,000 for injury or death of one person, \$30,000 for more than one person and \$5,000 for damage to property in any one accident. N.J. Stat. Ann. § 39:6A-3. Effective March 22, 1999 owners of automobiles principally garaged in New Jersey may purchase a basic automobile policy. Such policies no longer contain compulsory liability coverage but still mandate property damage coverage in the amount of \$5,000. N.J. Stat. Ann. § 39:6A-3.1. “No-fault” benefits also compulsory. N.J. Stat. Ann. § 39:6A-4. See No-Fault discussion.

Motor Vehicle Security Responsibility Law. Assures that all people wrongfully injured have financially responsible persons to look to for damages. Allows Di-

rector of Motor Vehicles to revoke and suspend the registration and driving privileges of resident and non-resident uninsured motorists unless security deposited. N.J. Stat. Ann. § 39:6-23, *et seq.*

Unsatisfied Claim and Judgment Fund Law. Provides for investigation and defense of claims against financially irresponsible motorists. Recovery may be had from Fund for injury to person or property in excess of \$500, but not more than \$15,000 for injury or death of one person or \$30,000 for same for more than one person in any one accident and \$5,000 for damage to property, in any one accident. N.J. Stat. Ann. § 39:6-69 *et seq.* N.J. Stat. Ann. § 39:6-64C abolishes Unsatisfied Claim and Judgment Fund Board and transfers all functions to New Jersey Property-Liability Guaranty Association.

FIRE INSURANCE

Actual Cash Value. New Jersey has adopted "broad evidence" rule, which, in determining actual cash value, takes into consideration replacement cost, depreciation, age of building, cost and extent of repairs made, use of building, condition of building prior to loss, etc. *Elberon Bathing Co. v. Ambassador*, 77 N.J. 1, 389 A.2d 439 (1978).

Arson. Defenses of arson, fraud and false swearing must be established by preponderance of evidence, not by clear and convincing evidence. *Italian Fisherman, Inc. v. Commercial Union*, 215 N.J. Super. 278, 521 A.2d 912 (App. Div.), *cert. denied*, 107 N.J. 152, 526 A.2d 211 (1987); *Olesak v. Central Mut.*, 215 N.J. Super. 155, 521 A.2d 849 (App. Div. 1987).

Appraisal. If the insured and insurer cannot agree on actual cash value or loss amount, then on written demand of either, each shall select a competent and disinterested appraiser, who then shall select an umpire. Appraisers shall appraise the actual cash value of each item separately and submit to umpire only disputed items. N.J. Stat. Ann. § 17:36-5.20 (Line 123 *et seq.*) Purpose of appraisal is to submit disputes to third parties to effect speedy resolution without recourse to courts. *Elberon, supra*.

Assignment. Assignment of fire insurance policy before loss, without consent of insurer, voids policy whether assignment is to mortgagee or vendee. *Kase v. Hartford*, 58 N.J.L. 34, 32 A. 1057 (Sup. Ct. 1895); *Raiken v. Commercial*, 135 A. 479 (Sup. Ct. 1926). New standard fire policy requires written consent of insurer. N.J. Stat. Ann. § 17:36-5.19. Policy may be assigned after loss because it constitutes assignment of the loss claim. *Combs v. Shrewsbury*, 32 N.J. Eq. 512 (Ch. 1880); *Flint Frozen Foods v. Firemen's Ins. Co.*, 12 N.J.

Super. 396, 79 A.2d 739 (Law Div. 1951), *rev'd on other grounds*, 8 N.J. 606, 86 A.2d 673 (1952).

Chattel Mortgage. Standard fire policy, N.J. Stat. Ann. § 17:36-5.15 *et seq.*, eliminated any reference to personal property encumbered by chattel mortgage. Old standard policy provides that it shall be void if the subject of insurance is personal property and is or becomes encumbered by chattel mortgage. *Heliotos v. Great American*, 103 N.J.L. 529, 138 A. 97 (Sup. Ct. 1927) holds policy indivisible and that chattel mortgage on part of insured property renders entire contract void. When chattel mortgage exists on property at time of issuance of policy, policy is void and assured cannot recover for loss by fire even though chattel mortgage is paid off prior to fire. *Vozne v. Springfield*, 115 N.J.L. 449, 180 A. 852 (E. & A. 1935); *Polleck v. Home Ins.*, 121 N.J.L. 52, 1 A.2d 398 (E. & A. 1938). Breach of condition as sole and unconditional owner voids policy. *Hudson v. Garfinkel*, 111 N.J. Eq. 70, 161 A. 195 (E. & A. 1932); *cf. Merchants Indem. v. Eggleston*, 37 N.J. 114, 179 A.2d 505 (1962) (provision related to encumbrances).

Binder. Binders or other contracts for temporary insurance may be made orally for a period not to exceed 10 days, or in writing not to exceed 60 days, and shall be deemed to include all terms and conditions of fire policy as set forth in statute and all applicable endorsements filed with Insurance Commissioner as designated in binder, except cancellation clause and clause specifying date and time of commencement may be superseded by express terms of binder. N.J. Stat. Ann. § 17:36-5.16.

Cancellation. See "CANCELLATION."

Mortgagee Clause. Standard mortgagee clause is independent agreement between insurer and mortgagee. In absence of legislation or agreement of parties giving mortgagors right to use fire insurance proceeds for repairing or rebuilding damaged property, mortgagee had right to apply proceeds to outstanding debt. *General GMC Sales v. Passarella*, 195 N.J. Super. 614, 481 A.2d 307 (App. Div. 1984), *aff'd*, 101 N.J. 12, 499 A.2d 1017 (1985). Under Standard Mortgagee clause, mortgagee's rights are independent of mortgagor's. Under terms of this clause, if insurer denies liability as to mortgagor, pays to mortgagee full amount of its debt, it is entitled to assignment of bond and mortgage and all other securities held by mortgagee. It sometimes occurs that, as against mortgagor, insurer would be entitled to pro rate with other insurers on risk, when as to mortgagee it may not do so. *Power v. Ajax*, 110 N.J.L. 256, 164 A. 410 (E. & A. 1933). If insurer pays less than full amount of debt, it is not entitled to assignment of any part of bond and mortgage. Nevertheless, mortgagee holds entire debt in trust. First to pay itself balance due it, then to repay insurer. To entitle insurer to subrogation, it must notify

mortgagee that it disclaims liability to mortgagor and to enforce right of subrogation it must establish that it is in fact under no liability to mortgagor. *Selray v. Mas-simino*, 110 N.J. Eq. 300, 160 A. 323 (Ch. 1932).

Mortgagee who forecloses his mortgage, acquires title to insured premises and subsequently sells premises to third party, taking back purchase money mortgage prior to fire, cannot recover on policy issued prior to Sheriff's sale, because he cannot subrogate insurer to mortgage not in existence when policy was issued. *Bess v. Importers*, 12 N.J. Misc. 119, 169 A. 536 (Sup. Ct. 1933). Insurer must elect to take subrogation within reasonable time after fire, but if mortgagee has divested self of all rights in security, insurer is not obliged to make tender of subrogation. *Altschuler v. New Brunswick*, 114 N.J.L. 442, 176 A. 359 (E. & A. 1935).

Reformation. Extraordinary remedy of reformation of policy is available only where mutual mistake or where mistake of one party is accompanied by fraud or unconscionable conduct of other party. *Martinez v. John Hancock*, 145 N.J. Super. 301, 367 A.2d 904 (App. Div. 1976), *cert. denied*, 79 N.J. 253, 377 A.2d 660 (1977). Reformation would not lie where general agent's dereliction was not deliberate or unconscionable, was at most an oversight, and real wrongdoers were brokers who ordered wrong kind of coverage and failed to review policy to make sure policy conformed to client's insurance needs. *Seiden v. Jefferson Ins.*, 112 N.J. Super. 86, 270 A.2d 417 (App. Div.), *aff'd*, 57 N.J. 171, 270 A.2d 412 (1970).

Severable Contracts. Unless terms of fire insurance policy are plainly to contrary and clearly called to attention of insured, insurer's obligation is several as to each insured and fraud or misconduct of one insured does not bar recovery to innocent co-insureds. *Howell v. Ohio Cas.*, 130 N.J. Super. 350, 327 A.2d 240 (App. Div. 1974). Policy of insurance is not divisible so as to cover part of property described. *Rice v. Norwich*, 128 N.J.L. 314, 25 A.2d 907 (E. & A. 1942).

Standard Policy Provisions. Substantially like New York, Pennsylvania and Connecticut standard policies. N.J. Stat. Ann. § 17:36-5.20. Provisions of policy drafted by the legislature are not to be construed against the insurer; ambiguous provisions drafted by the insurer without legislative restrictions are resolved against the insurer. Any conditions inconsistent with form prescribed by statute are a nullity. *Herbert L. Farkas Co. v. New York Fire Ins. Co.*, 5 N.J. 604, 76 A.2d 895 (1950).

Explosion. Standard fire policy provides insurer not liable for loss occurring as result of explosion unless fire ensues, and in that event, for loss by fire only. N.J. Stat. Ann. § 17:36-5.20 (line 36, *et seq.*)

Friendly Fires. Standard fire policy held to afford coverage for damage to boiler due to failure of low water cut off valve despite contention damage was result of "friendly fire." *Karadontes v. Continental Ins. Co.*, 139 N.J. Super. 599, 354 A.2d 696 (Dist. Ct. 1976).

Proof of Loss. By statute, no duty on assured to submit proof of loss by fire unless assured is furnished sixty days written notice that insurer desires proof of loss. N.J. Stat. Ann. § 17:36-6. *But see* N.J. Stat. Ann. § 17:36-5.20 (Line 90 *et seq.*). N.J. Stat. Ann. § 17:36-6 does not, on its face, apply to losses other than by fire; therefore, not applicable to losses under extended coverage. *Brindley v. Firemen's*, 35 N.J. Super. 1, 113 A.2d 53 (App. Div. 1955). As to form of notice, *see Luppino v. Firemen's*, 13 N.J. Misc. 223, 177 A. 446 (Sup. Ct. 1935). Voluntary filing of proofs more than sixty days after loss is not necessarily waiver of statutory protection. *Higgins v. Fidelity-Phoenix*, 107 N.J.L. 175, 151 A. 869 (E. & A. 1930). Failure to file proof in accordance with demand does not void standard fire insurance contract with rider adopting it as a rent loss policy, but only bars maintenance of action until proof is furnished. *Budrecki v. Firemen's*, 114 N.J.L. 187, 176 A. 143 (E. & A. 1935). General denial of liability is evidence of waiver of right to require assured to furnish proof of loss, unless based in part on failure of assured to comply with this particular provision. *Radwanski v. Scottish Union*, 100 N.J.L. 192, 126 A. 657 (Sup. Ct. 1924); *Evans v. Farmers*, 110 N.J.L. 159, 164 A. 258 (E. & A. 1933). Denial of liability on other grounds is waiver of proof of loss. *Rosenberg v. Maryland*, 3 N.J. Misc. 1132, 130 A. 726 (Sup. Ct. 1925), *aff'd*, 102 N.J.L. 724, 132 A. 923 (E. & A. 1926); *McNamee v. Metropolitan*, 137 N.J.L. 709, 61 A.2d 271 (E. & A. 1948). Policy provisions against change or waiver of conditions without written endorsement does not apply to conditions to be performed after loss has occurred. *Carson v. Jersey City Ins. Co.*, 43 N.J.L. 300, 39 Am. Rep. 584 (Sup. Ct. 1881). Insured's overestimate or overvaluation by mistake in proof of loss due to fire does not amount to fraud sufficient to void policy. *Jersey City Ins. Co. v. Nichols*, 35 N.J. Eq. 291, 40 Am. Rep. 625 (1882).

Repair/Replacement Value. Repair or replacement cost constitutes upper limit, not absolute measure of, insurer's liability for loss. *Elberon, supra*. Limiting clause in statute provides for actual cash value at time of loss not to exceed cost to repair or replace. *Id.*; N.J. Stat. Ann. § 17:36-5.19.

Statute of Limitations. Suit on fire policy must be commenced within 12 months after "inception of loss." Although period of limitation runs from date of loss, period is tolled from time insured gives notice until carrier formally declines liability under policy. *Peloso v.*



Hartford Fire Ins. Co., 56 N.J. 514, 267 A.2d 498 (1970); N.J. Stat. Ann. § 17:36-5.20 (Line 157 *et seq.*). *But see Haardt v. Farmers Mut. Fire Ins. Co.*, 796 F. Supp. 804 (D.N.J. 1992) (*Peloso* holding limited to cases involving insurance contracts containing “suit limitation” provision and does not affect statute of limitations analysis applied pursuant to N.J. Stat. Ann. § 2A:14-1 where New Jersey courts have invoked discovery and equitable estoppel doctrines). Insurer’s unjustifiably withholding policy information may defeat limitation defense. *Nieder v. Royal Indem.*, 62 N.J. 229, 300 A.2d 142 (1973).

Contribution. Standard policy provides liability of insurer is limited to proportion policy bears to total insurance, whether collectible or not, on same property. This provision has been construed to require apportionment of loss even though second fire policy was declared not collectible under clause-insurer not liable when loss occurs while building vacant beyond period of 60 days. *Ekelchik v. American Cas.*, 56 N.J. Super. 171, 152 A.2d 156 (App. Div. 1959). This has also been construed to require prorating with policy taken out by predecessors in title of assured which was neither cancelled nor endorsed to cover new owner. *Fisher v. Phoenix*, 103 N.J.L. 184, 134 A. 861 (E. & A. 1926).

Expiration of Policy. Fire insurer has no legal duty to advise insured of expiration of policy. *Citta v. Camden Fire Ins.*, 152 N.J. Super. 76, 377 A.2d 779 (App. Div. 1977).

Insurable Interest. Insured’s interest in property is fixed at time of loss. *General GMC Sales, supra*. Seller of property under executory contract suffers “loss,” where fire occurs prior to closing date, even where there is no abatement in purchase price. *Wolf v. Home Ins.*, 100 N.J. Super. 27, 241 A.2d 28 (Law Div.), *aff’d*, 103 N.J. Super. 357, 247 A.2d 345 (App. Div. 1968). Likewise, purchaser in possession under executory contract has insurable interest even though sellers assumed risk of loss. *Cooke v. Firemen’s*, 119 N.J. Super. 248, 291 A.2d 24 (App. Div. 1972).

GUEST CASES

Generally, a host has a duty to observe defects and provide precaution to guests against known dangers. *Berger v. Shapiro*, 30 N.J. 89, 159 A.2d 26 (1959). In the motor vehicle context, the word “guest” is used to denote one whom the owner or possessor of an automobile invites or permits to ride with him as a gratuity. *Moss v. Govan*, 52 N.J. Super. 550, 146 A.2d 227 (1950).

HOSPITAL

Hospital records which would not be admissible under one or more recognized exceptions to hearsay rule may nevertheless be admissible in evidence, but not to establish manner and place of injury. *Gilligan v. International*, 24 N.J. 230, 131 A.2d 503 (1957). Rules of Evidence now provide hospital records are admissible to permit patient’s declarations of condition, symptoms and feelings made to physician for purposes of diagnosis and treatment. Evidence Rule 803(c)(4). Generally, statements as to cause of symptoms or conditions are inadmissible. *State v. Taylor*, 46 N.J. 316, 217 A.2d 1 (1966), *cert. denied*, 385 U.S. 855 (1967). Exceptions to general rule exist where there is spontaneous motivation for truthfulness. One such exception is where history of injury is given which describes inception, general character of cause or external source of condition to be treated, so far as it is pertinent to the purpose of diagnosis and treatment. *Cestero v. Ferrara*, 57 N.J. 497, 273 A.2d 761 (1971). Where doctor cannot recollect events without hospital record, he can consult record that is admissible in evidence. *Greenfarb v. Arre*, 62 N.J. Super. 420, 163 A.2d 173 (App. Div. 1960).

Every hospital, nursing home, and licensed physician or dentist practicing in New Jersey shall have lien for services rendered to any person who sustained injuries as a result of negligence of others. N.J. Stat. Ann. § 2A:44-36. This lien shall attach to rights of action suits, claim or judgments, N.J.S.A. § 2A:44-37. No such lien exists where accident causing injury is within scope of workers’ compensation law. N.J. Stat. Ann. § 2A:44-40. Liens of professionals are limited to reasonable value of services rendered but may not exceed 25 percent of any judgment or settlement. N.J. Stat. Ann. § 2A:44-39. Liens on hospitals shall not exceed ward rates. N.J.S.A. § 2A:44-39.1. Required notice must be filed in the office of county clerk where injury occurred within 90 days after first treatment. N.J. Stat. Ann. § 2A:44-41.

In 1959, liability for negligence of a nonprofit corporation, society or association organized exclusively for hospital purposes was statutorily limited to \$10,000. N.J. Stat. Ann. § 2A:53A-8. Statutory limit on liability increased to \$250,000 with interest and costs of suit by Health Care Cost Reduction Act, N.J. Stat. Ann. § 2A:53A-8. Amendment to the charitable Immunity Act increasing hospital liability from maximum of \$10,000 to \$250,000 applies prospectively only to claims accruing on or after July 31, 1991 effective date of amendment. *Schiavo v. J.F. Kennedy Hosp.*, 258 N.J. Super. 380, 609 A.2d 781 (App. Div. 1992), *aff’d*, 131 N.J. 400, 620 A.2d 1050 (1993). The section limiting liability of non-profit hospitals does not apply to actions deriving from a strict liability theory. *Brody v. Overlook Hospital*,



121 N.J. Super. 299, 296 A.2d 688 (Law. Div. 1972), *rev. on other grounds*, 127 N.J. 448, 605 A.2d 1097 (App. Div. 1992). No statutory or common law duty on hospital to assure its physicians, including those with only admitting privileges, have malpractice insurance. *President v. Jenkins*, 357 N.J. Super. 288, 814 A.2d 1173 (App. Div. 2003), *aff'd in part, rev'd in part*, 180 N.J. 550, 853 A.2d 247 (2004).

HUSBAND AND WIFE

See Law Digest Tables.

New Jersey does not apply community property system; mother's obligation to care for child does not depend upon delegation of authority from husband. *Savoia v. F.W. Woolworth Co.*, 88 N.J. Super. 153, 211 A.2d 214 (App. Div. 1965). There is no interspousal immunity in automobile negligence actions. *Darrow v. Hanover Township*, 58 N.J. 410, 278 A.2d 200 (1971); *Merenoff v. Merenoff*, 76 N.J. 535, 388 A.2d 951 (1978). Independent cause of action exists between spouses in a divorce case for emotional distress in absence of physical injury. *Ruprecht v. Ruprecht*, 252 N.J. Super. 230, 599 A.2d 604 (Ch. Div. 1991). There is no immunity for one spouse's assertion of claim against other based upon transmission of venereal disease. *G.L. v. M.L.*, 228 N.J. Super. 566, 550 A.2d 525 (Ch. Div. 1988). Public policy precludes tort actions between spouses to recover compensatory or punitive damages for representations made concerning birth control before or during sexual relationships between consenting adults where alleged wrong results in birth of healthy child. *C.A.M. v. R.A.W.*, 237 N.J. Super. 532, 568 A.2d 556 (App. Div. 1990). Committed same-sex couples entitled to same rights and benefits as married opposite-sex couples. *Lewis v. Harris*, 188 N.J. 415, 908 A.2d 196 (2006).

Under *Romeo v. Romeo*, 84 N.J. 289, 418 A.2d 258 (1980), husband and wife have capacity to enter into contracts, therefore wife who owns business and employs husband is entitled to dependency benefits following death of husband in course of his employment. *Overruling Bendler v. Bendler*, 3 N.J. 161, 69 A.2d 302 (1949). See also *Felice v. Felice*, 34 N.J. Super. 388, 112 A.2d 581 (App. Div. 1955) addressing spouses of members of partnerships, and *Eule v. Eule Motor Sales*, 34 N.J. 537, 170 A.2d 241 (1961) (Wife may sue partnership, of which her husband is member, for injuries negligently inflicted by him.)

Loss of Consortium. Action "per quod" for loss of consortium is suit by spouse for compensation for loss of other spouse's aid, society and conjugal fellowship. *Tichenor v. Santillo*, 218 N.J. Super. 165, 527 A.2d 78 (App. Div. 1987). Per quod claim is maintainable only by reason of spouse's personal injury and is dependent

upon and incidental to personal injury action. *Id.* Consortium claim of wife may be prosecuted only if joined with husband's action. *Ekalo v. Constructive Service*, 46 N.J. 82, 215 A.2d 1 (1965). Damages for loss of companionship and society are really economic dependency damages. *DeLane v. City of Newark*, 343 N.J. Super. 225, 778 A.2d 511 (App. Div. 2001). In motor vehicle negligence cases, passenger spouse's per quod award is reduced by driver spouse's comparative negligence. *Tichenor v. Santillo*, 218 N.J. Super. 165, 527 A.2d 78 (App. Div. 1987). Absence of marriage defeats per quod claim. *Sykes v. Zook Enterprises, Inc.*, 215 N.J. Super. 461, 521 A.2d 1380 (Law Div. 1987), *aff'd sub nom.*, *Sykes v. Propane Power Corp.*, 224 N.J. Super. 686, 541 A.2d 271 (App. Div. 1988). *But see Stahl v. Nugent*, 212 N.J. Super. 340, 514 A.2d 1367 (Law Div. 1986), which held newlywed husband not barred from pursuing loss of consortium claim from date of marriage despite fact that wife's injury was sustained before marriage. See also *Friedman v. Klazmer*, 315 N.J. Super. 467, 718 A.2d 1238 (Law Div. 1998). *Stahl* decision has been strongly criticized. *Sykes*, 215 N.J. Super. at 465, 521 A.2d at 1382. See also *Schroeder v. Boeing*, 712 F. Supp. 39 (D.N.J. 1989). Derivative claims, for loss of consortium and services, fail upon failure of underlying personal injury claim. *Schenck v. Kloster Cruise Ltd.*, 800 F. Supp. 120 (D.N.J. 1992), *aff'd*, 993 F.2d 225 (3rd Cir. 1993).

INFANTS

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

Parent-child immunity eliminated in automobile negligence actions for causes of action arising after July 10, 1970. *France v. A.P.A. Transport Corp.*, 56 N.J. 500, 267 A.2d 490 (1970); *Schwartz v. U.S. Rubber Corp.*, 118 N.J. Super. 128, 286 A.2d 724 (App. Div. 1972), *cert. denied*, 291 A.2d 20 (1972).

This abolition applies to suits by children against parents and by parents against children. *Guterman v. Guterman*, 66 N.J. 69, 328 A.2d 233 (1974); *Small v. Rockfeld*, 66 N.J. 231, 330 A.2d 335 (1974). *Foldi v. Jeffries*, 93 N.J. 533, 461 A.2d 1145 (1983) abolished all parental immunity except for providing of customary child care and exercise of parental authority. See also *Murray v. Shimalla*, 231 N.J. Super. 103, 555 A.2d 24 (App. Div. 1989); *Mancinelli v. Crosby*, 247 N.J. Super. 456, 589 A.2d 664 (App. Div. 1991) (parent is liable for child's injury resulting from inadequate supervision only if lack of supervision is willful or wanton); *Buono v. Scalia*, 179 N.J. 131, 843 A.2d 1120 (2004).

Davis v. Elizabeth Gen'l, 228 N.J. Super. 17, 548 A.2d 528 (Law Div. 1988) recognized parental loss of



companionship and services claim for child's serious brain injury. However, Court in *Tynan v. Curzi*, 332 N.J. Super. 267, 753 A.2d 1987 (2000) overruled *Davis* as well as *Mealey v. Marella*, 328 N.J. Super. 129, 744 A.2d 1226 (Law Div. 1999), to extent it extended parent's right to maintain action for per quod damages, including loss of society and companionship, as result of injuries sustained by child after child had reached age of majority.

INLAND MARINE

"Inland Marine" insurance is a misnomer and includes many forms of insurance fully lacking in marine features. While chief characteristic is relation to transportation, there are recognized categories with no such relation. *Arrow Industrial Carriers v. Continental*, 232 N.J. Super. 324, 556 A.2d 1310 (Law Div. 1989).

"External cause" within policy insuring processor of textiles belonging to others against all risks of physical loss or damage to customer's goods from any external cause, did not mean something which happened off premises or was set in motion by someone or something that came from without. *Advanced Piece Dye Works v. Travelers Ind.*, 64 N.J. Super. 405, 166 A.2d 173 (App. Div. 1960).

Inland marine policy providing coverage for cargo damage incurred by insured motor carrier did not exclude coverage for collision between cargo and highway overpass bridge, although truck carrying cargo was not involved in the collision; policy provided coverage for cargo damage resulting from collision between conveyance and any other vehicle or object, but was ambiguous as to the extent of coverage when conveyance itself was not involved. *Arrow Industrial Carriers, Inc. v. Continental*, 232 N.J. Super. 324, 556 A.2d 1310 (Law Div. 1989).

LIABILITY INSURANCE

Compromise of Claims. Where insurer reserves control of settlement, insurer has duty to exercise good faith to settle claims within policy limits. *Bowers v. Camden Fire*, 51 N.J. 62, 237 A.2d 857 (1968).

Duty to Act in Good Faith. Nature of insured-insurer relationship requires insurer to exercise good faith in its dealings with insured, particularly when insured's money or other interest, e.g. reputation, may be at risk. *Lieberman v. Employers*, 84 N.J. 325, 419 A.2d 417 (1980).

Bad faith claim established by showing that "no debatable reasons existed for denial of benefits." If claim is fairly debatable, insurer not liable on insured's claim for bad faith. *Pickett v. Lloyd's*, 131 N.J. 457, 621 A.2d

445 (1993). Same standard applies to both first-party and third-party insurance. *Universal-Rundle v. Commercial Union*, 319 N.J. Super. 223, 725 A.2d 76 (App. Div.), *cert. denied*, 161 N.J. 149, 735 A.2d 574 (1999).

Insurer has fiduciary duty to take initiative and attempt to settle within policy limits. *Venetsanos v. Zucker, Facher & Zucker*, 271 N.J. Super. 459, 638 A.2d 1333 (App. Div.), *cert. denied*, 137 N.J. 166, 644 A.2d 614 (1994). Doubt as to existence of opportunity to settle within policy limits must be resolved in favor of insured unless insurer affirmatively demonstrates there was no realistic possibility of settlement within policy limits and also demonstrates that insured would not have contributed to settlement. Insurer may be guilty of bad faith even where plaintiff has not made formal offer to settle for face amount of policy. *Rova Farms Resort v. Investors Ins.*, 65 N.J. 474, 323 A.2d 495 (1974).

Insurer is liable for whole judgment when it takes unsuccessful appeal from judgment in excess of policy, where an appeal was not in good faith and plaintiff offered to settle within policy after trial prior to appeal. *Bowers, supra*. When probable that adverse verdict will exceed policy limit, insurer must treat any settlement offer as if there is full coverage for any verdict, regardless of policy limits. *Bowers, supra; Board of Ed. v. Lumbermens*, 293 F. Supp. 541 (D.N.J. 1968), *aff'd*, 419 F.2d 837 (3rd Cir. 1969).

Right of Insurer to Settle. While liability insurer normally has absolute right to control settlement where loss falls within policy limits, if loss exceeds limits of policy and if insurer breaches obligation to settle, insured may proceed to make prudent good faith settlement for amount in excess of policy limits and then, on proof of insurer's breach of reasonableness and good faith of settlement made, recover amount of policy limits from insurer. *Fireman's Fund v. Security Ins.*, 72 N.J. 63, 367 A.2d 864 (1976).

Contribution among Joint Tortfeasors. Right of contribution exists among joint tortfeasors for amount paid over pro rata share. N.J. Stat. Ann. § 2A:53A-2, 3. No contribution from person shall be entitled to indemnification for liability for which contribution sought. N.J. Stat. Ann. § 2A:53A-3. Where public entity is joint tortfeasor, can only obtain contribution to extent claim recognized under Tort Claims Act. N.J. Stat. Ann. § 59:9-3. Public entity not required to contribute more than percentage of damages attributed to public entity. N.J. Stat. Ann. § 59:9-3.1. See also "NEGLIGENCE."

Cooperation of Insured. Cooperation clauses impose a duty on insureds to assist insurers in the conduct and defense of actions. Insureds are generally required to provide all such information and assistance as insurer

may require. *In re: Environmental Ins. Declaratory Jmt. Actions*, 259 N.J. Super. 308, 612 A.2d 1338 (App. Div. 1992). If insured voluntarily assumes liability for accident, insurer is relieved from liability under policy. *Kindervater v. Motorists Cas.*, 120 N.J.L. 373, 199 A. 606 (E. & A. 1938). Insured's compliance with policy terms placing insured under duty to "cooperate" with carrier in conduct of suits and in "securing and giving of evidence," and to refrain from "voluntarily...assuming any obligation" is condition precedent to recovery under policy and insured's breach can cause forfeiture of coverage. *Griggs v. Bertram*, 88 N.J. 347, 443 A.2d 163 (1982). Insurer may disclaim coverage under cooperation clause only by showing insured breached the clause and the insurer suffered likelihood of appreciable prejudice as a result. *Chemical Leaman Tank v. Aetna*, 817 F. Supp. 1136 (D.N.J. 1993), *aff'd*, 89 F.3d 976 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 485 (1996).

Construction of coverage terms generally, see "CONSTRUCTION OF POLICY."

Standard Coverage Provisions. Pollution exclusion clause not enforced as written because industry did not present exclusion to regulators as eliminating all coverage for pollution claims except abrupt, accidental discharges. *Morton v. General Acc.*, 134 N.J. 1, 629 A.2d 831 (1993), *cert. denied*, 512 U.S. 1245 (1994).

Omnibus Coverage Provisions. Statutorily mandated omnibus liability coverage clauses are liberally construed to extend coverage to all potential persons. *Rao v. Universal Underwriters*, 228 N.J. Super. 396, 549 A.2d 1259 (App. Div. 1988).

Direct Action. Third party claimant not entitled to bring direct action against liability insurer unless they occupy status of judgment creditor. *Werrman v. Aratusa, Ltd.*, 266 N.J. Super. 471 (App. Div. 1993); *Eschle v. Eastern Freight Ways*, 128 N.J. Super. 299, 319 A.2d 786 (Law Div. 1974); *Caldwell Trucking PRP Group v. Spaulding Composites*, 890 F. Supp. 1247 (D.N.J. 1995) (generally no direct action against insurer absent statutory or contractual provision). Absent insured's express consent to assign rights against insurer for "bad faith" excess verdict, injured party has no right to pursue such excess verdict above policy limits against defendant's insurer. *Murray v. Allstate*, 209 N.J. Super. 163, 507 A.2d 247 (App. Div. 1986).

Duty to Defend. Where allegations of complaint potentially fall within terms of liability insurance policy, insurer has duty to defend insured. *Voorhees v. Preferred Mut.*, 128 N.J. 165, 607 A.2d 1255 (1992); *SL Industries v. American Motorists*, 128 N.J. 188, 607 A.2d 1266 (1992). However, where facts known to insurer at time claim is tendered establish that claim is not

covered under policy, insurer has no duty to defend notwithstanding allegations in underlying complaint. *Hartford Acc. & Indem. v. Aetna*, 98 N.J. 18, 483 A.2d 402 (1984); *Burd v. Sussex Mut.*, 56 N.J. 383, 267 A.2d 7 (1970). Duty to defend is co-extensive with duty to indemnify. If no duty to indemnify, no duty to defend. *Trustees of Princeton Univ. v. Aetna*, 293 N.J. Super. 296, 680 A.2d 783 (App. Div. 1996); *Aetna v. Ply Gem Industries*, 343 N.J. Super. 430, 778 A.2d 1132 (App. Div. 2001). If facts that govern whether or not there is coverage will not be resolved in underlying liability case, insurer may decline to defend and defense obligation reverts to duty to reimburse for defense expenses if coverage later established. *Trustees of Princeton Univ. v. Aetna, supra*. Where initial facts indicate no coverage for underlying claim, but later discovery reveals claim may be one covered by policy, duty to defend arises at that time and insurance company liable only for portion of defense costs arising after being informed of facts triggering duty to defend. *SL Industries, supra*. *But see L.C.S., Inc. v. Lexington Ins.*, 371 N.J. Super. 482, 853 A.2d 974 (App. Div. 2004) (declining to apply *Burd* and finding duty to defend even when complaint alleges conflicting theories, some of which are not covered, though subject to full reservation of rights).

Liability Between Insurers. No duty of primary undertaking defense to inform other primary of status of case and settlement negotiations. *General Acc. v. N.Y. Marine*, 320 N.J. Super. 546, 727 A.2d 1050 (App. Div. 1999). Primary insurer has same duty to excess insurer, as it does to its insured, as to settlement within policy limits. *Western World v. Allstate*, 150 N.J. Super. 481, 376 A.2d 177 (App. Div. 1977).

Exclusions.

Intentional Act. Intentional or reckless act must result in intended or reasonably expected injury for exclusion to apply. *Allstate v. Schmitt*, 238 N.J. Super. 619, 570 A.2d 488 (App. Div.), *cert. denied*, 122 N.J. 395, 585 A.2d 394 (1990). In certain situations, intentional act may be so reprehensible that intended injury is presumed. *Harleysville Ins. v. Garitta*, 170 N.J. 223, 785 A.2d 913 (2001) (citing *Voorhees v. Pref. Mutual*, 128 N.J. 165, 607 A.2d 1255 (1992)).

Assault. Regardless of how claim is framed, inadequate security, negligent hiring, training and supervision of employees, if operative facts constitute an assault and battery, exclusion applies. *Stafford v. T.H.E. Ins.*, 309 N.J. Super. 97, 706 A.2d 785 (App. Div. 1998); *c.f. L.C.S., Inc., supra*, finding that exclusion did not relieve insurer when policy ambiguous and no clear nexus between assault and battery and negligence claims.

Violation of Law. If complaint alleges conduct that would constitute violation of penal law, exclusion barring coverage for violations of penal law applies. *Mroz v. Smith*, 261 N.J. Super. 133, 617 A.2d 1259 (App. Div. 1992).

Pollution Exclusion. "Sudden and Accidental" pollution exclusion excludes coverage for contamination claims where insured's conduct constitutes intentional discharge of known pollutant. *Morton Int'l v. General Acc.*, 266 N.J. Super. 300, 629 A.2d 895 (App. Div. 1991), *aff'd*, 134 N.J. 1, 629 A.2d 831 (1993), *cert. denied*, 512 U.S. 1245 (1994). "Absolute" pollution exclusion is valid and operates to eliminate coverage for pollution liability claims. *Kimber Petroleum v. Travelers*, 298 N.J. Super. 286, 689 A.2d 747 (App. Div.), *cert. denied*, 150 N.J. 26, 695 A.2d 669 (1997). *But see Nav-Its, Inc. v. Selective*, 183 N.J. 110, 869 A.2d 919 (2005) (limiting pollution exclusion hazards traditionally associated with environmental claims).

Owned Property Exclusion. Owned property exclusion is clear and unambiguous and, by its terms, excludes coverage for on-site soil contamination on insured's property. Owned property exclusion does not exclude coverage for costs related to remediation of groundwater contamination because groundwater is not property of policyholder. *Kentopp v. Franklin Mut.*, 293 N.J. Super. 66, 679 A.2d 701 (App. Div. 1996). For the purposes of a commercial general liability policy, groundwater should not be considered property owned by the insured. *Universal-Rundle v. Commercial Union*, 319 N.J. Super. 223, 725 A.2d 76 (App. Div. 1999), *cert. denied*, 161 N.J. 149, 735 A.2d 574 (1999). Where soil contamination is only contamination at issue, exclusion will apply. *Id.*

Business Risk Exclusion. Excludes coverage for damage to insured's product or work but not to damage caused to work or product of others. *Weedo v. Stone-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788 (1979).

Waiver of Exclusions. Insurer estopped from asserting exclusion if act or omission of insurer materially encroaches on insured's right to handle claim directly. *Griggs v. Bertram*, 88 N.J. 347, 443 A.2d 163 (1982). Citation of one exclusion denying coverage while failing to mention another does not waive unmentioned exclusion; coverage cannot be enlarged by waiver. *Greenberg & Covitz v. Nat'l Union*, 312 N.J. Super. 251, 711 A.2d 909 (App. Div.), *cert. denied*, 157 N.J. 577, 725 A.2d 688 (1998), *cert. granted and remanded on other grounds*, 161 N.J. 143, 735 A.2d 569 (1999).

Reservation of Rights. No waiver of defenses not specifically raised in reservation of rights letter where letter reserves right to assert all defenses and no action

suggesting intentional relinquishment of known right. *Hatco v. W.R. Grace*, 801 F. Supp. 1334 (D.N.J. 1992).

Infants. Child living with mother during week and with father on weekends is resident of both households under homeowners' policies. *Miller v. USF&G*, 127 N.J. Super. 37, 316 A.2d 51 (App. Div. 1974).

Expected and/or Intended. Burden on insurer that seeks to preclude coverage based on "occurrence" definition to prove insured intended or expected to cause environmental harm comparable to both severity and type with that for which coverage is sought. It is not enough that insurer prove insured expected or intended any injury to environment. *CPC Int'l v. Hartford*, 316 N.J. Super. 351, 720 A.2d 408 (App. Div. 1998), *cert. denied*, 158 N.J. 74, 726 A.2d 937 (1999).

Allocation and Availability of Insurance. Generally, time of occurrence of accident within meaning of policy is not when wrongful act was committed, but when complaining party was actually damaged. *Hartford v. Aetna*, 98 N.J. 18, 483 A.2d 402 (1984). Exception in New Jersey has continuous trigger approach in environmental contamination and exposure cases where progressive individual injury or damage results from exposure to injurious conditions. *Owens-Illinois v. United Ins.*, 138 N.J. 437, 650 A.2d 974 (1994); *Carter-Wallace v. Admiral Ins.*, 154 N.J. 312, 712 A.2d 1116 (1998); *Benjamin Moore v. Aetna*, 179 N.J. 87, 843 A.2d 1094 (2004). Two basic principles of allocation for indivisible injury from exposure: 1) portion of damages allocated to given year is based on coverage limits for that year in relation to total coverage limits for all years; 2) damages are allocated to policy years by vertical exhaustion. Policyholder responsible for portion of damages allocated to periods when elected to be uninsured or self-insured and to periods where policyholder's coverage exhausted or insolvent. *Spaulding Composites v. Aetna*, 176 N.J. 25, 819 A.2d 410 (2003), *cert. denied, sub nom., Liberty Mut. v. Caldwell Trucking*, 540 U.S. 1142 (2004). Non-cumulation clause unenforceable in context of *Owens-Illinois/Carter Wallace* allocation. *Id.* Insured required to satisfy full deductible for each policy under continuous trigger theory before entitled to indemnity; no pro-rata allocation of deductibles. *Benjamin Moore, supra*.

Insolvency of Insured. Insolvency or bankruptcy of insured shall not release insurance carrier from payment of damages for injuries sustained or loss occasioned during life of policy. N.J. Stat. Ann. § 17:28-2. In event execution is returned unsatisfied because of insolvency or bankruptcy of insured, action may be maintained against insurer on policy for amount of judgment. *Id.*

Jury. Right to jury does not attach to declaratory judgment action by insured against insurer primarily

seeking order to discharge future policy obligations, deemed equivalent of equitable claim for specific performance. *In re Environmental Ins., Dec. Judg. Actions*, 149 N.J. 278, 693 A.2d 844 (1997). Right to jury does attach to declaratory judgment action primarily seeking legal relief, coverage for damages already incurred. *Ward v. Merrimack Mut.*, 312 N.J. Super. 162, 711 A.2d 394 (App. Div. 1998).

Notice Provision. Purpose of notice requirement of liability policy is to afford insurer opportunity for investigation and to prevent fraud and imposition upon insurers; but such requirement is not directed to accident so seemingly trivial as to relieve prudent action or lack foresight of probable suit for damages, and whether insured should have given notice is question of fact. *Associated Metals & Minerals v. Dixon Chem. & Research*, 68 N.J. Super. 305, 172 A.2d 237 (Ch. Div. 1961), *vacated in part*, 82 N.J. Super. 281, 197 A.2d 569 (App. Div. 1963), *on remand*, 83 N.J. Super. 263, 199 A.2d 394 (Ch. Div. 1964), *cert. denied*, 42 N.J. 501, 201 A.2d 580 (1964). No loss of coverage under auto policy for failure to notice if insured reasonably and in good faith believed no claim against him was contemplated. *Cooper v. GEICO*, 51 N.J. 86, 237 A.2d 870 (1968). For occurrence policies, insurer must show appreciable prejudice resulting from failure to give required notice. *Cooper, supra*. Insurer must establish that substantial rights related to defense of claim have been “irretrievably lost” and insurer likely would have been able to interpose meritorious defense had it been timely notified. *American Centen. v. Warner-Lambert*, 293 N.J. Super. 567, 681 A.2d 1241 (Law Div. 1995). But notice requirement strictly construed and appreciable prejudice rule not applicable under claims made policies. *Zuckerman v. Nat’l Union*, 100 N.J. 304, 495 A.2d 395 (1985); *Gazis v. Miller*, 186 N.J. 224, 892 A.2d 1277 (2006). But these principles apply only to notice required to be given by insured to primary carrier. It is primary carrier’s responsibility to give notice to excess carriers. *Baen v. Farmer’s Mut.*, 318 N.J. Super. 260, 723 A.2d 636 (App. Div. 1999).

Punitive Damages. Policy does not afford coverage for punitive damage award as it is contrary to public policy since purpose of punitive damages is to deter aggravated misconduct in future. *Johnson & Johnson v. Aetna*, 285 N.J. Super. 575, 667 A.2d 1087 (App. Div. 1995). Insurer, as subrogee, not entitled to pursue claim for punitive damages. Insurer only entitled to indemnity to extent of money actually paid. *Colonial Penn. v. Ford*, 172 N.J. Super. 242, 411 A.2d 736 (Law Div. 1979). N.J. Stat. Ann. § 17:29B-7 penalizes insurance companies for unreasonable delays, in payment of claims no punitive damages as penalty.

Employment Claims. Employment exclusion in CGL policy held valid and barred coverage for employee’s wrongful discharge claim. *American Motorists v. L-C-A Sales*, 155 N.J. 29, 713 A.2d 1007 (1998). Coverage found for employment claims under employer’s liability (Part B) portion of workers’ compensation policies for sexual harassment claims insofar as such claims include allegations of bodily injury, despite presence of employment and intentional acts exclusions. *Schmidt v. Smith*, 294 N.J. Super. 569, 684 A.2d 66 (App. Div. 1996), *aff’d*, 155 N.J. 44, 713 A.2d 1014 (1998). Insurers have started offering separate Employment Practice Liability Insurance (E.P.L.I.) covering employment related claims. *American Motorists, supra*. Employment exclusion violated requirements of Workers’ Compensation Act and public policy in excluding coverage for alleged bodily injuries, and Act specifically requires employers obtain insurance for all employee injury claims. 155 N.J. at 37. Intentional act exclusion inapplicable because no evidence insured employer intended to harass employee, but rather vicariously liable for harassing conduct of its employees. *Id.* at 51. No coverage for wrongful termination claim because allegations of loss of sleep and appetite not “physical manifestations” of emotional injury, and therefore no bodily injury. *U.S. Liability v. Security Ins.*, 381 N.J. Super. 211, 885 A.2d 477 (App. Div. 2005). Employee accused of harassing conduct found not entitled to defense and indemnity under employer’s CGL or workers’ compensation/employers liability policies or own homeowner’s policy. *Miller v. McClure*, 326 N.J. Super. 558, 742 A.2d 564 (App. Div. 1998), *aff’d*, 162 N.J. 575, 745 A.2d 1162 (1999). Employment Benefits Liability (EBL) endorsement covers negligent acts, errors or omissions in administration of employee benefits plans, which include routine ministerial tasks, but excludes ERISA, bodily injury and loss of use of tangible personal property liability. EBL coverage narrower than coverage under fiduciary liability policies. *Maryland Cas. v. Economy Bookbinding Pension Plan and Trust*, 621 F. Supp. 410 (D.N.J. 1985).

Although Workers’ Compensation Act bars lawsuits by employees against employers for job-related injuries, Act contains exclusion for intentional wrongdoing. N.J. Stat. Ann. § 34:15-8. Employee must show deliberate intention to injure to qualify for intentional wrong exception to Workers’ Compensation Act. *Mabee v. Borden, Inc.* 316 N.J. Super. 218, 720 A.2d 342 (App. Div. 1998). The bar applies both to injuries where employee alleges conduct subjectively intended to cause injury, as well as where substantially certain to cause injury even if injury not specifically intended. *New Jersey Mfrs. v. Delta Plastics*, 380 N.J. Super. 532, 883

A.2d 399 (App. Div. 2005), *aff'd*, 188 N.J. 582, 911 A.2d 477 (2006).

Homeowner's Policies. Mini bike not covered under homeowner's policy, as it is "motorcycle" and "motor vehicle designed for travel on public roads." *Laino v. Nationwide Mut.*, 169 N.J. Super. 65, 404 A.2d 314 (App. Div. 1979). *But see Aetna v. Weiss*, 174 N.J. Super. 292, 416 A.2d 426 (App. Div.), *cert. denied*, 85 N.J. 127, 425 A.2d 284 (1980), where court held moped not "motor vehicle" within homeowner's policy exclusion. Homeowner's exclusion for personal injury to insured excludes wife's injuries inflicted by husband. *Foley v. Foley*, 173 N.J. Super. 256, 414 A.2d 34 (App. Div. 1980).

LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables. See Also "NO-FAULT."

One year: libel and slander (N.J. Stat. Ann. § 2A:14-3); two years: injuries to persons by wrongful act (N.J. Stat. Ann. § 2A:14-2); action by parent or other persons by reason of injury to minor (N.J. Stat. Ann. § 2A:14-2.1); wrongful death (N.J. Stat. Ann. § 2A:31-3); six years: actions for property damage, conversion, trespass, replevin, contract, account, debt without specialty (N.J. Stat. Ann. § 2A:14-1); action on instrument under seal brought by merchant or financial institution (N.J. Stat. Ann. § 2A:14-4); ten years: damages from unsafe condition or improvement to real property (N.J. Stat. Ann. § 2A:14-1.1), actions commenced by State (N.J. Stat. Ann. § 2A:14-1.2); sixteen years: actions for rent, on lease under seal, contract or arbitration award under seal (N.J. Stat. Ann. § 2A:14-4); twenty years: judgment of court of record (N.J. Stat. Ann. § 2A:14-5); right of entry into real estate (N.J. Stat. Ann. § 2A:14-6); actions at law for real estate (N.J. Stat. Ann. § 2A:14-7); actions on bonds of fiduciaries. (N.J. Stat. Ann. § 2A:14-16).

Anyone under disability of age, or insane may bring action within time limited after removal of disability as to all periods of limitation N.J. Stat. Ann. § 2A:14-21. Enactment of statute modifying age of majority from 21 to 18 reduced disability of age to 18. *Green v. Auerbach Chevrolet Corp.*, 127 N.J. 591 (1992). Nonresidence of defendant suspends running of statute. N.J. Stat. Ann. § 2A:14-22. Period of military service in time of war and six months thereafter not included in computing running of statute. N.J. Stat. Ann. § 2A:14-26. Under Rule 4:2-2 civil action is commenced by filing a complaint with Court.

Ten year limit for suits on defect in improvement to real property, starting from completion date. N.J. Stat.

Ann. § 2A:14-1.1. Ten-year period begins to run at conclusion of builders' and developers' services and construction work in connection with repairs rather than from date of original construction of house. *Horosz v. Alps Estates, Inc.*, 266 N.J. Super. 382, 629 A.2d 1350 (App. Div. 1993), *aff'd*, 136 N.J. 124, 642 A.2d 384 (1994). Ten-year period not tolled by reason of infancy of plaintiff. *O'Connor v. Abraham Altus*, 67 N.J. 106, 335 A.2d 545 (1975). Surveyor is within 2A:14-1.1 but suit for damages to business of plaintiff because location of building on land due to surveying error, suit was not barred by ten year limitation. *E.A. Williams Inc. v. Russo Development Corp.*, 82 N.J. 160, 411 A.2d 697 (1980).

Removable overhead crane installed in building was piece of "production machinery" and not "improvement to real property," and accident arising out of use of crane did not fall within ten-year limitation statute. *McCalla v. Harnischfeger Corp.*, 215 N.J. Super. 160, 521 A.2d 851 (App. Div.), *cert. denied*, 108 N.J. 219, 529 A.2d 36 (1987).

Installation of elevator is improvement to real property within intentment of statute. *Hall v. Luby Corp.*, 232 N.J. Super. 337, 556 A.2d 1317 (Law Div. 1989). *See Santos v. Hubey Corp.*, 236 N.J. Super. 608, 566 A.2d 588 (Law Div. 1989), where ten year limitation applied to designers, planners, supervisors of improvement to real property.

Commercial buyer seeking damage for economic loss can only proceed under U.C.C., and not in tort against distributors and four-year statute of limitations under the U.C.C., not the six-year general statute of limitations, N.J. Stat. Ann. § 2A:14-1 applies. *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985). *But see Coastal Group, Inc. v. Dryvit Systems, Inc.*, 274 N.J. Super. 171, 643 A.2d 649 (App. Div. 1994).

Although per quod claim may be separate damage claim, it is derivative of spousal claim and statute of limitations for per quod claim begins to run at same time as spouse's personal injury claim. *Tichenor v. Santillo*, 218 N.J. Super. 165, 527 A.2d 78 (App. Div. 1987).

Workers' compensation carrier's subrogation action to recover for benefits paid as result of automobile accident in which employee sustained personal injury was barred where not brought within two years of accident, cause of action having accrued at that time and not when it paid benefits to injured employee of insured. *Glass v. Spaits*, 221 N.J. Super. 643, 535 A.2d 561 (Law. Div. 1987).

No life insurance policy issued by any company shall be issued limiting time within which any action at law or equity may be commenced to less than five years



after cause of action shall accrue. N.J. Stat. Ann. § 17B:25-15. But provision not applicable to group accidental death policy issued as supplement to group life policy. *Holland v. Lincoln Nat'l Life Ins. Co.*, 46 N.J. Super. 257, 134 A.2d 595 (App. Div. 1957). If life insurance policy is silent as to period of limitation, six years for bringing of any action on simple contract and sixteen years for action on contract under seal applies. See *Brown v. New York Life*, 32 F. Supp. 443 (D.N.J. 1940).

Suit upon fire insurance policy must be commenced within 12 months after "inception of loss." N.J. Stat. Ann. § 17:36-5.20. Although period of limitation runs from date of loss this period is tolled from time an insured gives notice, until carrier formally declines liability under policy. *Peloso v. Hartford Fire*, 56 N.J. 514, 267 A.2d 498 (1970); N.J. Stat. Ann. § 17:36-5.20. Insurer unjustifiably withholding policy information may prevent defense of 12 month limitation. *Nieder v. Royal Indem.*, 62 N.J. 229, 300 A.2d 142 (1973).

New Jersey Department of Transportation denied limitations defense as its public contract did not expressly advise of the effect of preliminary administrative proceedings on the running of the statute. *W.V. Pangborne & Co. v. New Jersey Dept. of Transp.*, 116 N.J. 543, 562 A.2d 222 (1989).

North Carolina Statute of Limitations applied where accident occurred in North Carolina, all parties were subject to jurisdiction in North Carolina, and New Jersey had no substantial interest in matter. *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412 (1973). See also *Seckular v. Celotex*, 209 N.J. Super. 242, 507 A.2d 290 (App. Div. 1986) where New Jersey forum held to have no interest in applying its own statute of limitations to asbestos exposure case where plaintiff domiciled in Florida, exposed to asbestos in New York, diagnosed with mesothelioma in New York and treated in New Jersey.

New Jersey statute of limitations law and in particular, the discovery rule, held applicable to plaintiff's DES action, where plaintiff, New York resident moved to New Jersey after action was time-barred under New York law, if plaintiff could establish bona fide domicile in New Jersey at time action filed. *Pine v. Eli Lilly & Co.*, 201 N.J. Super. 186, 492 A.2d 1079 (App. Div. 1985). Cause of action accrues when injured person discovers, or should have discovered by exercise of reasonable diligence and intelligence, that he might have basis for actionable claim against another person. *Wade v. Armstrong World Indus., Inc.*, 746 F. Supp. 493 (D.N.J. 1990).

Where suit was commenced within limitations, but machine manufacturer was designated "John Doe," and

after reasonable diligence in ascertaining name and amending complaint to name manufacturer, and no showing that defendant was prejudiced by lapse of time, amendment would relate back to date of filing complaint. *Farrell v. Votator Division of Chemetron*, 62 N.J. 111, 292 A.2d 394 (1973). See also *Wimmer v. Coombs*, 198 N.J. Super. 184, 486 A.2d 916 (App. Div. 1985). But see *Miletta v. Doe*, 158 N.J. Super. 550, 386 A.2d 897 (Law Div. 1978) (amended complaints nor subsequent pleadings referenced "John Doe," thus statute ran). Statutes of limitations are subject to fictitious party rule, which allows plaintiff to issue process against defendant whose true name is unknown under fictitious name. *Mears v. Sandoz Pharmaceuticals, Inc.*, 300 N.J. Super. 622, 693 A.2d 558 (App. Div. 1997).

Plaintiffs avoided application of statute of limitations in asbestos suit by naming "John Does" in complaint which were described as manufacturers, suppliers and/or distributors of asbestos products and/or materials used by plaintiffs in course of their employment. *Jarmsewicz v. Johns-Manville*, 188 N.J. Super. 638, 458 A.2d 156 (Law Div. 1983).

Generally, plaintiff loses benefit of "John Doe" rule once specific defendant is substituted for fictitious defendant. *Miletta v. Doe*, 158 N.J. Super. 550, 386 A.2d 897 (Law Div. 1978). However, where plaintiff substituted specific defendant for fictitious defendant and thereafter sought to amend complaint to add another defendant, amendment related back to filing of original complaint where plaintiff's employer had misled plaintiff as to identity of manufacturer of machine upon which plaintiff was injured. *Viviano v. CBS, Inc.*, 101 N.J. 538, 503 A.2d 296 (1986).

Plaintiff was permitted to substitute three named defendants and have amendment relate back to original filing of complaint, even where only one John Doe defendant had been named in complaint. *Fede v. Clara Maass Hosp.*, 221 N.J. Super. 329, 534 A.2d 443 (Law Div. 1987).

Plaintiff's later amendment to complaint to name additional driver in place of fictitious name did not relate back to filing of complaint where plaintiff failed to obtain police report which would have disclosed name, address and insurance company of all drivers in accident. Plaintiff's lack of due diligence precluded use of fictitious name practice. *Younger v. Kracke*, 236 N.J. Super. 595, 566 A.2d 581 (Law Div. 1989).

Where plaintiff named wrong defendant, as to whether amended complaint would relate back to date of filing original complaint, Court must balance interests of parties and consider possible prejudice to defendant, diligence of plaintiff, good faith, and reasonableness in



course pursued by plaintiff. *Aruta v. Keller*, 134 N.J. Super. 522, 342 A.2d 231 (App. Div. 1975).

Where parents of child born with birth defects sought damages for their own emotional distress and expert medical expenses attributable to birth defects sustained by child, they were barred by two-year statute of limitations and their action did not derive from timely action brought on behalf of child. *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984).

Discovery rule may apply in certain medical malpractice actions, *Lopez v. Swyer*, 62 N.J. 267, 300 A.2d 563 (1973), or toxic tort products liability actions. In such cases, statute of limitations commences to run when plaintiff discovers, or by exercise of reasonable diligence and intelligence should have discovered, factual basis for defendant's legal liability, not when he learns from third party that those facts constitute legal cause of action against defendant. *Burd v. New Jersey Tel. Co.*, 76 N.J. 284, 386 A.2d 1310 (1978).

Under discovery rule in toxic tort action, plaintiff's impression of nature of the injury and its cause must have some reasonable medical support before cause of action will be deemed to have accrued. *Vispiano v. Ashland Chem. Co.*, 107 N.J. 416, 527 A.2d 66 (1987).

Accrual of causes of action, for statute of limitation purposes, for asbestosis and asbestos-related cancer, may be vastly different in determining whether suit was timely filed. *Devlin v. Johns-Manville*, 202 N.J. Super. 556, 495 A.2d 495 (Law Div. 1985).

Where plaintiffs recovered judgment against township maintaining toxic landfill for deterioration in quality of life and medical surveillance due to contamination of aquifer with toxic pollutants, neither single controversy doctrine nor statute of limitations would bar a future claim for injury or disease "discovered" within appropriate statutory period. *Ayers v. Jackson Twp.*, 106 N.J. 557, 525 A.2d 287 (1987).

In medical malpractice action, statute of limitation accrued when plaintiff knew all relevant facts, not when condition was medically confirmed or when attorney advised him of potential malpractice claims against physician. *Silverman v. Lathrop*, 168 N.J. Super. 333, 403 A.2d 18 (App. Div. 1979). *But see Miller v. Estate of Walter Sperling*, 326 N.J. Super. 572, 742 A.2d 572 (App. Div. 1999). Statute of limitations is not tolled simply because plaintiff has not found physician who is prepared to prove that prior doctor's treatment was malpractice. *Brizak v. Needle*, 239 N.J. Super. 415, 571 A.2d 975 (App. Div.), *cert. denied*, 122 N.J. 164, 584 A.2d 230 (1990).

Determination was required as to whether dentist induced plaintiff not to file timely complaint by advising that injury was temporary and healing and whether plaintiff's acceptance of same and delay resulting therefrom was reasonable. *Abboud v. Viscomi*, 111 N.J. 56, 534 A.2d 29 (1988). Despite instantaneous injury upon ingestion of baking soda, plaintiff's complaint against manufacturer was not barred by two-year limitation period where no medical opinion of treating physicians causally related the same and awareness of fault was not self-evident. *Graves v. Church & Dwight Co., Inc.*, 225 N.J. Super. 49, 541 A.2d 725 (App. Div. 1988), *aff'd*, 115 N.J. 256, 558 A.2d 463 (1989).

Two-year statute of limitations for action to recover personal injury protection (PIP) benefits after no-fault insurer paid benefits runs when last payment was actually made, not when insured incurred oldest uncompensated expense. *Washington v. Market Transition Facility*, 295 N.J. Super. 368, 685 A.2d 57 (App. Div. 1996).

MALPRACTICE

N.J. Stat. Ann. § 2A:53A-27 *et seq.* sets forth that plaintiff asserting claim for professional malpractice must file Affidavit of Merit within sixty days of date of filing of defendant's Answer. Statute applies to actions for personal injury or wrongful death brought against hospitals, nurses, doctors and other "licensed persons" as defined by N.J. Stat. Ann. § 2A:53A-26. Affidavit of merit not required against licensed midwife when sued in their professional capacity. *Saunders v. Capital Health Systems at Mercer*, 398 N.J. Super. 500, 442 A.2d 142 (App. Div. 2008) Additional period of 60 days is available to plaintiff upon finding of good cause. Failure to serve an appropriate affidavit subjects complaint to dismissal with prejudice in all but exceptional circumstances. *Cornblatt v. Barrow*, 153 N.J. 218, 708 A.2d 401 (1998). N.J. Stat. Ann. § 2A:53A-41 requires affiant with specified professional qualifications. N.J. Stat. Ann. § 2A:14-2 requires plaintiff bring claim injuries sustained at birth prior to minor's 13th birthday. Parties asserting contribution and indemnity claims exempt from filing Affidavit of Merit. *Diocese of Metuchen v. Prisco & Edwards, AIA*, 374 N.J. Super. 409, 864 A.2d 1168 (App. Div. 2005). Nor is affidavit required when professional negligence was so obvious to layman (common knowledge exception). *Bryan v. Shah*, 351 F. Supp. 2d 295 (D. N.J. 2005). An affidavit of merit is required for engineering malpractice actions. *Paragon Cont. Inc. v. Peachtree Condominium Ass'n*, 406 N.J. Super. 568, 968 A.2d. 752 (App. Div. 2009).

Generally, medical malpractice claim requires expert proof establishing standard of care, deviation therefrom, and that the deviation proximately caused injury.

Verdicchio v. Ricca, 179 N.J. 1, 843 A.2d 1042 (2004). Limited exception to expert testimony rule occurs in instances where court applies “common knowledge doctrine.” *Rosenberg v. Cahill*, 99 N.J. 318, 492 A.2d 371 (1985). Expert testimony required for *res ipsa loquitur* if requested inference outside common knowledge. *Jerista v. Murray*, 185 N.J. 175, 883 A.2d 350 (2005). A Claim of professional negligence against a pharmacist for filling a prescription with the wrong drug falls within the “common knowledge” exception. *Bender v. Walgreen Eastern Co, Inc.*, 399 N.J. Super. 584, 945 A.2d 120 (App. Div. 2008)

Where physician negligently failed to timely diagnose patient’s breast cancer, causation proven by evidence that delay resulted in increased risk of harm which risk was substantial factor in producing injury claimed. *Evers v. Dollinger*, 95 N.J. 399, 471 A.2d 405 (1984). Where patient lapsed into coma during cataract surgery, proper theory of liability was whether operating room physicians neglect increased patient’s risk of harm and was a substantial factor in producing injuries, rather than whether all injuries were attributable to physicians. *Lanzet v. Greenberg*, 126 N.J. 168, 594 A.2d 1309 (1991). Jury question is raised when evidence demonstrates with reasonable degree of medical probability that negligent treatment increased risk of harm posed by preexisting condition. *Scafidi v. Seiler*, 119 N.J. 93, 574 A.2d 398 (1990). Defendant has burden to prove that preexisting condition existed. *Anderson v. Picciotti*, 144 N.J. 195, 676 A.2d 127 (1996).

Where experts testify that, because of delay in diagnosis, patient would probably suffer recurrence of breast cancer, patient is entitled to jury determination of probability of recurrence and future medical costs; if future damage is reasonably probable, patient can recover for it in present. *Campo v. Tama*, 133 N.J. 123, 627 A.2d 135 (1993).

Treating physician held liable for his failure to testify in patient’s personal injury action, which failure resulted in patient’s settling personal injury action for grossly inadequate amount. *Spaulding v. Hussain*, 229 N.J. Super. 430, 551 A.2d 1022 (App. Div. 1988).

Standard for whether physician obtained patient’s informed consent is “prudent patient” standard, focusing on what physician should disclose to reasonable patient in order to make informed decision, not on what information a reasonable doctor should impart to the patient. *Largey v. Rothman*, 110 N.J. 204, 540 A.2d 504 (1988), *overruling Kaplan v. Haines*, 51 N.J. 404, 241 A.2d 235 (1968) and *Niemiera v. Schneider*, 114 N.J. 550 (1989).

Wrongful Birth. Where physician allegedly failed to advise parents of test for “Downs Syndrome” in fetus

and child was thus not aborted, suit for “wrongful birth” may be instituted by parents for past and future emotional anguish but not for cost of raising child. *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979). *See Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981) (parents entitled to recover extraordinary medical costs expended on child born with cystic fibrosis). *But see Hummel v. Reiss*, 129 N.J. 118, 608 A.2d 1341 (1992) (declining to extend cause of action to child born before *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973)).

Same limitation on recovery has been applied in products liability case against manufacturer of allegedly defective contraceptive device whose use resulted in birth of healthy, normal twins. *J.P.M. v. Schmid Labs., Inc.*, 178 N.J. Super. 122, 428 A.2d 515 (App. Div. 1981).

Where physician allegedly failed to diagnose German measles (Rubella) which had occurred during first trimester of pregnancy, thereby depriving mother of information that would have given mother option of terminating pregnancy, and child was born with birth defects diagnosed as congenital rubella syndrome, either child or his parents may recover damages for extraordinary medical expenses incurred during infancy, and infant may recover damages for extraordinary medical expenses which will be incurred during his majority. *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984). Infant cannot recover damages for pain and suffering and for diminished childhood. *Procanik, supra*. Physicians and hospital had no duty to parents of infant suffering from life-threatening situation to inform them of the alternative to withhold treatment and let child die. Physicians not liable for damages arising out of child’s survival. *Iafelice v. Luchs*, 206 N.J. Super. 103, 501 A.2d 1040 (Law Div. 1985), *aff’d*, 221 N.J. Super. 278, 534 A.2d 417 (App. Div. 1987).

Where alleged malpractice resulted in child being stillborn, unborn fetus was not a “person” within the Wrongful Death Act, but parents could maintain action against physician for emotional distress. *Giardina v. Bennett*, 111 N.J. 412, 545 A.2d 139 (1988); *see Gendek v. Poblete*, 139 N.J. 291 (1995), discussing parameters of parents’ limited emotional distress claim.

Where parents advised physician of change in son’s condition and witnessed deterioration in son’s condition, parent’s claim for negligent infliction of emotional distress was insufficient in law since failure of physician to properly diagnose and treat was not an “incident” witnessed by parents. *Frame v. Kothari*, 115 N.J. 638, 560 A.2d 675 (1989).

See also P. v. Portadin, 179 N.J. Super. 465, 432 A.2d 556 (App. Div. 1981), where negligent perform-

ance of sterilization procedure resulted in unwanted pregnancy and damages were limited to pain, suffering, loss of consortium, medical expenses and lost wages directly resulting from pregnancy but not future costs of raising the child.

Wrongful Life. Infant suffering from Down's Syndrome has no cause of action for wrongful life. See "*Berman*" case, *supra*. But see "*Procanik*" case, *supra*, child born with birth defects able to recover for extraordinary medical expenses. But, child could not maintain wrongful life action where child born before United States Supreme Court established a woman's qualified right to an abortion in *Roe v. Wade*, 410 U.S. 113 (1973); *Hummel v. Reiss*, 129 N.J. 118, 608 A.2d 1341 (1992).

Mental health practitioner has duty to warn and protect from patient's imminent threats of violence to self or others. *Marshall v. Klebanov*, 378 N.J. Super 371, 875 A.2d 1035 (App. Div. 2005).

Physicians and nurses could be liable for attempted suicide by mentally disturbed patient when patient brought to hospital earlier that day for treatment as result of overdose of sleeping pills, and defense of contributory negligence was unavailable. *Cowan v. Doering*, 111 N.J. 451, 545 A.2d 1159 (1988).

NEGLIGENCE

Age. Under age of seven, prima facie incapable of negligence. Question for jury, see *Bush v. New Jersey & New York Transit Co.*, 30 N.J. 345, 153 A.2d 28 (1959). Where child four years of age and no evidence of capacity for contributory negligence, held no jury question is presented. *Id.*

Standard of care generally applicable to minors is that of reasonable person of like, age, intelligence and experience under the circumstances, including nature of activity in which minor was engaged. *Goss v. Allen*, 70 N.J. 442, 360 A.2d 388 (1976). Sports participants not immune from liability for negligence. *Crawn v. Campo*, 266 N.J. Super. 599, 630 A.2d 368 (App. Div. 1993); *modified and aff'd*, 136 N.J. 494, 643 A.2d 600 (1994) (liability arising out of mutual, informal, recreational sports activities should not be based on standard of ordinary, negligence, but on a heightened standard of recklessness or intent to harm).

Attractive Nuisance. Doctrine does not apply in New Jersey. See *Strang v. South Jersey Broadcasting*, 9 N.J. 38, 86 A.2d 777 (1952); *Harris v. Menten-Williams*, 11 N.J. 559, 95 A.2d 388 (1953); *Vega v. Piedilato*, 154 N.J. 496, 713 A.2d 442 (1998).

Alcohol. Social host who provides intoxicating liquor to guest known to be intoxicated and knows guest will soon drive is liable for injuries inflicted on third person by guest operating motor vehicle if negligence in operating motor vehicle is caused by intoxication. *Kelly v. Gwinnett*, 96 N.J. 538, 476 A.2d 1219 (1984). Social hosts not liable where intoxicated guest returned home and negligently started fire, resulting in death and personal injury to members of her family. *Griesenbeck v. Walker*, 199 N.J. Super. 132, 488 A.2d 1038 (App. Div.), *cert. denied*, 101 N.J. 264, 501 A.2d 932 (1985). By statute, N.J. Stat. Ann. § 2A:15-5.7, liability is limited to third parties in automobile accidents. However, same statute preserves full common-law liability of social hosts where damage caused by minor. See, *Steele v. Kerrigan*, 148 N.J. 1, 29, 689 A.2d 085 (1997). Although accident occurred prior to effective date of statute, as matter of comity, court would not extend social host's liability to include claim made by estate of social guest who became intoxicated and was killed in automobile accident. *Finer v. Talbot*, 230 N.J. Super. 19, 552 A.2d 626 (App. Div. 1988), *cert. denied*, 115 N.J. 58, 556 A.2d 1205 (1989). Under appropriate circumstances, passengers who knowingly rode in plane with inebriated pilot could have negligence assessed against them and in favor of tavern. *Buckley v. Pirolo*, 101 N.J. 68, 500 A.2d 703 (1985). Until there is evidence of unsafe driving there is duty on a passenger to supervise a driver. *Champion ex rel. Ezzo v. Dunfee*, 398 N.J. Super. 112, 939 A.2d 825 (App. Div. 2008). One who becomes voluntarily intoxicated may be found comparatively negligent by jury in Dram Shop case only up to point of intoxication. *Lee v. Kiku Restaurant*, 127 N.J. 170, 603 A.2d 503 (1992). Passenger may be comparatively negligent in choosing to ride with intoxicated driver but when passenger is found to be visibly intoxicated by jury there is a presumption that passenger could not appreciate risk of his behavior and cannot be negligent. *Id.* However, *Lee* does not preclude a jury from considering all relevant evidence when apportioning fault. *Steele v. Kerrigan*, 148 N.J. 1, 33, 689 A.2d 085 (1997); *Showalter v. Barilari*, 312 N.J. Super. 494, 712 A.2d 244 (App. Div. 1998).

Parents may be liable for common law negligence, if, when absent from home, they leave teenagers in circumstances where improper supervision likely led to alcohol consumption by under-aged drinkers who then drove and caused injuries to innocent victims. *Morella v. Machu*, 235 N.J. Super. 604, 563 A.2d 881 (App. Div. 1989). See also *Witter v. Leo*, 269 N.J. Super. 380, 635 A.2d 580 (App. Div. 1994).

Premises Liability. New Jersey Readopted Restatement of Torts Section 339. *Simmel v. New Jersey Coop. Co.*, 28 N.J. 1, 143 A.2d 521 (1958) (Landowner



must have “actual” knowledge of third party’s creation of dangerous condition on his premises to be held liable). However, realization of risk involved requires appreciation of type of danger involved rather than mere knowledge of existence of condition itself. *Haase v. North Hudson Scrap Iron*, 62 N.J. 263, 300 A.2d 561 (1973). Landowner under most circumstances, has duty to warn trespassers of artificial condition on property posing risk of death or serious bodily harm. *Hopkins v. Lazo Realtors*, 132 N.J. 426, 625 A.2d 1110 (1993).

Owner of commercial property may be held liable for injuries sustained by pedestrian caused by dilapidated condition of sidewalk abutting property. *Stewart v. 104 Wallace St., Inc.*, 87 N.J. 146, 432 A.2d 881 (1981), partially overruling, *Yanhko v. Fane*, 70 N.J. 528, 362 A.2d 1 (1976). See also *MacGrath v. Levin Properties*, 256 N.J. Super. 247, 606 A.2d 1108 (1992). Policies behind Stewart do not apply to a vacant commercial lot. *Abraham v. Gupta*, 281 N.J. Super. 81, 85, 656 A.2d 850 (App. Div. 1995). Duties imposed by Stewart do not extend to tenants in multi-tenant shopping complexes absent a contractual obligation. *Barrows v. Princeton University*, 244 N.J. Super. 144, 581 A.2d 913 (1990).

Pedestrian who establishes that any prior owner of commercial property negligently maintained sidewalk and that negligence was proximate cause of accident and ensuing injuries will be entitled to recover from that wrongdoer. *Cogliati v. Ecco High Frequency Corp.*, 92 N.J. 402, 456 A.2d 524 (1983).

Imputed Negligence. Negligence of operator not imputed to passenger. *Gifford v. Pennsylvania R. Co.*, 119 N.J.L. 397, 196 A. 679 (E. & A. 1938). Negligence of husband not imputed to wife. *Peskovitz v. Lawrence F. Kramer, Inc.*, 105 N.J.L. 415, 144 A. 604 (E. & A. 1929).

Negligence of agent is imputable to his principal, that of employee to employer, and that of business partner or joint venturer to his co-partners or co-venturers, provided that in each case, agent, employee, partner, or joint venturer is driving automobile in the course of business of the principal, employer, or joint venturer. *Clemens v. O’Brien*, 85 N.J. Super. 404, 204 A.2d 895 (App. Div. 1964).

Interspousal immunity eliminated in New Jersey. Spouse is liable for negligent operation of automobile causing injury to other spouse. *Immer v. Risko*, 56 N.J. 482, 267 A.2d 481 (1970); *Darrow v. Hanover Twp.*, 58 N.J. 410, 278 A.2d 200 (1971). Interspousal immunity eliminated for all accidents after June 1, 1978, with proviso that some situations may still exist where recovery will not be permitted by one spouse against other. These will be decided on case-by-case basis. *Merenoff v.*

Merenoff, 76 N.J. 535, 388 A.2d 951 (1978). N.J. Stat. Ann. § 37:2-5. Prior to 1978, one spouse could not sue the other in tort except where the marital status had been dissolved by death. See *Long v. Landy*, 35 N.J. 44, 171 A.2d 1 (1961).

Last Clear Chance Doctrine. Held to be application of principle of proximate cause. *Pangborn v. Central R.R.*, 18 N.J. 84, 112 A.2d 705 (1955); *Latta v. Caulfield*, 158 N.J. Super. 151, 385 A.2d 910, *aff’d*, 79 N.J. 128 (1979).

Proximate Cause. See *Hellstern v. Smelowitz*, 17 N.J. Super. 366, 86 A.2d 265 (App. Div. 1952) (proximate cause is the efficient cause, the one that necessarily sets the other causes in operation, and it is that cause which naturally and probably led to, and which might have been expected to produce the result). While proximate cause is generally defined as the natural or probable effect of the wrongdoing, fairness in policy also enters into assessment of causal relationship between conduct and accidental harm. *Griesenbeck v. Walker*, 199 N.J. Super. 132, 488 A.2d 1038 (App. Div.), *cert. denied*, 101 N.J. 264, 501 A.2d 932 (1985).

Test of proximate cause is satisfied when negligent act is substantial contributing factor in causing loss. *Wheatly v. Sook Shu*, 217 N.J. Super. 233, 525 A.2d 340 (App. Div. 1987). Plaintiff must prove negligence was proximate cause of plaintiff’s injuries; plaintiff has burden of proving by competent, credible evidence that negligent conduct was substantial contributing factor in causing loss. *Scafidi v. Seiler*, 225 N.J. Super. 576, 543 A.2d 95 (App. Div. 1988), *modified*, 119 N.J. 93, 574 A.2d 398 (1990); *Gardner v. Pawliw*, 150 N.J. 359, 696 A.2d 599 (1997).

Comparative Negligence. Contributory negligence shall not bar recovery unless negligence of plaintiff is greater than that of defendant or greater than the combined negligence of multiple defendants. N.J. Stat. Ann. § 2A:15-5.1. Judge shall mold judgment by percentage of each party’s negligence or fault. N.J. Stat. Ann. § 2A:15-5.2. Trier of fact must make findings in negligence actions as to percentage of each party’s negligence or fault. N.J. Stat. Ann. § 2A:15-5.2. Total percentage of negligence or fault of all parties is to be 100%. N.J. Stat. Ann. § 2A:15-5.2.

Historically, and prior to December 18, 1987 “Joint and Several Liability” in New Jersey meant that plaintiff could collect total award from any liable defendant irrespective of that defendant’s percentage negligence and “paying” defendant could then seek the other defendants to pay their proportional share of award. N.J. Stat. Ann. § 2A:15-5.3 amended in 1987 and 1995 applies to all non environmental tort actions and states: 1) defendant



60% or more responsible can be compelled to pay entire award; 2) party with a percent of liability less than 60% is only responsible for that party's directly attributable fault. Party paying more than his share may seek contribution from other joint tortfeasors under N.J. Stat. Ann. § 2A:15-5.3. In environmental tort actions involving manufacture, use, disposal, handling, storage or treatment of hazardous or toxic substances successful plaintiff may compel any liable defendant to pay entire award.

Where one defendant settled with plaintiff prior to trial and at trial, non-settling defendant was found 100% negligent, non-settling defendant was not entitled to pro tanto reduction of judgment under Comparative Negligence Act but rather joint tortfeasors share on basis of percentage of negligence. *Cartel Capital Corp. v. Fireco*, 81 N.J. 548, 410 A.2d 674 (1980); *Lee's Hawaiian v. Safety First*, 195 N.J. Super. 493, 480 A.2d 927 (App. Div.), cert. denied, 99 N.J. 205, 491 A.2d 703 (1984). See *Ryan v. KDI Sylvan Pools*, 121 N.J. 276, 579 A.2d 1241 (1990) for apportionment of damages between strictly liable defendant, negligent defendant and contributorily negligent plaintiff.

Where one or more defendants settle, any verdict recovered by plaintiff against nonsettling defendants will be reduced by percentage of negligence attributable to settling defendants. *Cartel Capital Corp., supra*; *Young v. Latta*, 233 N.J. Super. 520, 559 A.2d 465 (App. Div. 1989), aff'd, 123 N.J. 584, 589 A.2d 1020 (1991). New Jersey courts permit "high - low agreements" in which defendant agrees to pay plaintiff minimum recovery in return for plaintiff's agreement to accept maximum sum regardless of outcome. *Benz v. Pires*, 269 N.J. Super. 574, 636 A.2d 101 (App. Div. 1994); *Malik v. Seaview Lincoln Mercury*, 398 N.J. Super 182, 940 A.2d 1221 (App. Div. 2008). Jury required to apportion liability to non-party discharged in bankruptcy. *Brodsky v. Grinnell Haulers, Inc.*, 181 N.J. 102, 853 A.2d 940 (2004).

Failure of nonsettling defendant to assert cross-claim against settling defendant will not bar jury from assessing proportionate liability of settling defendant but non settling defendant must give timely notice as to alleged liability of settling defendant.

If no fact issue is presented to trier regarding settling defendant liability then trier cannot assess proportionate liability against settling party. *Young, supra*.

Settling defendant is not presumed to be negligent, and burden is on non-settling defendant to prove negligence of settling defendant in order to obtain benefits of settling defendant's percentage of negligence. *Shatz v. TEC Technical Adhesives*, 174 N.J. Super. 135, 415 A.2d 1188 (App. Div. 1980).

Percentage of negligence attributable to plaintiff's employer, where employer is exempt from liability, cannot be used in determining respective percentages of negligence of parties to action. *Jarrett v. Duncan Thecker Associates*, 175 N.J. Super. 109, 417 A.2d 1064 (Law Div. 1980).

Joint and Several Liability. Exists under joint tortfeasors contribution law, N.J. Stat. Ann. § 2A:53A-1 et seq. except as modified by Comparative Negligence Act. N.J. Stat. Ann. § 2A:15-5.1, et seq. Master and servant or principal and agent shall be considered single tortfeasors. While it has been held that one tortfeasor is not required to implead another but may establish joint tort liability in subsequent independent action after original judgment has been paid. *Sattleberger v. Telep*, 14 N.J. 353, 102 A.2d 557 (1954), application of entire controversy rule may become issue.

Tort reform legislation in New Jersey has significantly modified the principle of joint and several liability as it applies to negligence and strict liability actions filed on or after June 29, 1995. Act of June 29, 1995, Ch. 140, 1995 N.J. Laws 457, (concerning tort reform and joint and several liability, amending P.L. 1973, c.146, N.J.S. 2A:15-5.2). In such actions, jury will first determine amount of damages to which plaintiff is entitled regardless of relative fault of parties; thereafter, jury will apportion percentage of fault/liability among parties to total 100%, after which judge will mold verdict and plaintiff will recover accordingly. Plaintiff may recover full amount of damages awarded from any party which has been found 60% or more liable. However, as to a defendant adjudged to be less than 60% at fault, plaintiff may only recover percentage of damages which is attributed to that party.

Special provisions apply to environmental tort matters (including asbestos matters): Plaintiff may recover full amount from any one party except where percentage of fault can be apportioned. Where non-settling insolvent defendant's percentage share may not be recovered from said defendant, plaintiff may recover same from any other defendant. Defendant who is compelled to pay greater than percentage apportioned by finder of fact may seek contribution from other tortfeasors. Defendant found to be 5% or less at fault who accepts such finding is not liable on crossclaims for contribution. Act specifically provides that, in social host cases, fault/negligence of any intoxicated individual shall be considered and determined by finder of fact.

Settlement between injured party and one tortfeasor does not release other tortfeasor. *Breen v. Peck*, 28 N.J. 351, 146 A.2d 665 (1958). Non settling defendant cannot seek contribution against settling party. *Young v. Latta*, 233 N.J. Super. 520, 559 A.2d 465 (App. Div.

1989), *aff'd*, 123 N.J. 584, 589 A.2d 1020 (1991). Rather than settling defendant seeks molding of verdict to reflect proportionate liability. *Young, supra*.

When one defendant settles, remaining co-defendants are chargeable with total verdict less that attributable to settling defendant's share. *Cartel Capital Corp. v. Fireco*, 81 N.J. 548, 410 A.2d 674 (1980). See Comparative Negligence.

Immunity. Charitable immunity exists for non profit corporations and associations organized for religious, charitable, educational or hospital purposes where plaintiff is a beneficiary of such organization or association. N.J. Stat. Ann. § 2A:53A-7. Plaintiff can collect damages up to \$250,000 from an organization organized for hospital purposes. N.J. Stat. Ann. § 2A:53A-8 (Amended 1991). This amendment applies prospectively only from its effective date of July 31, 1991. *Schiavo v. Kennedy Hosp.*, 258 N.J. Super. 380, 609 A.2d 781 (App. Div. 1992), *aff'd*, 131 N.J. 400, 620 A.2d 1050 (1993). Charitable Immunity Act shall be liberally construed but it does not apply to aggravated wrongful conduct. *P.V. ex rel. T.V. v. Camp Jaycee*, 197 N.J. 132 962 A.2d 453 (2008).

Unpaid trustee, director, officer or voluntary member of boards of non profit organizations are not liable for damages resulting from exercise of discretion in connection with their office unless actions evidence reckless disregard for duties of position. N.J. Stat. Ann. § 2A:53A-7.1. Board members not liable for acts or omissions arising out of or in course of volunteer service unless there was willful, wanton or gross negligence. N.J. Stat. Ann. § 2A:53A-7.1 amended to extend same immunity to cemetery boards as has been given to other nonprofit institutions but it does not modify or supersede statutes regarding liability of persons involved with non profit sports teams. N.J. Stat. Ann. § 2A:53A-7.1 (Amended January 3, 1990).

N.J. Stat. Ann. § 2A:62A-6 affords volunteer athletic coaches, managers and officials (other than an accredited sports official) of nonprofit or similar charter sports teams, immunity from liability for damages to player, participant, spectator subject to conditions and exceptions. *Byrne v. Fords Clara Barton Boys Baseball League*, 236 N.J. Super. 185, 564 A.2d 1222 (App. Div. 1989). Sports participants are not immune from liability for gross negligence. *Crawn v. Campo*, 266 N.J. Super. 599, 630 A.2d 368 (App. Div. 1993), *modified and aff'd*, 136 N.J. 494, 643 A.2d 600 (1994).

August 3, 1988 amendment to N.J. Stat. Ann. § 2A:62A-6 requires that for immunity to apply athletic volunteer must have participated in prescribed safety and skills training program. *Byrne, supra*. Safety program is

satisfied if it has met minimum standards established by Governors Council on Physical Fitness and Sports. N.J. Stat. Ann. § 2A:62A-6. Athletic Volunteer Immunity does not apply to willful, wanton or grossly negligent act or omission or to negligent operation of motor vehicle or to volunteer who permits sports practice or competition to be conducted without supervision. N.J. Stat. Ann. § 2A:62A-6. Nothing in Act applies to "athletic coach, manager, or official who provides services or assistance as part of public or private educational institution's athletic program." N.J. Stat. Ann. § 2A:62A-6(f).

Accredited sports official pursuant to N.J. Stat. Ann. § 18A:11-3 whether or not compensated who serves a voluntary association or public entity is entitled to immunity absent proof of willful, wanton or gross negligence, and absent damage as result of motor vehicle operation. N.J. Stat. Ann. § 2A:62A-6.1 (August 17, 1987).

Sponsors of nonprofit sports teams are not liable for damages to player or participant as result of goods, services or assistance supplied absent willful, wanton, or gross negligence or resulting from negligent operation of motor vehicle. N.J. Stat. Ann. § 2A:62A-6.2 (August 3, 1988 amendment).

Volunteers, trustees, directors, officers or members of nonprofit blood bank are granted immunity absent reckless disregard for the duties imposed by law, willful, wanton or gross negligence or absent damage as result of negligent motor vehicle operation. N.J. Stat. Ann. § 2A:53A-7.2 (December 27, 1988). *cf. Jacobs v. North Jersey Blood Center*, 172 N.J. Super. 159, 411 A.2d 210 (Law Div. 1979).

Medical personnel and facilities involved in obtaining substance specimens at request of law enforcement officer including prosecutor, or medical examiner are immune from liability. N.J. Stat. Ann. § 2A:62A-10

N.J. Stat. Ann. § 2A:62A-3 grants immunity to medical personnel and facilities for civil damages as result of acts or omissions in rendering care to cure person's dependency on use of controlled dangerous substances or fumes, provided professional uses skill ordinarily required and exercised in profession.

Good Samaritan Rule for rendering good faith emergency care at scene of accident or emergency bars civil damage liability. N.J. Stat. Ann. § 2A:62A-1 *et seq.* See also N.J. Stat. Ann. § 2A:53A-12. Applies to volunteer member of first aid or emergency rescue squad.

Volunteer fire company and volunteer rescue squad members are not liable for acts or omissions arising out of and in course of rendering services or arising out of and in course of participation in authorized drill but im-

munity shall not extend to operation of any motor vehicle in connection with rendering of such service or willful or wanton activities. N.J. Stat. Ann. § 2A:53A-13 and N.J. Stat. Ann. § 2A:53A-13.1.

Sovereign Immunity. Abolished for tort actions effective July 1, 1972 and contract liability June 1, 1972. Public entity and employee immunity and liability set forth in N.J. Stat. Ann. § 59:1-1 *et seq.* Except as provided in N.J. Stat. Ann. § 59:2-1 *et seq.* a public entity is not liable for injury. A public entity is not liable for computer related failure. N.J.S.A. § 59:2-1.2. Public entity is not liable for discretionary activities, N.J. Stat. Ann. § 59:2-3, failure to adopt or enforce a law, N.J. Stat. Ann. § 59:2-4, issuance or denial of permit or license, N.J. Stat. Ann. § 59:2-5, failure to inspect, N.J. Stat. Ann. § 59:2-6, failure to provide supervision of recreational facilities, N.J. Stat. Ann. § 59:2-7, termination or reduction of public assistance, N.J. Stat. Ann. § 59:2-8, slander of title of property, N.J. Stat. Ann. § 59:2-9, criminal activity or willful misconduct of an employee, N.J. Stat. Ann. § 59:2-10.

N.J. Stat. Ann. § 59:3-1 *et seq.* set forth liability and immunity of public employee. N.J. Stat. Ann. § 59:4-1 *et seq.* liability for condition of public property. N.J. Stat. Ann. § 59:5-1 *et seq.* liability and immunity for correction and police activities. N.J. Stat. Ann. § 59:6-1 *et seq.* liability and immunity for public health activities. N.J. Stat. Ann. § 59:7-1 *et seq.* sets forth liability and immunity for administration of tax laws.

Claims against public entities must be in strict conformance with N.J. Stat. Ann. § 59:8-1 *et seq.* Claims must be filed by certified mail or hand delivered within 90 days of accrual and plaintiff cannot file suit until six months after the Notice of Claim is received. N.J. Stat. Ann. § 59:8-8; N.J. Stat. Ann. § 59:8-10. To file a claim outside of the 90 day period, application must be made to court showing extraordinary circumstances as to why claim not timely filed. N.J. Stat. Ann. § 59:8-9; *Lowe v. Zarghami*, 158 N.J. 606, 731 A.2d 14 (1999); *Eagan v. Boyarsky*, 158 N.J. 632, 731 A.2d 28 (1999); *Blank v. City of Elizabeth*, 318 N.J. Super. 106, 723 A.2d 75 (App. Div. 1999), *aff'd*, 162 N.J. 150, 742 A.2d 540 (1999); *Leidy v. County of Ocean*, 398 N.J. Super 449, 942 A.2d 112 (App. Div. 2008) Court will not permit late claim if public entity has been substantially prejudiced. N.J. Stat. Ann. § 59:8-9.

No damages may be awarded for pain and suffering unless there is permanent injury and medical expenses in excess of \$3,600. N.J. Stat. Ann. § 59:9-2.

Toxic Tort. Those who use or permit others to use land for conduct of abnormally dangerous activities are strictly liable. *State, DEP v. Ventron*, 94 N.J. 473, 468

A.2d 150 (1983). As matter of law, handling toxic waste is abnormally dangerous. *Id.*

Party which creates toxic waste hazard is responsible for clean up and any damage whether or not damage was foreseeable at time hazard was created. *T&E Ind. v. Safety Light*, 123 N.J. 371, 587 A.2d 1249 (1991). Absolute liability of prior owner for toxic waste absent purchaser who knowingly accepts burden of waste. *T&E Ind., supra.*

Plaintiff may recover from public or private entities for disease as a result of exposure to toxic chemicals upon proof that contraction of disease is probable. *Mauro v. Raymark*, 116 N.J. 126, 561 A.2d 257 (1989). Plaintiff must prove quantification of enhanced risk. *Ayers v. Jackson Twp.*, 106 N.J. 557, 525 A.2d 287 (1987). Plaintiff with enhanced risk after exposure to toxic pollutants may recover compensable medical surveillance damages without regard to likelihood of developing disease. *Ayers, supra.* Plaintiff may also recover for emotional distress based on a reasonable concern of enhanced risk of further disease. *Mauro, supra.* See also *Advisory Comm'n v. Diamond Shamrock*, 243 N.J. Super. 170, 578 A.2d 1248 (App. Div. 1990). Emotional distress claims which constitute "pain and suffering" are not recoverable against public entity under New Jersey Tort Claim Act. *Ayers, supra.*

"Quality of life" damages are recoverable from public or private entities under nuisance law for exposure to toxic pollutants. *Ayers, supra.*

NO-FAULT

New Jersey Automobile Repair Reform Act initially effective January 1, 1973. Act applies to "automobile," defined to include private passenger, van, pickup and camper-type vehicles used for recreational purposes but excluding commercial trucks and vehicles used as public or livery conveyance for passengers, N.J. Stat. Ann. § 39:6A-2.

Under current statutory scheme, motorcyclists not eligible for no-fault benefits. N.J. Stat. Ann. § 39:6A-4.

Compulsory Liability Coverage. Owner of automobile registered or principally garaged in State including legislatively authorized self-insured lessors must obtain either "basic" or "standard" policies of automobile insurance. Standard policy minimum liability limits of \$15,000 per person and \$30,000 per accident. N.J. Stat. Ann. § 39:6A-3. Under "basic" policy, individual not required to purchase liability coverage. N.J. Stat. Ann. § 39:6A-3.1. Qualified low-income individuals may purchase "special" policies that provide limited emergency room no-fault benefits to named insured and resident dependent family members. N.J. Stat. Ann. § 39:6A-3.3.

New Jersey Automobile Full Insurance Underwriting Association (NJAFIUA) liable for minimum compulsory insurance where policy retroactively voided for misrepresentation. *Marotta v. New Jersey Auto*, 280 N.J. Super. 525, 656 A.2d 20 (App. Div. 1995), *aff'd*, 144 N.J. 325, 676 A.2d 1064 (1996).

Legislatively authorized self-insured automobile lessor may limit liability coverage in rental contract to statutory minimum. *Agency Rent-A-Car v. Indemnity Ins.*, 268 N.J. Super. 319, 633 A.2d 975 (App. Div. 1993).

Personal Injury Protection (PIP) coverage mandatory. N.J. Stat. Ann. § 39:6A-4. Every automobile liability insurance policy, issued or renewed after Jan. 1, 1991, insuring automobile as defined in N.J. Stat. Ann. § 39:6A-2 must provide PIP coverage in the minimum amount of \$250,000. N.J. Stat. Ann. § 39:6A-4. Optional PIP coverage including income continuation benefits, essential services benefits, death benefits and funeral expenses may be purchased at additional premiums. N.J. Stat. Ann. § 39:6A-4. For policies issued or renewed on or after March 22, 1999 every "standard" automobile policy is still subject to the minimum PIP coverage limits of \$250,000. However, under the "basic" policy, medical coverage is limited to \$15,000/person and accident except that medical expense benefits up to \$250,000 are available for all medically necessary treatment of: "permanent or significant brain injury, spinal cord injury or disfigurement or for medically necessary treatment of other permanent or significant injuries rendered at a trauma center or acute care hospital...until patient is stable." N.J. Stat. Ann. § 39:6A-3.1. Insurer may require precertification of certain procedures. N.J. Stat. Ann. § 39:6A-4. Coverage extends to member of insured's family residing in his household, injured while occupying, entering into, alighting from or using any automobile, or as a pedestrian, caused by object propelled by or from an automobile. Coverage also extends to other persons injured while occupying, entering into, alighting from or using the automobile of the named insured, with permission of named insured, sustaining bodily injury caused by named insured's automobile or struck by object propelled by or from such automobile. N.J. Stat. Ann. § 39:6A-4. PIP coverage of named insured is primary for named insured and any resident relative in named insured's household who is not insured under an automobile policy of his own. N.J. Stat. Ann. § 39:6A-4.2. Primary carrier must pay insured's PIP benefits initially and may seek contribution from other available PIP coverage. *USF&G v. Industrial Indem.*, 264 N.J. Super. 379, 624 A.2d 1014 (App. Div. 1993), *cert. denied*, 134 N.J. 484, 634 A.2d 530 (1993). Injured passenger could not recover PIP from driver's insurer where driver did not own or lease the automobile being

driven. *Sotomayor v. Vasquez*, 109 N.J. 258, 536 A.2d 746 (1988). Such passenger would be entitled to PIP if he were a member of insured's family and residing in household. *Id.* Each automobile's PIP policy is responsible both for passengers and the policy holder's resident relative. *Id.*

For named insureds and resident relative, PIP policy follows family. For passengers and pedestrians, PIP policy follows insured's automobile. *Id.* In multi-vehicle accident where one vehicle strikes another which in turn strikes third vehicle, second vehicle is considered a propelled object under statute and carriers for both vehicles can be liable to a pedestrian for PIP benefits. *Lumpkins v. Market Transition Facility*, 283 N.J. Super. 181, 661 A.2d 341 (Law Div. 1995).

Lessee of vehicle injured when struck by New York vehicle while pedestrian not afforded PIP coverage where corporate owner was insured under leased vehicle's insurance policy and not lessee, New Jersey law did not require out-of-state vehicles operated in New Jersey to comply with New Jersey PIP statute. *Healey v. Allstate*, 225 N.J. Super. 172, 542 A.2d 4 (App. Div. 1988). PIP protection afforded to only lessors and not lessees of vehicles. *Id.* N.J. Stat. Ann. § 17:28-1.4 requires any insurer authorized to do business in New Jersey to include New Jersey PIP coverage in policy which is sold in another state whenever automobile insured under policy is operated in this state. Insurance policies will automatically be reformed to provide PIP coverage required under N.J. law. *Id.* Delaware resident injured in New Jersey automobile accident entitled to recover PIP benefits mandated by New Jersey no-fault law which were greater than PIP benefits mandated by Delaware law where insurer transacted business in New Jersey. *Adams v. Keystone*, 264 N.J. Super. 367, 624 A.2d 1008 (App. Div. 1993). Injuries sustained while inflating tire from insured vehicle, even though tire had been removed from vehicle and transported some distance away, were held to have been sustained while "using" vehicle. *Hopkins v. Liberty Mut.*, 156 N.J. Super. 72, 383 A.2d 458 (App. Div. 1978). *See also Darel v. Pennsylvania Mfrs. Ass'n Ins.*, 114 N.J. 416, 555 A.2d 570 (1989). But, injuries sustained while walking to car with key in hand did not occur "while entering." *Aversano v. Atlantic Employers Ins. Co.*, 290 N.J. Super. 570, 676 A.2d 556 (App. Div. 1996), *aff'd*, 151 N.J. 490, 701 A.2d 129 (1997).

Bicyclist is pedestrian under No-Fault Statute, *Harbold v. Olin*, 287 N.J. Super. 35, 670 A.2d 117 (App. Div. 1996), but operator of moped is not. *Nunag v. Pennsylvania Nat'l*, 224 N.J. Super. 753, 541 A.2d 306 (App. Div. 1988). However, one pushing a moped off roadway deemed a pedestrian. *Sprague v. Niagara Fire*



Ins., 239 N.J. Super. 197, 570 A.2d 1280 (App. Div. 1990), *cert. denied*, 122 N.J. 319, 585 A.2d 339 (1990).

Insured who left car to watch gas station attendant add water to radiator and was burned from resulting explosion and fire, held to be “occupant” of vehicle although outside vehicle when injuries occurred. *Newcomb Hosp. v. Fountain*, 141 N.J. Super. 291, 357 A.2d 836 (Law Div. 1976).

Driver seated in car assaulted when he stopped to ask directions was entitled to PIP benefits. *Smaul v. Irvington General Hosp.*, 108 N.J. 474, 530 A.2d 1251 (1987). Pedestrian struck by bullet fired from automobile entitled to pedestrian PIP coverage. *Lindstrom v. Hanover*, 269 N.J. Super. 339, 635 A.2d 559 (App. Div. 1993), *rev'd*, 138 N.J. 242, 649 A.2d 1272 (1994). *But see Uzcatequi-Gaymon v. New Jersey Mfrs.*, 193 N.J. Super. 71, 472 A.2d 163 (App. Div. 1984) where plaintiff’s decedent shot and killed while in telephone booth during an attempted robbery of his car keys and car not entitled to PIP. Wife shot to death by husband as she sat in driver’s seat of car not entitled to PIP benefits. *Morgan v. Prudential*, 242 N.J. Super. 638, 577 A.2d 1300 (App. Div. 1990), *cert. denied*, 122 N.J. 370, 585 A.2d 377 (1990). Passenger who left automobile to confront occupants of another vehicle regarding traffic dispute and stabbed during altercation not entitled to PIP benefits. *Vasil v. Zullo*, 238 N.J. Super. 572, 570 A.2d 464 (App. Div. 1990).

Under No-Fault statute, where bicyclist was injured when forced off road by automobile, insurer was not liable for PIP payments where bicyclist was neither struck by automobile nor struck by object propelled from automobile. *Ingraham v. Travelers*, 217 N.J. Super. 126, 524 A.2d 1319 (App. Div. 1987), *aff'd*, 110 N.J. 67, 539 A.2d 733 (1988).

While driving automobile, where death of operator resulted solely from heart attack and not from automobile accident, driver’s estate not entitled to PIP benefits for “accident” involving automobile. Only those injuries having substantial nexus with use of automobile are covered. *Kordell v. Allstate*, 230 N.J. Super. 505, 554 A.2d 1 (App. Div. 1989), *cert. denied*, 117 N.J. 43, 563 A.2d 813 (1989).

Payment of PIP benefits. Insurer may require written notice as soon as practicable after accident. N.J. Stat. Ann. § 39:6A-5. Healthcare provider must provide written notice no later than 21 days following the commencement of treatment. *Id.* Benefits shall be overdue if not paid within 60 days of notice unless insurer gives written reasons for denying claim or need for additional time to investigate claim, not to exceed 45 days. *Id.* All overdue payments shall bear interest. *Id.* Insurer must

provide claimant with option of submitting PIP dispute to binding arbitration. *Id.* If claimant prevails at arbitration, insurer shall pay all costs of proceedings including reasonable attorney’s fees. R. 4:42-9.

Collateral Source. PIP benefits are payable without regard to collateral sources, except workers’ compensation, employee temporary disability benefits, Medicare and benefits paid to active and retired military personnel under Federal law shall be deducted from collectible PIP benefits. N.J. Stat. Ann. § 39:6A-6. Insurer which has paid PIP benefits may apply directly to worker’s compensation or disability carrier for reimbursement. *Id.*

Income continuation benefits could not be recovered under No-Fault Act from auto insurer where dependency benefits already received under Worker’s Compensation Act exceeded maximum income continuation benefits. *Simon v. CNA*, 225 N.J. Super. 606, 543 A.2d 110 (App. Div. 1988), *cert. denied*, 113 N.J. 350, 550 A.2d 461 (1988). However, where disability continued beyond time period for payment of temporary worker’s compensation benefits, insured was entitled to receive income continuation benefits for as long as disability continued up to maximum income continuation benefits of policy, with insurer receiving a credit for worker’s compensation benefits paid. *Olivero v. New Jersey Mfrs.*, 227 N.J. Super. 367, 547 A.2d 710 (App. Div. 1988), *cert. denied*, 115 N.J. 76, 556 A.2d 1219 (1988). Permanent disability benefits create right to set-off. *Portnoff v. New Jersey Mfrs.*, 392 N.J. Super. 377, 920 A.2d 761 (App. Div. 2007).

Where injured party had received worker’s compensation benefits, she could not recover medical expenses from PIP insurer, even where worker’s compensation carrier’s lien had been reimbursed as part of settlement of third-party action. *Bernick v. Aetna*, 158 N.J. Super. 574, 386 A.2d 908 (Law Div. 1978). PIP carrier can institute a derivative Workers’ Compensation action to recover benefits for amount that would have been paid to insured for Workers’ Compensation if he had filed claim. *Aetna v. Para Mfg. Co.*, 176 N.J. Super. 532, 424 A.2d 423 (App. Div. 1980).

Exclusions to PIP Coverage. Persons whose conduct contributed to injuries while committing high misdemeanor or felony, seeking to avoid arrest or while acting with specific intent to injure himself or others, N.J. Stat. Ann. § 39:6A-7; persons who owned automobile registered or principally garaged in New Jersey being operated without PIP coverage, with burden of proof on claimant. *Gibson v. New Jersey Mfrs.*, 261 N.J. Super. 579, 619 A.2d 636 (App. Div. 1993); persons operating or occupying auto without permission of owner. N.J. Stat. Ann. § 39:6A-7; any person other than named insured or member of named insured’s family residing in

his household, if that person is entitled to coverage as named insured or member of named insured's family residing in his household under terms of another policy, *Id.*; and any person who at time of accident was member of named insured's family residing in named insured's household if that person is entitled to coverage as named insured under terms of another policy. *Id.*

Tort Options. Tort option governs insured's right to make tort liability claim for non-economic (pain, suffering, inconvenience) loss. N.J. Stat. Ann. § 39:6A-8. Under Basic Policy, "limitation on lawsuit" or "verbal threshold" option is mandatory. Under Standard policy insured has right to select which tort option applies. Tort option preserves right to sue as result of injury arising out of ownership, operation, maintenance or use of automobile, if injury fits within any one of 6 categories: death, dismemberment, significant disfigurement or significant scarring, displaced fractures, loss of a fetus and permanent injury within reasonable degree of medial probability, other than scarring or disfigurement. An injury shall be considered permanent when body part or organ or both has not healed to function normally and will not heal to function normally with further medical treatment. N.J. Stat. Ann. § 39:6A-8.

Plaintiff who has elected tort option shall, within 60 days following Answer to complaint by defendant, provide Certification from licensed treating physician, or board certified licensed physician that states under penalties of perjury, that plaintiff has sustained injury as outlined in statute and shall be based upon and refer to objective clinical evidence which may include testing performed in accordance with medical protocols in N.J. Stat. Ann. § 39:6A-4.7. It is a crime of the fourth degree to purposefully or knowingly make a false certification. N.J. Stat. Ann. § 39:6A-8.

Second option (no threshold) preserves right to recover for non-economic loss as a result of bodily injury arising out of ownership, operation, maintenance or use of automobile in state. Tort option elected applies to all automobiles owned by named insured and any immediate family member residing in named insured's household provided such person is not named insured under another automobile policy. N.J. Stat. Ann. § 39:6A-8.1. Basic tort option deemed to apply to insured and any immediate family member residing in insured's household if insured fails to select an option. *Id.* Passengers not covered under their own policy or under the policy of immediate family member deemed to have second tort option. *Murphy v. Allstate*, 252 N.J. Super. 280, 599 A.2d 916 (App. Div. 1991). N.J. Stat. Ann. § 39:6A-8 applicable to nonresident automobile owners insured by carriers licensed to operate in New Jersey where insured vehicle operated in New Jersey. *Dyszel v. Marks*, 6 F.3d

116 (3rd Cir. 1993). Basic tort option applies to such owners and immediate family members. *Watkins v. Davis*, 259 N.J. Super. 482, 614 A.2d 189 (App. Div. 1992), *aff'd*, 268 N.J. Super. 211, 633 A.2d 112 (App. Div. 1993). Under *Oswin v. Shaw*, 129 N.J. 290, 609 A.2d 415 (1992), court required plaintiff subject to verbal threshold to prove injury one of nine categories of serious injury plus serious impact on life. But, in *DiProspero v. Penn*, 183 N.J. 477, 874 A.2d 1039 (2005), Supreme Court ruled that plain language of N.J. Stat. Ann. § 39:6A-8a (as amended 1998) did not require showing of serious impact on life.

Subrogation. There was no subrogation by PIP insurer against any party for accidents occurring after December 31, 1974, even if tortfeasor was not owner or operator of private passenger automobile, *Aetna v. Gilchrist Brothers, Inc.*, 85 N.J. 550, 428 A.2d 1254 (1981), until the passage of N.J. Stat. Ann. § 39:6A-9.1, effective October 4, 1983 and amended January 21, 1986, which provides a PIP insurer right to recover PIP benefits from any tortfeasor who was not required to maintain PIP or medical expense benefits coverage, other than for pedestrians, or, although required to do so, did not maintain such PIP or medical expense benefits coverage at the time of accident.

Insurer recovery of PIP benefits paid. Insurer, health maintenance organization or governmental agency which has paid PIP benefits may pursue subrogation claim against an insured tortfeasor's carrier for recovery, by inter-company agreement or by arbitration. N.J. Stat. Ann. § 39:6A-9.1. Action must be brought within two years of the filing of the PIP claim. *Id.* See also *Allstate v. Coven*, 264 N.J. Super. 240, 624 A.2d 594 (App. Div. 1993). N.J. Stat. Ann. § 39:6A-9.1 does not establish any subrogation rights for the PIP insurer through its insured. *Id.*

Statute of Limitations to Sue on PIP. Two years after expense is known to be related to accident or four years after accident, whichever is earlier. N.J. Stat. Ann. § 39:6A-13.1. If payment of benefits was terminated, two years after last payment. *Id.* See *Aponte-Correa v. Allstate Ins. Co.*, 162 N.J. 318, 744 A.2d 175 (2000).

Suit more than two years after incurring first unpaid medical expense was barred as to PIP carrier. *Danilla v. Leatherby Ins. Co.*, 168 N.J. Super. 515, 403 A.2d 925 (App. Div. 1979). See also *Still v. Ohio Cas. Ins.*, 189 N.J. Super. 231, 459 A.2d 1195 (App. Div. 1983). Period begins to run when last payment was actually made. *Washington v. Market Transition Facility*, 295 N.J. Super. 368, 685 A.2d 57 (App. Div. 1996). Where suit for PIP benefits was commenced more than three years after accident and incurring of insured's first medical expense, entire claim was barred by statute of limitations,

including any claims for expenses incurred less than two years prior to commencement of action. *Ochs v. Federal Ins. Co.*, 90 N.J. 108, 447 A.2d 163 (1982). Statute of limitations for filing suit for PIP is not tolled by infancy of injured party. *Giantonio v. Reliance Ins.*, 175 N.J. Super. 309, 418 A.2d 303 (Law Div. 1980). No bar where suit more than two years after last payment of benefit and more than four years after accident where future medical treatment was contemplated and was reasonably necessary and suit was filed within two months of carrier's refusal and within few months of incurring those medical expenses. *Lind v. INA*, 174 N.J. Super. 363, 416 A.2d 922 (Law Div. 1980), *aff'd*, 193 N.J. Super. 303, 473 A.2d 981 (App. Div. 1983).

Carrier that paid PIP benefits to insured as result of automobile accident, if charged with knowledge medical condition would probably require future treatment, cannot rely upon two-year statute of limitations. *Zupo v. CNA*, 98 N.J. 30, 483 A.2d 811 (1984). *See also Rahnefeld v. Security of Hartford*, 115 N.J. 628, 560 A.2d 670 (1989).

Statute of limitations for suit to compel payment of PIP benefits not tolled for infancy or incompetency. *McLaughlin v. Metzner*, 201 N.J. Super. 51, 492 A.2d 696 (App. Div. 1985). *See also Green v. Averbach*, 127 N.J. 591; 606 A.2d 1093 (1992).

Where personal injury action was commenced by pedestrian struck by automobile within two years of accident, and where a subsequent claim was made by pedestrian against the operator's liability insurer more than two years after accident for PIP benefits, filing of PIP claim would relate back to filing of original personal injury complaint and would not be barred by two-year statute of limitations. *Smelkinson v. Ethel & Mac. Corp.*, 178 N.J. Super. 465, 429 A.2d 422 (App. Div. 1981).

PIP payments not admissible in evidence except as may be required in action brought pursuant to N.J. Stat. Ann. § 39:6A-9.1. In civil action by injured person to recover non-economic damages for bodily injury, evidence of PIP benefits paid or collectible is inadmissible. N.J. Stat. Ann. § 39:6A-12. Double-recovery is contrary to policy enunciated by No-Fault Law. *Cirelli v. Ohio Cas.*, 72 N.J. 380, 371 A.2d 17 (1977). Injured person qualified to sue for non-economic loss under no-fault statute may not include in damages PIP deductible or co-payment. *Roig v. Kelsey*, 135 N.J. 500, 641 A.2d 248 (1994).

PENALTY AND ATTORNEY FEES

Penalties. Penalties in form of statutory interest or fines may be imposed by statute for failure to pay benefits in timely manner. *See, e.g.*, N.J. Stat. Ann. § 39:6A-

5(h), providing for interest on overdue personal injury protection (PIP) benefits; N.J. Stat. Ann. § 17B:26-46, providing statutory penalty for failure to pay benefits under individual life and health insurance contracts.

Attorney Fees. Award of counsel fees "in an action upon a liability or indemnity policy of insurance, in favor of a successful claimant," exists as procedural rule of court. R. 4:42-9(a)(6). Purpose of rule is to discourage meritless disclaimers and to more equitably provide benefits of insurance contract to insured without judicial determination that the insured was in fact entitled to protection. *Enright v. Lubow*, 215 N.J. Super. 306, 521 A.2d 1300 (App. Div. 1987), *cert. denied*, 108 N.J. 193, 528 A.2d 19 (1987). Award of fees is matter of trial court's discretion, governed by equitable principles. *Cobo v. Market Transition Facility*, 293 N.J. Super. 374, 680 A.2d 1103 (App. Div. 1996). Rule applies to action brought in New Jersey where substantive law of another jurisdiction governs. *Du-Wel Products v. U.S. Fire Ins.*, 236 N.J. Super. 349, 565 A.2d 1113 (App. Div. 1989), *cert. denied*, 121 N.J. 617, 583 A.2d 316 (1990).

Rule applies where defense obligation found even if no indemnity obligation. Fee must be allocated between covered and non-covered claims. If defense costs cannot be apportioned, insurer bears costs in entirety. *Sears v. Nat'l Union*, 340 N.J. Super. 223, 774 A.2d 526 (App. Div.), *cert. denied*, 169 N.J. 608, 782 A.2d 426 (2001).

Fees for declaratory judgment action appropriate where insurer reserved rights and defense by insurer's assigned counsel caused conflict of interest. *Aquino v. State Farm*, 349 N.J. Super. 402, 793 A.2d 824 (App. Div. 2002).

Rule does not authorize counsel fees in actions involving direct suits against carrier to enforce casualty-type direct coverage. *Vesley v. Cambridge Mut.*, 189 N.J. Super. 521, 461 A.2d 162 (App. Div. 1981), *aff'd*, 93 N.J. 323, 460 A.2d 1057 (1983). *See also Eagle Fire v. First Ins. Co.*, 145 N.J. 345, 678 A.2d 699 (1996) (company bond is not liability or indemnity policy within purview of rule.) Exception exists allowing counsel fees in personal injury protection (PIP) benefit actions where insured is successful. *Maros v. Transamerica Ins.*, 76 N.J. 572, 388 A.2d 971 (1978). Counsel fees allowable on PIP claims settled before trial. *Van Houten v. NJM Ins.*, 170 N.J. Super. 415, 406 A.2d 984 (App. Div. 1979). With the adoption of AICRA, effective March 22, 1999, successful claimant's claim for reasonable attorney fee became discretionary based upon factors; previously reasonable award was considered mandatory.

PRIVILEGED COMMUNICATIONS

Attorney/Client. Communications between attorney and client in course of attorney-client relationship and in professional confidence are privileged. Client has right to claim privilege to refuse disclosure, prevent lawyer from disclosing, and prevent others from disclosing if information becomes known in course of attorney-client transmittal, in manner not reasonably anticipated, as result of breach of attorney-client relationship, or in course of confidential or privileged communication between others and client. Attorney must claim privilege unless otherwise instructed by client or client's representative. N.J. Stat. Ann. § 2A:84A-20.

Correspondence between insurer and assigned defense counsel not privileged in suit by insured alleging bad faith of insurer in exposing insured to payment of sums exceeding policy limits. *Longo v. American Policyholders*, 181 N.J. Super. 87, 436 A.2d 577 (Law Div. 1981).

Insurer/Insured. Communications by insured to insurer representative privileged only where dominant purpose is defense of insured by attorney where confidentiality is reasonable expectation of parties. *State v. Pavin*, 202 N.J. Super. 255, 494 A.2d 834 (App. Div. 1985); *Pfender v. Torres*, 336 N.J. Super. 379, 765 A.2d 708 (App. Div. 2001), *cert. denied*, 167 N.J. 637, 772 A.2d 938 (2001); *Cf. Miller v. J.B. Hunt Transport*, 339 N.J. Super. 144, 770 A.2d 1288 (App. Div. 2001).

Clergy/Penitent. Clergy member may not disclose communication made to member as spiritual adviser. N.J. Stat. Ann. § 2A:84A-23.

Doctor/Patient. Patient or authorized representative may claim privilege from disclosure of confidential communication with physician reasonably believed helpful for diagnosis or treatment. Privilege protects disclosure by patient, physician, and person obtaining knowledge of communication from intentional breach of duty of nondisclosure by physician. N.J. Stat. Ann. § 2A:84A-22.2.

Physician has obligation to maintain patient's confidentiality. *Stempler v. Speidell*, 100 N.J. 368, 495 A.2d 857 (1985). Physician sending medical records to adversary counsel pursuant to discovery subpoena without patient authorization acts contrary to privilege, and physician and attorney issuing subpoena subject to civil liability. *Crescenzo v. Crane*, 350 N.J. Super. 531, 796 A.2d 283 (App. Div.), *cert. denied*, 174 N.J. 364, 807 A.2d 196 (2002).

Psychologist who testifies against patient without threat of "imminent serious physical violence" required by N.J. Stat. Ann. § 2A:62A-16(b)(1) breaches psy-

chologist/patient privilege and is liable to patient for damages. *Runyon v. Smith*, 163 N.J. 439, 749 A.2d 852 (2000). Psychologist/patient privilege survives death of patient. *Correia v. Sherry*, 335 N.J. Super. 60, 760 A.2d 1156 (Law Div. 2000).

Spousal. Communication in confidence between spouses privileged in civil action unless both consent to disclosure or relevant to issue in action between spouses. N.J. Stat. Ann. § 2A:84A-22.

Waiver/Piercing. Privilege may be pierced if there is legitimate need for evidence, evidence is relevant and material, and information cannot be secured from less intrusive source. *Kinsella v. Kinsella*, 150 N.J. 276, 696 A.2d 556 (1997). Privilege waived where holder contractually agrees not to claim it or, without coercion and with knowledge, discloses any part of privileged matter or consents to disclosure by another. N.J. Stat. Ann. § 2A:84A-29. If privileged documents put in issue and privilege would deny opposing party access to information vital to defense, privilege waived for documents relevant to such issue. *United Jersey Bank v. Wolosoff*, 196 N.J. Super. 553, 483 A.2d 821 (App. Div. 1984). In camera review of documents where privilege asserted required to determine if pierced or waived. *Kinsella, supra*; *Wolosoff, supra*.

Newspaper reporter cannot be compelled to divulge source of information. N.J. Stat. Ann. § 2A:84A-21. *See also Resorts Int'l, Inc. v. NJM Assoc.*, 89 N.J. 212, 445 A.2d 395, *cert. denied*, 459 U.S. 907 (1982).

PRODUCTS LIABILITY

New Jersey has adopted doctrine of strict liability in tort. *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960).

New Jersey has adopted Products Liability Act. N.J. Stat. Ann. § 2A:58C-1, *et seq.* Effective for suits filed on or after July 22, 1987. The Act does not apply to environmental tort actions. N.J. Stat. Ann. § 2A:58C-6. Act does not codify all issues related to products liability. Plaintiff must prove design defect, manufacturing defect or improper warnings or instructions. N.J. Stat. Ann. § 2A:58C-2. Defendant may defend based upon "State of the Art" on ground that there was no practical and technically feasible alternative design which would not have substantially impaired function of product. This, however, is not defense where product is egregiously unsafe or ultra-hazardous, has little or no usefulness, and user or consumer cannot be expected to have knowledge of product's risks, or product poses danger of serious injury to persons other than user or consumer. N.J. Stat. Ann. § 2A:58C-3(a)(1) and N.J. Stat. Ann. § 2A:58C-3(b). Defendant may also defend on ground



that characteristics of product are known to ordinary consumer or user and harm is an inherent characteristic of product that would be recognized by average consumer; however, defense does not apply to industrial machinery or equipment and does not apply to dangers that can feasibly be eliminated without impairing product usefulness. N.J. Stat. Ann. § 2A:58C-3(a)(2). Third statutory defense: defendant not liable if harm caused by unavoidably unsafe aspect of product and product accompanied by adequate warning. N.J. Stat. Ann. § 2A:58C-3(a)(3). Manufacturer not liable for breach of duty to warn if product contains adequate warning or if manufacturer or seller who discovers or should discover danger after product leaves its control thereafter provides adequate warning. N.J. Stat. Ann. § 2A:58C-4. Adequate warning defined as one that reasonably prudent person would have provided with respect to danger and which communicates adequate warning of danger, taking into account characteristics of product and ordinary knowledge common to person who is intended user or, in the case of prescription drugs, common knowledge of prescribing physician. *Id.* If warning or instruction is approved by FDA, rebuttable presumption arises that warning was adequate. *Id.*

Tort reform legislation provides additional defense for “product sellers” in matters where “cause of action occur(s) on or after” June 29, 1995. N.J. Stat. Ann. § 2A:58C-8,9,10, & 11, (concerning tort reform and liability of innocent sellers in products liability cases). Products sellers who: 1) did not create alleged defect; 2) did not exercise “some significant control” over design, manufacture, packaging or labeling of product (as to alleged defect only); and 3) neither had nor should have had knowledge of alleged defect, may be relieved of strict liability if affidavit filed identifying manufacturer.

Breach of warranty and strict liability in tort applicable to mass developer of homes and to builder-vendor. *Schipper v. Levitt & Sons*, 44 N.J. 70, 207 A.2d 314 (1965); *Patitucci v. Drelich*, 153 N.J. Super. 177, 379 A.2d 297 (Law Div. 1977). *But see McDonald v. Mianeki*, 159 N.J. Super. 1, 386 A.2d 1325 (App. Div. 1978), *aff'd*, 79 N.J. 275, 398 A.2d 1283 (1979), and *Aronsohn v. Mandara Masonry*, 98 N.J. 92, 484 A.2d 675 (1984).

Strict liability applicable to product leasing. *Cintrone v. Hertz*, 45 N.J. 434, 212 A.2d 769 (1965), but not applicable to financial institutions which finance purchase of product and sell product to third party after default by original purchaser. *Morgan v. Aetna Business Cred.*, 208 N.J. Super. 108, 504 A.2d 1237 (Law Div. 1985).

Strict liability applies to defective repairs prior to sale. *Realmuto v. Straub Motors*, 65 N.J. 336, 322 A.2d

440 (1974). Liability only imposed upon post-sale repairman if service is negligent or parts provided are defective. Strict liability not applicable. *Lally v. Printing Machinery Sales*, 240 N.J. Super. 181, 572 A.2d 1187 (App. Div. 1990). Product liability applicable to machinery rebuilders. *Michalko v. Cooke Color & Chem. Corp.*, 91 N.J. 386, 451 A.2d 179 (1982).

Owner selling product previously used by owner when owner is not engaged in business of selling that product is not a “merchant” of product and not strictly liable in tort. *Santiago v. EW Bliss*, 201 N.J. Super. 205, 492 A.2d 1089 (App. Div. 1985); *Allen v. Nicole*, 172 N.J. Super. 442, 412 A.2d 824 (Law Div. 1980). Doctrine of strict liability is inapplicable to occasional seller of used equipment. *Id.* Dealers of used equipment are subject to strict liability. *Realmuto, supra.*; *Turner v. International Harvester*, 133 N.J. Super. 277, 336 A.2d 62 (Law Div. 1975).

Uniform Commercial Code (UCC), and not strict liability doctrine, applies to disputes between commercial entities regarding breach of warranty. *Spring Motors Distributors v. Ford Motors Co.*, 98 N.J. 555, 489 A.2d 660 (1985). UCC is exclusive source of damages, when seller is subject to liability based solely upon economic loss. *Id.* Under UCC, four year statute of limitations, not general six year statute for property damage, applies. *Id.* However, fraud and misrepresentation claims may still survive in action between commercial parties. *Coastal Group, supra.*; *Perth Amboy Iron Works v. American Home*, 226 N.J. Super. 200, 543 A.2d 1020 (App. Div. 1988), *aff'd*, 118 N.J. 249, 571 A.2d 294 (1990).

For actions prior to Products Liability Act and for all environmental tort actions, case law holds that even where product complies with state of art, jury may still find it defective if risks of injury involved in use of product outweigh utility of product. *Becker v. Baron*, 138 N.J. 145, 649 A.2d 613 (1994); *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983); *Beshada v. Johns-Manville*, 90 N.J. 191, 447 A.2d 539 (1982). While state of the art evidence is not an absolute defense apart from risk utility analysis in strict liability action, it may be dispositive on facts of particular case, and combined with other evidence relevant to risk utility analysis, it may support judgment for manufacturer. *Malin v. Union Carbide*, 219 N.J. Super. 428, 530 A.2d 794 (App. Div. 1987). *But see Smith v. Keller*, 275 N.J. Super. 280, 645 A.2d 1269 (App. Div. 1994) (upholding verdict for defendant on same rationale). Plaintiff holds burden of proving availability of alternative safer design. *Smith v. Keller, supra.*; *Simmons v. Ford Motor Co.*, 132 Fed. Appx. 950 (3rd Cir. 2005).

Contributory Negligence. Contributory negligence in limited sense of voluntary, unreasonable exposure to

known hazard remains defense to claim of strict liability. *Dixon v. Jacobsen*, 270 N.J. Super. 569, 637 A.2d 915 (App. Div.), *cert. denied*, 136 N.J. 295, 642 A.2d 1004 (1994). Contributory negligence defense was eroded in *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406 A.2d 140 (1979). Held contributory negligence inapplicable to design defect case where industrial employee uses product in intended or reasonably foreseeable manner. In making threshold determination of whether defect exists, trial court should weigh all risk utility factors. *Id.* Case law indicates “meaningful choice” of worker is no longer a defense such that employee could have performed task in a different manner to avoid injury. *Tirrell v. Navistar*, 248 N.J. Super. 390, 591 A.2d 643 (App. Div.), *cert. denied*, 126 N.J. 390, 599 A.2d 166 (1991). *But see* Product Liability Act, *supra* for actions after July 22, 1987.

Whether allegedly unintended use of product constitutes contributory negligence is question of fact, not law, and generally, availability of contributory negligence as a defense does not turn on whether product was used for its intended purpose. *Rivera v. Westinghouse Elevator Co.*, 107 N.J. 256, 526 A.2d 705 (1987).

Comparative Negligence Act applies to strict liability in tort where plaintiff’s conduct may be found to constitute contributory negligence. *See Suter, supra*; *See* “NEGLIGENCE.” Where plaintiff brought suit against manufacturer of automobile and defendant asserted as defense plaintiff’s failure to wear seat belt, such failure could be used to reduce plaintiff’s recovery. If plaintiff sustained injuries that could have been avoided by use of seat belt, as to those injuries only, jury must add percentage of defendant’s negligence in causing accident, percentage of plaintiff’s negligence in causing accident and percentage of plaintiff’s negligence in failing to use a seat belt. Those three percentages will be divided into later two percentages to determine amount of which plaintiff’s “seat belt” or “second collision” injuries will be reduced. *Waterson v. General Motors*, 111 N.J. 238, 544 A.2d 357 (1988).

Public policy prohibits use of contributory negligence defense where manufacturer of machine fails to place guard or safety device on machine, and negligent act of plaintiff using machine is circumstance for which safety device was designed. *Bexiga v. Havir Mfg. Corp.*, 60 N.J. 402, 290 A.2d 281 (1972); *Finnegan v. Havir Mfg. Co.*, 60 N.J. 413, 290 A.2d 286 (1972).

Where manufacturer of machine has provided admittedly adequate guard, but plaintiff’s expert contends that machine should nevertheless have been provided with “interlock,” fact question for jury was presented as to whether machine was defective in design. *Cepeda, supra*.

In a design defect case, plaintiff must prove that the product was not being misused or abnormally used except where misuse or abnormal use is foreseeable. *Id.* Plaintiff has burden of proving foreseeability of misuse. *Beatty v. Schramm Inc.*, 188 N.J. Super. 587, 458 A.2d 127 (App. Div. 1983). When misuse is an issue in design defect case, before engaging in risk-utility evaluation of product to determine existence of defect, jury must determine whether product was being used for objectively foreseeable purpose and, if so, whether plaintiff’s manner of use was objectively foreseeable. *Jurado v. Western Gear Works*, 131 N.J. 375, 619 A.2d 1312 (1993). *See also Dixon, supra*.

Under “risk-utility analysis” for determining whether product is defectively designed, jury is required to impose liability on manufacturer if danger posed by product outweighs benefit of manner in which product was designed and marketed, and manufacturer cannot escape liability on grounds of user’s misuse or abnormal use if actual use proximate to injury was objectively foreseeable. *Johnson v. Makita*, 128 N.J. 86, 607 A.2d 637 (1992); *Smith v. Keller, supra*; *Dixon, supra*.

Nonprofit swimming pool trade association, promulgating minimum standards for construction and design of swimming pools, did not owe duty to consumer injured while diving into pool and did not undertake duty to warn consumers or its members of dangers inherent in diving into shallow pool or dangers presented by certain pool liners. *Meyers v. Donnatacci*, 220 N.J. Super. 73, 531 A.2d 398 (Law Div. 1987).

Under the doctrine of *res ipsa loquitur* where plaintiff is unable to identify a responsible party/tortfeasor, burden of proof of nonculpability may shift to defendants, who must provide an “explanation” of how the accident or injury occurred. *Anderson v. Somberg*, 67 N.J. 291, 338 A.2d 1 (1975), *cert. denied*, 423 U.S. 929 (1975) (surgical instrument broke during surgery); *Buckelew v. Grossbard*, 87 N.J. 512, 435 A.2d 1150 (1981). *See also Jakubowski, infra*. However, ultimate burden of proof rests with plaintiff, *e.g. Buckelew, supra*.

Where tire manufacturer breached express warranty against blowouts, and consumer was killed by blowout, manufacturer was liable for breach of express warranty even though tire was free from defects. Manufacturer’s limitation of liability for breach of express warranty to replacement of tire was held unconscionable. *Collins v. Uniroyal, Inc.*, 64 N.J. 260, 315 A.2d 16 (1974). To recover under strict liability in tort, plaintiff must prove product was defective at time it left control of manufacturer, and in absence of direct evidence of manufacturing or design defect or other evidence permitting inference that dangerous condition existed prior to sale, plaintiff

must negate other causes of failure of product for which defendant would not be responsible in order to give rise to reasonable inference that product was defective at time it left manufacturer. *Jakubowski v. Minnesota Mining & Mfg.*, 42 N.J. 177, 199 A.2d 826 (1964); *Scanlon v. General Motors Corp.*, 65 N.J. 582, 326 A.2d 673 (1974). *But see Moraca v. Ford Motor Co.*, 66 N.J. 454, 332 A.2d 599 (1975) (finding six month old automobile defective when it left manufacturer).

Manufacturer of product may be liable for substantial alteration of product if it is objectively foreseeable that such change will cause injury. Plaintiff has burden of proving foreseeability of alteration, but manufacturer has burden of proving intervening superseding cause of accident. *Navarro v. George Koch & Sons*, 211 N.J. Super. 558, 512 A.2d 507 (App. Div.), *cert. denied*, 107 N.J. 48, 526 A.2d 138 (1986). Deliberate alternative use of product and continued use for 15 years negates proximate cause as matter of law. *Brown v. U.S. Stove Co.*, 98 N.J. 155, 484 A.2d 1234 (1984).

Duty to Warn. Manufacturer and distributor of product have no duty to warn of negligence of third party. *Taylor by Wurgaft v. General Electric*, 208 N.J. Super. 207, 505 A.2d 190 (App. Div. 1986). *See also* N.J.S.A. 2A:58C-8,9,10, & 11, (relieving product sellers of strict liability in certain cases). Manufacturers of machines which were components of aerosol line had no duty to warn manufacturers of other machine in that line that other machines should be explosion proof and thus held not liable for fire and explosion caused by other machine. *DePrimo v. Lehn & Fink Products Co.*, 223 N.J. Super. 265, 538 A.2d 461 (Law Div. 1987). There is no liability when a component part, not in and of itself dangerous or defective, is incorporated into a larger system. *Zaza v. Maquess & Nell, Inc.*, 144 N.J. 34, 675 A.2d 620 (1996).

Manufacturer of product may be held liable for failure to warn of latent dangers in perfectly made product under theories of negligence, *Martin v. Bengue, Inc.*, 25 N.J. 359, 136 A.2d 626 (1957), or strict liability in tort, *Kuhner v. Mariln Manor*, 129 N.J. Super. 554, 324 A.2d 128 (Law Div. 1974), *rev'd on other grounds*, 135 N.J. Super. 582, 343 A.2d 820 (App. Div. 1975).

In duty to warn cases, strict liability in tort generally should be charged to jury. *Freund v. Cellofilm Properties, Inc.*, 87 N.J. 229, 432 A.2d 925 (1981). Knowledge of dangerous trait of product is imputed to manufacturer. *Id.* In duty to warn asbestos cases, state of art is not defense, even where danger is undiscoverable by manufacturer at time of sale. *Beshada v. Johns-Manville Products Corp*, *supra*; *Becker, supra*. *But see Feldman v. Lederle Labs.*, 97 N.J. 429, 479 A.2d 374 (1984); *cert. denied*, 112 S. Ct. 3027 (1991); *Feldman v.*

Lederle Laboratories [Feldman II], 125 N.J. 117, 592 A.2d 1176, *cert. denied* 112 S.C. 3027 (1991) (restricting *Beshada* to cases dealing with asbestos products). Where drug manufacturer was accused of breach of duty to warn of side effects of tetracycline, Court refused to exempt prescription drugs from principles of strict liability. However, manufacturer would be permitted to defend upon ground that information relating to danger was not reasonably available or obtainable, that it lacked actual or constructive knowledge of defect and that it therefore had no duty to warn of alleged dangers. Manufacturer is obligated to warn of danger of product discovered subsequent to its sale as soon as reasonably feasible. *Feldman II, supra*.

Punitive damages assessable where asbestos manufacturer fails to warn users, is aware of or culpably indifferent to risk of injury, and fails to take steps to prevent or lessen risk of injury. *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466 (1986).

Manufacturer is not automatically relieved of duty to warn merely because danger is patent, but if user of product knows danger of which warning would have apprised him at very moment of accident and chooses to disregard that conscious knowledge, absence of warning cannot be proximate cause of accident. If danger has even been momentarily forgotten by user however, absence of warning as proximate cause is factor to be considered by jury. *Vallillo v. Muskin Corp.*, 212 N.J. Super. 155, 514 A.2d 528 (App. Div. 1986), *cert. denied*, 111 N.J. 624, 546 A.2d 540 (1988); *Dixon, supra*.

In strict liability action manufacturer has duty to warn foreseeable users of products of hidden/latent dangers arising from use of product. Obviousness of danger in product is one element to be factored into analysis to determine whether manufacturer had duty to warn. Manufacturer is not automatically relieved of duty to warn merely because danger was patent and obvious. *Campos v. Firestone Tire & Rubber Co.*, 98 N.J. 198, 485 A.2d 305 (1984).

Fact that injured user of product perceived danger does not automatically extinguish manufacturer's duty to warn, but such knowledge might negate claim that failure to warn was proximate cause of plaintiff's injuries. *Id.* In absence of warning, plaintiffs are entitled to rebuttable presumption that had warning been present it would have been read and heeded. *Coffman v. Keene Corp.*, 133 N.J. 581, 628 A.2d 710 (1993).

Breach of duty to adequately warn is actionable in strict liability if warning would have enabled user of product to make product reasonably safe in ordinary use or otherwise to protect himself. *Hull v. Getty Refining & Marketing Co.*, 202 N.J. Super. 461, 495 A.2d 445 (App.



Div. 1985). The subjective understanding and experience of plaintiff is relevant to issue of whether lack of adequate warning was proximate cause. *Id.* But see *Dixon, supra*, (employing objective test).

Where placing of multiple warnings on tank car would detract from safety and create more dangerous result, duty to warn cannot be imposed as matter of law. *Andre v. Union Tank Car Co.*, 213 N.J. Super. 51, 516 A.2d 277 (Law Div. 1986), *aff'd*, 216 N.J. Super. 219, 523 A.2d 278 (App. Div. 1987).

In strict liability action, manufacturer cannot be absolved of duty to warn, whereas in negligence action, knowledge of risk that employer will not warn employees is not imputed to manufacturer. Under negligence theory, plaintiff must show defendants negligently ignored or failed to discover the risk that employer would not warn its employees. *Olencki v. Mead Chem. Co.*, 209 N.J. Super. 456, 507 A.2d 803 (App. Div. 1986). See also *Dixon, supra*.

Where, at time of transfusion, there was no reliable method by which it could be determined whether blood drawn contained serum hepatitis virus, hospital and blood bank could not be held liable under doctrine of strict liability in tort for death of patient who received transfusion of blood containing hepatitis virus. Blood given by transfusion was “unavoidably unsafe product” and thus not unreasonably dangerous or proper subject for application of doctrine of strict liability. *Brody v. Overlook Hosp.*, 127 N.J. Super. 331, 317 A.2d 392 (App. Div. 1974), *aff'd*, 66 N.J. 448, 332 A.2d 596 (1975). See also *Moore v. Underwood Memorial Hosp.*, 147 N.J. Super. 252, 371 A.2d 105 (App. Div. 1977).

No cause of action against other drug manufacturers based upon joint efforts to have “DES” placed on market, where drug was made by identified defendant. *Lyons v. Premo Pharmaceutical Labs. Inc.*, 170 N.J. Super. 183, 406 A.2d 185 (App. Div.), *cert. denied*, 82 N.J. 267, 412 A.2d 774 (1979). See also *Namm v. Charles E. Frost*, 178 N.J. Super. 19, 427 A.2d 1121 (App. Div. 1981).

Manufacturer of jeep made in strict conformity with government specification was entitled to summary judgment and could not be held liable under theory of strict liability in tort. *Sanner v. Ford Motor Co.*, 144 N.J. Super. 1, 364 A.2d 43 (Law Div. 1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (App. Div. 1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978). But where re-builder of machine omitted safety devices, even though machine was rebuilt to owner’s specifications, it could be liable under strict tort liability, particularly where it failed to advise owner that safety devices should be placed on machine. *Michalko v. Cooke Color & Chem.*

Corp., supra. Reconditioner of football helmets could be held liable for strict tort liability. *Gentile v. MacGregor Mfg. Co.*, 201 N.J. Super. 612, 493 A.2d 647 (Law Div. 1985).

Label change by manufacturer of adhesive product subsequent to sale to plaintiff but before accident was admissible in evidence. *Shatz v. TEC Technical Adhesives*, 174 N.J. Super. 135, 415 A.2d 1188 (App. Div. 1980); *Dixon, supra*.

Intermediate distributor in chain of distribution of asbestos was required to indemnify ultimate distributor when both were strictly liable as intermediate distributor was better able “to put pressure on” producer to make product safe. *Promaulayko v. Amtorg Trading Corp.*, 116 N.J. 505, 562 A.2d 202 (1989). See also *Sholtis v. American Cyanamid*, 238 N.J. Super. 8, 568 A.2d 1196 (App. Div. 1989); *Goss v. American Cyanamid*, 278 N.J. Super. 227, 650 A.2d 1001 (App. Div. 1994). See also N.J. Stat. Ann. § 2A:58C-8,9,10,&11, (limiting liability of innocent product sellers in action occurring on or after June 29, 1995).

Successor corporation acquiring all or substantially all assets and continuing essentially same manufacturing operation, is liable for defective products manufactured and sold by its predecessor. *Ramirez v. Amsted Ind.*, 86 N.J. 332, 431 A.2d 811 (1981); see also *Nieves v. Bruno Sherman Corp.*, 86 N.J. 361, 431 A.2d 826 (1981) (under certain circumstances, intermediate corporation, as well as current, viable successor corporation, may also be liable for acts or omissions of original manufacturer). Where successor acquires all or substantially all of manufacturers’ assets and undertakes essentially same operation, successor is liable for injuries caused by defects in units of same product line, even if sold by original manufacturer or its predecessor. *Mettinger v. W.W. Lowensten, Inc.*, 292 N.J. Super. 293, 678 A.2d 1115 (App. Div. 1996), *aff'd as modified by Mettinger v. Globe Slicing Machine Co.*, 153 N.J. 371, 709 A.2d 779 (1998). Successor need not be incorporated prior to expiration of limitation period of plaintiff’s product’s liability action to be bound by judgment against distributor seeking indemnification from successor, assuming all requirements for successor liability have been met. *Id.* Claims for economic loss alone based in tort or strict liability can not be maintained against a successor corporation. *Alloway v. General Marine Indus.*, 149 N.J. 620, 695 A.2d 264 (1997).

Preemption. Action for breach of duty to warn against cigarette manufacturer was not preempted by 1965 Cigarette Labeling and Advertising Act, nor was claim that cigarettes were defective in design preempted by Act. *Dewey v. R.J. Reynolds Tobacco Corp.*, 121 N.J. 69, 577 A.2d 1239 (1990). See also *Miranda v. Shortline*



Terminal, 276 N.J. Super. 20, 647 A.2d 167 (App. Div. 1994).

Without factual and scientific basis for expert's opinion, expert testimony ("net opinion") is inadmissible. *Jiminez v. GNOC Corp.*, 286 N.J. Super. 533, 670 A.2d 24 (App. Div. 1996), *cert. denied*, 145 N.J. 374 (1996). Proper foundation must be laid for expert's testimony where, in products liability automobile action, expert testified regarding lack of federal investigation of harness/conduit to support inference that no complaints had been filed and therefore no safety problem existed. *Adelman v. Lupo*, 291 N.J. Super. 207, 677 A.2d 230 (App. Div. 1996), *cert. denied*, 147 N.J. 259 (1996).

RELEASE

See Law Digest Tables.

Release of one joint tortfeasor does not necessarily release others. *Breen v. Peck*, 28 N.J. 351, 146 A.2d 665 (1958); *see also Cartel Capitol v. Fireco of New Jersey*, 81 N.J. 548, 410 A.2d 674 (1980). However, satisfaction of judgment against one joint tortfeasor concludes rights against all others. *Theobald v. Kenney's Suburban House*, 48 N.J. 203, 225 A.2d 10 (1966). Also, giving of covenant not to sue does not release joint tortfeasors. *See Breen v. Peck, supra; Vattani v. Damiano*, 9 N.J. Misc. 290, 153 A. 841 (Cir. Ct. 1931). Fraud in procurement of release nullifies release. *Palmer v. Tomlin*, 104 N.J.L. 215, 141 A. 2 (Sup. Ct. 1928); for broader view *see Heuter v. Coastal Air Lines, Inc.*, 12 N.J. Super. 490, 79 A.2d 880 (App. Div. 1951) and *Peter W. Kero, Inc. v. Terminal Constr. Corp.*, 6 N.J. 361, 78 A.2d 814 (1951).

Release is merely a form of contract and general rules that apply to contract interpretation apply to release. *Domanske v. Rapid-American*, 330 N.J. Super. 241, 749 A.2d 399 (App. Div. 2000). *See also Guerin v. Cassidy*, 38 N.J. Super. 454, 119 A.2d 780 (Ch. Div. 1955) (observing that release must have valuable consideration.) An accord and satisfaction is substitute contract for settlement of debt by alternative other than full payment, and consideration is resolution of disputed claim. *Paramount Aviation v. Agusta*, 178 F.3d 132 (3rd Cir. 1999), *cert. den.*, 528 U.S. 878 (1999).

Generally, an infant's contract is voidable at his election. *Notaro v. Notaro*, 38 N.J. Super. 311, 118 A.2d 880 (Ch. Div. 1955). *See also In re The Score Board, Inc.*, 238 B.R. 585 (D.N.J. 1999); *Boyce v. Doyle*, 113 N.J. Super. 240, 273 A.2d 408 (Law Div. 1971) (plaintiff minor who executed release in favor of defendant in consideration of payment of money, who, while proceeds could not be directly traced, received immediate benefit upon signing release, and who later elected to rescind release and obtained judgment against co-

defendant, was required to return consideration he received from defendant who prevailed on merits as to plaintiff.)

Under New Jersey law, where party affixes his signature to written instrument, such as release, conclusive presumption arises that he read, understood and assented to its terms, and he will not be heard to complain that he did not comprehend the effect of his signing. *Cooper v. Borough of Wenonah*, 977 F. Supp. 305 (D.N.J. 1997).

REPRESENTATIONS AND WARRANTIES

Untrue representation, material to risk and reasonably relied upon by insurer will support action for rescission without necessity of proving fraud. *Allstate v. Meloni*, 98 N.J. Super. 154, 236 A.2d 402 (App. Div. 1967); *Metropolitan Life v. Somers*, 137 N.J. Eq. 419, 45 A.2d 188 (Ch. Div. 1946).

Where manufacturer of tire expressly warranted tire against blowouts during life of original tread of tire, and blowout occurred within such period, causing severe personal injuries, it was unnecessary to prove defect in tire to establish breach of express warranty, and limitation by manufacturer for breach of warranty to replacement of tire and excluding liability for consequential damages resulting from such breach was invalid. *Collins v. Uniroyal, Inc.*, 64 N.J. 260, 315 A.2d 16 (1974), *aff'g*, 126 N.J. Super. 401, 315 A.2d 30 (App. Div. 1973).

SERVICE OF PROCESS

Upon Domestic or Foreign Corporations. Service may be made by delivering copy to officer, director, trustee or managing or general agent, or to person authorized by appointment or by law to receive service, or to person at registered office in charge thereof. If cannot serve as above, may serve person at principal place of business in charge thereof, or if no office in state, upon employee of corporation acting within state in discharge of duties. If cannot service as above, may serve by personal service in other state or outside United States, or by certified and regular mail addressed to registered agent, principal place of business, or registered office. R. 4:4-4.

Upon Insurance Carriers and Non-Resident Motorists. See "AUTOMOBILES."

Personal Service. May serve by certified and regular mail where personal service required but effective only if defendant answers. If personal service cannot be made despite diligent effort and inquiry, may serve by certified and regular mail, or as provided by law, or if no other means possible, by court order consistent with due process. R. 4:4-4.

SUBROGATION

Subrogation is an equitable doctrine to compel ultimate discharge of obligation by one who in good conscience ought to pay it. *A & B Auto Stores v. Newark*, 59 N.J. 5, 279 A.2d 693 (1971); *Standard Accident v. Pellecchia*, 15 N.J. 162, 104 A.2d 288 (1954). Although subrogation is a creature of equity, by express provision parties may modify or destroy right, *Providence Washington Ins. Co. v. Hogges*, 67 N.J. Super. 475, 171 A.2d 120 (App. Div. 1961); *Commercial Union v. Bituminous Cas. Corp.*, 851 F.2d 98 (3rd Cir. 1988). But in absence of such provisions, subrogation arises from mere fact of payment. *Dome Petroleum Ltd. v. Employers Mut.*, 767 F.2d 43 (3rd Cir. 1985), *on remand*, 635 F. Supp. 1397 (D.N.J. 1986). To extent of its payment, insurer occupies position of equitable assignee of all rights of assured against third party. *Montefusco Excavating & Contracting Co., Inc. v. Middlesex County*, 82 N.J. 519, 414 A.2d 961 (1980); and no formal assignment is necessary. *Id.* Right of subrogation is assignable right. *Equity Sav. & Loan Ass'n v. Chicago Title Ins. Co.*, 190 N.J. Super. 340, 463 A.2d 398 (App. Div. 1983).

Insurer, as subrogee, may not bring claim for punitive damages. *Colonial Penn v. Ford*, 172 N.J. Super. 242, 411 A.2d 736 (Law Div. 1979).

Real Party in Interest. Rule 4:26-1 provides that every action may be prosecuted in name of real party in interest. This rule being permissive rather than mandatory, subrogation suits may be brought in name of insured. See *Royce Chemical v. Daner*, 4 N.J. Super. 441, 67 A.2d 888 (App. Div. 1949); *Sullivan v. Naiman*, 130 N.J.L. 278, 32 A.2d 589 (Sup. Ct. 1943).

Where injured employee brings suit against third party after receiving workers' compensation payments, right of employer or workers' compensation insurance carrier to recover, by means of subrogation, payments made to employee, is not eliminated or reduced by reason of employer's negligence. N.J. Stat. Ann. § 34:15-40; *Schweizer v. Elox*, 70 N.J. 280, 359 A.2d 857 (1976).

Where insurer pays policy limits in settlement of PIP claim, injured party's subrogating PIP carrier thereafter loses right of subrogation. However, where liability insurer first pays subrogating PIP carrier, it is still liable to injured party for full limits of its liability, with amounts paid to subrogating PIP carrier not being deductible. *Pennsylvania Mfrs. Assn. v. Government Employees*, 136 N.J. Super. 491, 347 A.2d 5 (App. Div. 1975), *aff'd*, 72 N.J. 348, 370 A.2d 855 (1977).

There was no subrogation by PIP insurer against any party for accidents occurring after Dec. 31, 1974, even if tortfeasor was not owner or operator of private passenger automobile, *Aetna v. Gilchrist*, 85 N.J. 550,

428 A.2d 1254 (1981), *superseded by statute as stated in Wilson v. Unsatisfied Claim & Judgment Fund*, 109 N.J.271 (1988), until passage of N.J. Stat. Ann. § 39:6A-9.1, effective Oct. 4, 1983 and amended Jan. 21, 1986, which permits PIP insurer to recover PIP benefits from any tortfeasor who was not required to maintain PIP or medical expense benefits coverage, other than for pedestrians, or, although required to do so, did not maintain such PIP or medical expense benefits coverage at the time of the accident.

WAIVER AND ESTOPPEL

In general. Waiver is voluntary, intentional relinquishment of known right which must be evidenced by clear, unequivocal and decisive act from which intent to relinquish can be inferred. *In re CAFRA Permit*, 290 N.J. Super. 498, 676 A.2d 161 (App. Div. 1996), *rev'd on other grounds*, 152 N.J. 287, 702 A.2d 1261 (1997). Estoppel unavailable as basis for extending coverage to risks not covered by policies absent inducement, misrepresentation and reasonable reliance. *Martinez v. John Hancock*, 145 N.J. Super. 301, 367 A.2d 904 (App. Div. 1976), *cert. denied*, 74 N.J. 253, 377 A.2d 660 (1977).

Where party acts or makes statement, which would be fraudulent to controvert or impair because other party acted upon it in belief that what was done or said was true, party estopped from repudiating act or gainsaying statement. *Peloso v. Hartford*, 102 N.J. Super. 357, 246 A.2d 52 (Law Div. 1968), *aff'd per curiam*, 105 N.J. Super. 474, 253 A.2d 183 (App. Div. 1969), *rev'd on other grounds*, 56 N.J. 514, 267 A.2d 498 (1970). Where letter denying coverage failed to deny based on lack of bodily injury, party assigned insured's rights under policy reasonably and detrimentally relied on scope of denial letter, and insurer estopped from denying coverage for that reason; oblique, cryptic reference in letter to denial for "any other good and valid reason" insufficient. *Pasha v. Rosemount Mem. Park*, 344 N.J. Super. 350, 781 A.2d 1119 (App. Div. 2001), *cert. denied*, 171 N.J. 42, 791 A.2d 221 (2002).

Waiver by Agent. Where agent misrepresents to insured before or at inception that coverage for specific risk exists under policy, equitable estoppel cannot be invoked to hold carrier liable and insured must establish liability pursuant to N.J. Stat. Ann. § 17:28-1.9(a). *Pizzullo v. New Jersey Mfrs.*, 391 N.J. Super. 113, 917 A.2d 276 (App. Div. 2007), *rev'd on other grounds*, 196 N.J. 251, 952 A.2d 1077 (2008). Regulatory estoppel based on misrepresentation by Insurance Rating Board about scope of pollution exclusion in CGL policy appropriate except where shown insured intentionally discharged known pollutant. *Morton Int'l v. General Acc.*, 134 N.J. 1, 629 A.2d 831 (1993), *cert. denied*, 512 U.S. 1245,



reh'g denied, 512 U.S. 1277 (1994). No comparative negligence claim against insured for failure to read policy in professional malpractice suit against agent for negligent failure to procure coverage. *Aden v. Fortsh*, 169 N.J. 64, 776 A.2d 792 (2001).

Non-Waiver Agreements. Insurer who undertakes defense of insured without effective reservation of rights agreement in place estopped from later disclaiming coverage if will prejudice insured. *Griggs v. Bertram*, 88 N.J. 347, 443 A.2d 163 (1982). Insurer's attorney's control of trial and failure of insurer to inform insured that punitive damages not covered estopped insurer from denying coverage for punitive damages. *Battista v. Western World*, 227 N.J. Super. 135, 545 A.2d 841 (Law Div. 1988), *mod. sub nom, Battista v. Olson*, 250 N.J. Super. 330, 594 A.2d 260 (App. Div.), *cert. denied*, 127 N.J. 553, 606 A.2d 366 (1991).

Premiums. Requirement of payment of first full premium before policy takes effect for insurer's benefit may be waived; requirement of payment in cash waived where agent refused to accept cash payment and insured could withdraw premium electronically from bank account. *Kramer v. Met. Life*, 494 F. Supp. 1026 (D.N.J. 1980).

Proof of Loss. Insurer estopped from asserting failure to file proof of loss where loss payee has vital interest in claim and was led to believe claim adequately presented. *Highway Trailer v. Donna Motor Lines*, 46 N.J. 442, 217 A.2d 617, *cert. denied sub nom, Mt. Vernon Fire v. Highway Trailer*, 385 U.S. 834 (1966).

WARRANTIES

See "REPRESENTATIONS AND WARRANTIES."

WORKERS' COMPENSATION

General/Statutory Reference. Workers' compensation system is designed to insure work related injuries will be compensated without proof of fault. *McIntosh v. DeFilippo*, 281 N.J. Super. 171, 656 A.2d 1287 (App. Div. 1995). Statute that governs: Title 34, Chap. 15, N.J. Stat. Ann. § 34:15-1 *et seq.*

New Jersey Division of Workers' Compensation has jurisdiction when New Jersey is 1) place of injury, 2) location of contract or 3) where employment relation exists or is located. The Division has primary jurisdiction to determine if the accident is compensable. N.J. Stat. Ann. § 34:15-49. *Kristiansen v. Morgan*, 153 N.J. 298 (1998), *modified by Kristiansen v. Morgan*, 158 N.J. 681 (1999). N.J. Stat. Ann. § 34:15-10 modified to read that this subsection applies to children under eighteen years of age and that such children can file a negligence action against employer and co-worker. N.J. Stat. Ann.

§ 34:15-10 also modified to read that this subsection applies to two categories of workers who can file a tort claim, those under 18 without proper employment certificates or children employed in violation of child labor laws. Claim is to be filed in duplicate with Secretary of Workers' Compensation Bureau, Trenton, New Jersey. N.J. Stat. Ann. § 34:15-51. Employee must file within two years of date of accident. N.J. Stat. Ann. § 34: 15-1.

Appeal of decision from the Division is to Appellate Division reviewed under same standards as non-jury case. *Close v. Kordulak Bros.*, 44 N.J. 589 (1965).

Workers' Compensation is exclusive remedy as to employer and co-employee, and civil action is barred, except if employee proves intentional wrong. Factual issue if employers removal or alteration of safety guard had an intent to injure and therefore, an exception under exclusivity doctrine. *Mabee v. Borden*, 316 N.J. Super. 218 (App. Div. 1998). *See also Laidlaw v. Hariton Machinery*, 170 N.J. 602, 790 A.2d 884 (2002); N.J. Stat. Ann. § 34: 15-8. Employer or co-employee cannot be a joint tortfeasor and therefore, subject to liability under Comparative Negligence Act. N.J. Stat. Ann. § 2A:15-5.2(b); *Ramos v. Bowning-Ferris*, 103 N.J. 177 (1986). Jury is precluded from considering employer's or co-employee's negligence. Exception is express indemnification agreement. *Bradford v. Kupper Assoc.*, 283 N.J. Super. 556 (App. Div. 1995).

Employer-Employee Relationship. Employment defined by statute: person who performs services for an employer for financial consideration. N.J. Stat. Ann. § 34:15-36. Definition of employee is liberally construed. Sales Agents considered employees not independent contractors. *Re/Max of NJ v. Wausau*, 162 N.J. 282 (2000). Casual employees, arising by chance or accident and not in connection with business are not protected. N.J. Stat. Ann. § 34:15-36. *Graham v. Greene*, 31 N.J. 207 (1959). Dual employment is recognized and benefits are apportioned. Off duty police officer employed as a security guard injured while arresting a shoplifter in joint employment at time of incident. *Domanoski v. Boro of Fanwood*, 237 N.J. Super 452 (App. Div. 1989).

Independent Contractor has no benefits. Determination if an independent contractor based on two tests: Right to control and nature of work. *Lesniewski v. W.B. Furze*, 308 N.J. Super. 270 (App. Div. 1998); *Re/Max of NJ v. Wausau*, 162 N.J. 282 (2000).

Compensability. Claim must arise out of and be in course of employment. Arise out of: risk of particular accident is reasonably incidental to employment. *Coleman v. Cycle Transformer*, 105 N.J. 285 (1986). Course of employment: within the scope of work period and



work place. *Coleman, supra.*; but see where *Coleman declined to extend in Shaudys v. IMO Industries*, 285 N.J. Super. 407 (App. Div. 1995).

Recreational Activity. Participation in employer sponsored recreational or social activity is not in course of employment unless activity produced benefit to employer beyond improvement of employee health and morale. N.J. Stat. Ann. § 34:15-7. Employer compelling participation in activity ordinarily considered recreational or social in nature will render that activity a work-related task as matter of law. *Lozano v. Frank DeLuca Construction*, 178 N.J. 513, 842 A.2d 156 (2004).

Benefits available for work related claim: medical, temporary disability, permanent disability and dependency benefits. N.J. Stat. Ann. § 34:15-1 *et seq.*

Occupational Claims. Statute provides for benefits if employee contracts occupational disease/injury. Ex. Respiratory, cardiac, audiological, orthopedic, neurologic or psychiatric. N.J. Stat. Ann. § 34:15-31. Petitioner must demonstrate work exposure greater than that in daily life and due to causes or characteristics peculiar to employment. N.J. Stat. Ann. § 34:15-31.

Mental Stress Claims. Compensable if work conditions were objectively stressful, peculiar to work place and justified medical opinion states it was cause of disability. No stressful work condition peculiar to workplace which entitled petitioner to workers' compensation benefits for chronic and severe depression. *Goyden v.*

Judiciary of Superior Court, 256 N.J. Super. 438 (App. Div. 1991), *aff'd*, 128 N.J. 54 (1992). But see, *Lopez v. Bell Atlantic*, 2005 WL 461260 (A.D.) (30% permanent partial disability awarded for stress-related psychiatric injury from single intimidating event).

Employer is entitled to credit for award for prior loss of function which does not have to be work related. (Ex. Prior acts) *Abdullah v. S.B. Thomas*, 190 N.J. Super. 26 (App. Div. 1983); but see *declined to follow in Akefir v. BASF Corp.*, 275 N.J. Super. 30 (App. Div. 1994).

Lien. Employer is reimbursed for benefits where employee recovers against third party for same injuries. Lien is applicable to settlement or judgment. N.J. Stat. Ann. § 34:15-40. Lien must be "perfected," *i.e.* written notice via certified mail, return receipt to third party defendant or it's insurance carrier prior to disposition of third party case. N.J. Stat. Ann. § 34:15-40(d).

Attorneys' Fees. Judge's discretion for payment of fees up to maximum of 20% of judgment and is apportioned between employee and employer. N.J. Stat. Ann. § 34: 15-64. If third party case exists, employee is entitled to payment of attorneys fees, limited to 33 1/3 of amount paid under release or judgment and costs of \$750. N.J. Stat. Ann. § 34:15-40.

Modification of Award. Award under order approving settlement or judgment may be reviewed and modified. N.J. Stat. Ann. § 34:15-27. Order entered as a settlement with dismissal under N.J. Stat. Ann. § 34:15-20 is final and not subject to a lien.