

DIGEST OF INSURANCE LAW

NEW YORK

Courtesy of
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Albany, New York

CIVIL JUDICIAL SYSTEM

Courts of Original Jurisdiction

There are number of inferior courts of limited original civil jurisdiction, such as justice, municipal, city and county courts. In New York City each of five boroughs has Civil Court with maximum jurisdiction of \$25,000. Supreme Court, court of general and unlimited jurisdictional amount, can transfer case to Civil Court without limiting judgment amount.

Supreme Court has unlimited original civil (and criminal) jurisdiction, State being divided into eleven Supreme Court judicial districts. Except in special cases, appeals are determined by Appellate Division.

Uniform Civil Rules for Supreme Court and County Court and Uniform Rules for New York City Civil Court, relating to bifurcated trials, have been revised to encourage bifurcated trial of issues of liability first and then if liability is established, trial on damages in personal injury actions.

In Suffolk, Nassau, Queens, Brooklyn and Richmond Counties, tort trials are, in discretion of the judge, usually bifurcated. If the jury returns a verdict against one or more defendants, then a trial commences on damages.

Appellate Courts

Appellate Term. This is special Appellate Court, existent in City of New York, for purpose of determining appeals from civil courts of City of New York and other courts designated under order of Appellate Division. Appeal therefrom may be had to Appellate Division, by permission of justices of either court.

Appellate Division. State is divided into four judicial departments, in each of which there is Appellate Division, principal intermediate appellate court of State. Appeal may be taken to Appellate Division as matter of right from Supreme Court and other courts of original and minor appellate jurisdiction. Appeals may also be taken from Appellate Term by permission of justices of either court.

Court of Appeals. This is State Court of highest resort, civil and criminal. It is composed of Chief Judge and six associate judges. Its decisions are final except in cases involving Federal Constitution. This Court reviews only issues of law.

Court of Claims. Hears cases against State of New York, without a jury.

Note: There are other civil courts such as Surrogates Courts and State Court of Claims which are not here explained because of rarity with which they deal with tort or insurance matters.

LAW

Abbreviations

- A.D. – Appellate Division Reports.
 - A.D.2d – Appellate Division Reports, Second Series.
 - CPLR – Civil Practice Law and Rules.
 - E.P.T.L. – Estate Powers and Trust Laws.
 - F. Supp. – Federal Supplement.
 - F.2d – Federal Reporter, Second Series.
 - Gen. Oblig. Law – General Obligations Law.
 - Ins. Law – Insurance Law.
 - Misc. – Miscellaneous Reports.
 - N.E.2d – North Eastern Reporter, Second Series.
 - N.E. – North Eastern Reporter.
 - N.Y. or N.Y.2d or Ct. App. – New York Court of Appeals. Highest State Court.
 - N.Y.S. – New York Supplement.
 - N.Y.S.2d – New York Supplement, Second Series.
 - N.Y. Transp. Law – New York Transportation Law.
 - P.J.I. – Pattern Jury Instructions (By Association of Superior Court Justices).
 - U.C.C. – Uniform Commercial Code.
 - U.S.C.A. – United States Code Annotated.
 - N.Y. Veh. & Traf. Law – Vehicle and Traffic Law.
 - N.Y. Workers' Comp. Law – Workers' Compensation Law.
- Statutory references, unless otherwise indicated, are to Insurance Law and amendments thereof.



ACCIDENT AND HEALTH INSURANCE

See "DISABILITY."

Disease induced by accident. No statute. Following cases interpret phrase: Under policy excluding liability for death caused wholly or partly by disease, recovery permitted for death by peritonitis from dormant ulcer ruptured by blow in abdomen while lifting milk can. *Silverstein v. Metropolitan Life Ins. Co.*, 254 N.Y. 81, 171 N.E. 914 (1930). Death from infection caused by contact with hides containing "bacillus anthrax" held not induced by accident. *Bacon v. U.S. Mut. Acc. Ass'n*, 123 N.Y. 304, 25 N.E. 399 (1890). Death from gangrene caused by fall held accident. *Mulvihill v. Commercial Cas. Ins. Co.*, 221 A.D. 494, 224 N.Y.S. 644 (1927), *aff'd*, 248 N.Y. 524, 162 N.E. 510 (1928). No recovery for disability caused by prostatitis, although only secondary infection from throat trouble, under policy excepting disability from disease of generative organs. *Bartolotte v. Commercial Cas. Ins. Co.*, 163 N.Y.S. 95 (N.Y. App. Term 1917). Septic poisoning resulting from use of hypodermic needle by unskilled person, not voluntary exposure to unnecessary danger. *Townsend v. Commercial Travelers' Mut. Acc. Ass'n of Am.*, 231 N.Y. 148, 131 N.E. 871 (1921). Policy insured "against disability or death resulting directly and independently...from bodily injuries sustained through external, violent and accidental means." Insured, man 70 years old, suffered from chronic nephritis and other serious chronic conditions. Died 20 days after automobile accident. Held burden imposed upon plaintiff to show death caused by accident and not by disease. *McMartin v. Fidelity & Cas. Co.*, 264 N.Y. 220, 190 N.E. 414 (1934).

Death following blood poisoning aggravating heart condition held accidental. *Eisser v. Commercial Travelers' Mut. Acc. Ass'n of Am.*, 272 N.Y. 581, 4 N.E.2d 813 (1936). Tubercle bacillus infection detected after accident did not relieve insurer from liability. *Bellanca v. Travelers Ins. Co.*, 160 Misc. 795, 290 N.Y.S. 664 (N.Y. Sup. Ct. 1936).

Double Indemnity. New York policies generally provide for double indemnity in case of injury while in or on public conveyance. Taxicab held public conveyance. *Anderson v. Fidelity & Cas. Co.*, 228 N.Y. 475, 127 N.E. 584 (1920). Subway platform not public conveyance. *Weil v. Globe Indem. Co.*, 179 A.D. 166, 166 N.Y.S. 225 (1st Dep't 1977). Injuries sustained on unenclosed platform of railroad car, not "in any passenger conveyance." *Von Bokkelen v. Travelers' Ins. Co. of Hartford*, 34 A.D. 399, 54 N.Y.S. 307 (1898), *aff'd*, 167 N.Y. 590, 60 N.E. 1121 (1901). Insured in hospital for chronic alcoholism fell, fractured skull, died; covered. *Moran v. Massachusetts Mut. Life Ins. Co.*, 29 N.Y.S.2d 33 (N.Y. App. Term 1941), *aff'd*, 263 A.D. 936, 33

N.Y.S.2d 108 (1st Dep't 1942). Double indemnity recoverable if death resulted from accident, regardless of presence of disease, if disease did not contribute to death. *Escoe v. Metropolitan Life Ins. Co.*, 178 Misc. 698, 35 N.Y.S.2d 833 (N.Y. Sup. Ct. 1942).

Proof showing death due to disease, not corrected by subsequent proof that death was caused by accident or accidental means, precludes recovery of double indemnity. *Wachtel v. Equitable Life Assur. Soc. of U.S.*, 266 N.Y. 345, 194 N.E. 850 (1935).

No recovery by insured under hospital policy which excluded "hospital service provided for under any compensation law," though compensation carrier was reimbursed out of proceeds of insured's settlement with third party tortfeasor. *Moeller v. Assoc. Hosp. Serv.*, 304 N.Y. 73, 106 N.E.2d 16 (1952).

See "AVIATION."

Notice and Proof of Loss. Failure to furnish within required time, not excused although insured not aware of injury until expiration of time. *MacKay v. Metropolitan Life Ins. Co.*, 281 N.Y. 42, 22 N.E.2d 154 (1939).

Renewal. Constitutes new contract and commences new period for which disability benefits payable. *Jacobson v. Equitable Life Assur. Soc. of U.S.*, 176 Misc. 879, 29 N.Y.S.2d 254 (N.Y. City Ct. 1941); *Ginsburg v. Equitable Life Assur. Soc.*, 254 A.D. 445, 5 N.Y.S.2d 16 (1st Dep't 1938), *appeal denied*, 279 N.Y. 810, 18 N.E.2d 46 (1938).

ACCIDENTAL MEANS

Is the occurrence an "accident" within the policy, must look to the casualty from view of insured and is it unexpected, unusual and unforeseen. *Lachter v. Insurance Co. of N. Am.*, 145 A.D.2d 540, 536 N.Y.S.2d 93 (2d Dep't 1988).

No Statute. Following have been held to be accidental means: Fall caused by vertigo. *Larkin v. Interstate Cas. Co.*, 43 A.D. 365, 60 N.Y.S. 205 (2d Dep't 1899). Fall causing hemorrhage of brain. *Bernard v. Commercial Travelers Mut. Acc. Ass'n of Am.*, 223 N.Y. 644, 119 N.E. 1031 (1918). Use of hypodermic needle causing septic poisoning. *Townsend v. Commercial Travelers Mut. Acc. Ass'n of Am.*, 231 N.Y. 148, 131 N.E. 871 (1921). Streptococci following tooth extraction. *Pardee v. Prudential Ins. Co. of Am.*, 171 Misc. 981, 14 N.Y.S.2d 736 (N.Y. City Ct. 1939). Infection from punctured wound causing inflammation of brain. *Lewis v. Ocean Acc. & Guarantee Corp.*, 224 N.Y. 18, 120 N.E. 56 (1918). Sunstroke. *Gallagher v. Fidelity & Cas. Co. of N.Y.*, 163 A.D. 556, 148 N.Y.S. 1016 (2d Dep't 1914). Overexertion from unexpected weight. *Reynolds v. Equi-*



table Acc. Ass'n, 1 N.Y.S. 738 (N.Y. Sup. Ct. 1888), *aff'd*, 121 N.Y. 649, 24 N.E. 1091 (1890). Patient asphyxiated by vomit while under ether. *Burch v. Prudential Ins. Co. of Am.*, 250 A.D. 450, 294 N.Y.S. 458 (2d Dep't 1937). Monoxide poisoning. *Parker v. Equitable Life Assur. Soc'y*, 248 A.D. 803, 289 N.Y.S. 57 (3d Dep't 1936); *Bolger v. Prudential Ins. Co. of Am.*, 250 A.D. 122, 293 N.Y.S. 554 (2d Dep't 1937). Death following sedative for insomnia. *Meyer v. New York Life Ins. Co.*, 249 A.D. 243, 291 N.Y.S. 912 (2d Dep't 1936), *mot. granted*, 276 N.Y. 557, 12 N.E.2d 573 (1937). Death from gangrene following fracture. *MacNair v. Commercial Travelers Mut. Acc. Ass'n of Am.*, 275 N.Y. 630, 11 N.E.2d 791 (1937). Death from asphyxiation caused by vomit while intoxicated. *Ash v. Mutual Life Ins. Co.*, 170 Misc. 227, 9 N.Y.S.2d 32 (N.Y. Sup. Ct. 1938), *aff'd*, 283 N.Y. 718, 28 N.E.2d 723 (1940). Hypersensitivity to novocaine. *Adlerblum v. Metropolitan Life Ins. Co.*, 284 N.Y. 695, 30 N.E.2d 728 (1940). Death from hemorrhage following tonsillectomy. *Garten v. Metropolitan Life Ins. Co.*, 287 N.Y. 738, 39 N.E.2d 940 (1942). Insured driving through heavy snowstorm with wife and child, accidentally went into ditch and died from overexertion trying to extricate car. *Schechter v. Equitable Life Assur. Soc'y*, 275 A.D. 958, 89 N.Y.S.2d 654 (2d Dep't 1949); *Burr v. Commercial Travelers Mut. Acc. Ass'n*, 295 N.Y. 294, 67 N.E.2d 248 (1946). Where no emergency. *McQuade v. Prudential Ins. Co.*, 166 Misc. 524, 2 N.Y.S.2d 647 (N.Y. Mun. Ct. 1938).

Following held not to have been caused by accidental means: Paralysis following fall, where pathological condition of vertebrae existed prior thereto. *Naseef v. Metropolitan Life Ins. Co.*, 230 A.D. 610, 245 N.Y.S. 430 (4th Dep't 1930). Septic peritonitis resulting from inflammation of stomach, caused by regular movements of the psoas muscle while riding bicycle. *Appel v. Aetna Life Ins. Co.*, 180 N.Y. 514, 72 N.E. 1139 (1904). Heart disease aggravated by injury. *Smith v. Massachusetts Bonding & Ins. Co.*, 207 A.D. 682, 202 N.Y.S. 857 (2d Dep't 1924), *aff'd*, 241 N.Y. 558, 150 N.E. 554 (1925). Death by gas administered by dentist. *Barnstead v. Commercial Travelers' Mut. Acc. Ass'n*, 204 A.D. 473, 198 N.Y.S. 416 (1st Dep't 1923). Rupture sustained by mail clerk while lifting mail sacks. *Fane v. National Ass'n Railway Mail Clerks*, 197 A.D. 145, 188 N.Y.S. 222 (4th Dep't 1921). Resisting arrest. *Manno v. Metropolitan Life Ins. Co.*, 139 Misc. 848, 249 N.Y.S. 471 (N.Y. City Ct. 1931); *Fabian v. Prudential Ins. Co.*, 139 Misc. 640, 249 N.Y.S. 1 (N.Y. Sup. Ct. 1931). Peritonitis following operation for recurrent hernia. *Ward v. Commercial Travelers Mut. Acc. Ass'n*, 139 Misc. 178, 249 N.Y.S. 43 (N.Y. Sup. Ct. 1931). Amputation of leg due to electric baking treatment. *Romanoff v. Commer-*

cial Travelers Mut. Acc. Ass'n, 243 A.D. 725, 277 N.Y.S. 291 (2d Dep't 1935). Death from heart rupture when construction foreman sprained himself in attempting to prevent accident. *Wilcox v. Mutual Life Ins. Co.*, 265 N.Y. 665, 193 N.E. 436 (1934). Monoxide poisoning. *City Bank Farmers Trust Co. v. Equitable Life Assur. Soc'y*, 272 N.Y. 448, 3 N.E.2d 863 (1936); *Osburn v. Commercial Travelers Mut. Acc. Ass'n*, 265 N.Y. 671, 193 N.E. 438 (1934). Abdominal hemorrhage caused by vibrator. *Gould v. Travelers Ins. Co.*, 244 A.D. 274, 279 N.Y.S. 892 (2d Dep't 1935), *aff'd*, 270 N.Y. 584, 1 N.E.2d 341 (1936). Death while under anesthetic. *Mulholland v. Prudential Ins. Co.*, 155 Misc. 718, 280 N.Y.S. 322 (N.Y. City Ct. 1935). Death from sunstroke, not caused by means of which there is visible contusion or wound. *Dupee v. Travelers Ins. Co.*, 253 A.D. 278, 2 N.Y.S.2d 62 (2d Dep't 1938), *aff'd*, 278 N.Y. 659, 16 N.E.2d 391 (1938). Death following acute alcoholism. *Powley v. Equitable Life Assur. Soc'y*, 257 A.D. 324, 12 N.Y.S.2d 864 (1st Dep't 1939), *aff'd*, 284 N.Y. 664, 30 N.E.2d 607 (1940). Death caused by blood poisoning resulting from infection, communicated to wound coincident with infliction, is covered by policy providing that insurance shall only apply to cases where injury is proximate and sole cause of disability or death. *Martin v. Manufacturers' Acc. Indem. Co.*, 151 N.Y. 94, 45 N.E. 377 (1896). Overexertion, shoveling snow. *Schechter v. Equitable Life Assur. Soc'y*, 275 A.D. 958, 89 N.Y.S.2d 654 (2d Dep't 1949). In emergency. *Burr v. Commercial Travelers Mut. Acc. Ass'n*, 295 N.Y. 294, 67 N.E.2d 248 (1946).

Retirement and Social Security Law §63 defines "accident" as "sudden, fortuitous mischance, unexpected, out of the ordinary and injurious impact." *Cadiz v. McCall*, 236 A.D.2d 766, 654 N.Y.S.2d 48 (3d Dep't 1997).

ADJUSTERS

License required for independent casualty adjuster. Ins. Law §123. Not liable for correct reports upon which insurer disclaims liability. *Greyhound Corp. v. Commercial Cas. Ins. Co.*, 259 A.D. 317, 19 N.Y.S.2d 239 (1st Dep't 1940).

AGE

See "AUTOMOBILES"; "LIABILITY INSURANCE. Infants and Violation of Law"; "NEGLIGENCE."

In general age of majority is 18 years. Legal age for buying alcoholic beverages is 21 years.



AGENTS AND BROKERS

Agents and brokers license requirements, *see* Ins. Law §§2101 and 2102. Insurance consultants license, *see* §2107. Excess lines brokers license, *see* §2105.

For Whom. Whether agent acts for insured or insurer is question of fact in each case but as general rule broker is agent of insured. *Jet Setting Service Corp. v. Toomey*, 91 A.D.2d 431, 459 N.Y.S.2d 751 (1st Dep't 1983); *Salzano v. Marine Ins. Co.*, 173 A.D. 275, 159 N.Y.S. 277 (4th Dep't 1916). In particular case may be agent for insurer, *e.g.*, delivering policy and collecting premiums. Ins. Law §2121; *Globe Indem. Co. v. Gilligan*, 73 Misc. 2d 27, 341 N.Y.S.2d 18 (N.Y. Dist. Ct. 1973); *C. A. Smith Lumber Co. v. Colonial Assur. Co.*, 175 A.D. 975, 161 N.Y.S. 1120 (1st Dep't 1916). For facts, *see C.A. Smith Lumber v. Colonial Assur. Co.*, 172 A.D. 149, 158 N.Y.S. 198 (1st Dep't 1916). Husband of mortgagee acting as agent for mortgagor liable for negligent procurement of policy, void as to mortgagor. *Barile v. Wright*, 256 N.Y. 1, 175 N.E. 351 (1931). Agent of insurer, authorized by insured to keep premises insured, is agent of insured with respect to cancellation. *Rose Inn Corp. v. National Union Fire Ins. Co.*, 258 N.Y. 51, 179 N.E. 256 (1932).

Ordinary duty of broker to insured is to procure policy which provides coverage desired. *Hermann v. Niagara Fire Ins. Co.*, 100 N.Y. 411, 3 N.E. 341 (1885). Though broker as alleged may have known about accident and possibility of claim against insured, suit by insured for failure of broker to give written notice of accident to insurer dismissed. *Cassidy v. Dauch*, 145 N.Y.S.2d 485 (N.Y. Sup. Ct. 1955).

Knowledge of Agent. Imputed to insurer in absence of warranty by insured. *Short v. Home Ins. Co.*, 90 N.Y. 16 (1882); *Bennett v. North British & Mercantile Ins. Co.*, 81 N.Y. 273 (1880). Rule contra in case breach of warranty contained in application. *Woodruff v. Imperial Fire Ins. Co.*, 83 N.Y. 133 (1880); *Van Schoick v. Niagara Fire Ins. Co.*, 68 N.Y. 434 (1877). Agent's knowledge of falsity of answer in application does not necessarily prevent defense of breach of warranty. *Fisher v. U.S. Cas. Co.*, 138 Misc. 307, 245 N.Y.S. 406 (N.Y. Sup. Ct. 1930), *aff'd*, 238 A.D. 781, 262 N.Y.S. 886 (1st Dep't 1933). General agent may appoint sub-agents, whose knowledge, acquired in ordinary course of business, binds insurer. *Barone v. Aetna Life Ins. Co.*, 260 N.Y. 410, 183 N.E. 900 (1933). Oral notice to agent did not relieve insured from giving written notice required by policy. *Nothhelfer v. American Surety Co.*, 277 A.D. 1009, 100 N.Y.S.2d 331 (2d Dep't 1950). Knowledge of agent not imputed to insurer where agent has community of interest with insured. *Bazar v. Great Am. Indem. Co.*, 306 N.Y. 481, 119 N.E.2d 346 (1954); *Otsego Aviation*

Serv. v. Glens Falls Ins. Co., 277 A.D. 612, 102 N.Y.S.2d 344 (3d Dep't 1951).

Liquidation of Insolvent Company. Broker's obligation re premiums collected by him but not paid to company or liquidator. *Bohlinger v. Zanger*, 306 N.Y. 228, 117 N.E.2d 338 (1954).

ARBITRATION

See CPLR §§7501 thru 7503 regarding primary issues in arbitration.

Arbitration may be set aside by court, if award has no rational basis. *Garcia v. Federal Ins. Co.*, 61 A.D.2d 236, 401 N.Y.S.2d 540 (2d Dep't 1978), *reversed on other grounds*, 46 N.Y.2d 1040, 389 N.E.2d 1066 (1979); *GEICO v. Sparrow*, 66 A.D.2d 782, 410 N.Y.S.2d 657 (2d Dep't 1978).

Generally statute of limitations is same as it applies in court on same type of claim. CPLR §7502 (b).

Three ways to proceed: Notice of Intention to Arbitrate, Application to Compel Arbitration, Petition Court to Stay Arbitration. CPLR §7503. Party has twenty days from demand for arbitration to move for stay. CPLR §7503(c); *Matter of Propulsora Ixtapa Sur*, 211 A.D.2d 546, 621 N.Y.S.2d 569 (1st Dep't 1995). Submission to arbitration discontinues suit. *Rivera v. Sales*, 208 A.D.2d 514, 618 N.Y.S.2d 34 (2d Dep't 1994); *Matter of Allstate Ins. Co.*, 161 A.D.2d 424, 555 N.Y.S.2d 353 (1st Dep't 1990); *Matarasso v. Cont'l Cas. Co.*, 56 N.Y.2d 264, 436 N.E.2d 1305 (1982).

ASSIGNMENT

See "FIRE INSURANCE"; "SUBROGATION, Parties to Action."

ATTORNEYS

Charging lien applies to proceeds from litigation and may be enforced only to obtain reasonable value of attorney's services. *Kaplan v. Reuss*, 113 A.D.2d 184, 495 N.Y.S.2d 404 (2d Dep't 1985), *aff'd*, 68 N.Y.2d 693, 497 N.E.2d 671 (1986).

Casualty insurer may change attorneys if policy provides change attorneys without consent of insured. *Petition of Preferred Acc. Ins. Co.*, 273 A.D. 993, 78 N.Y.S.2d 674 (1st Dep't 1948). However, it is recommended that insurer request consent and seek cooperation from insured.

Conflict of interest between insured and insurer as to "character of act causing injury" or some causes of complaint outside policy coverage, insured should choose defense attorney and insurer reimburse fee.



Prashker v. U.S. Guarantee Co., 1 N.Y.2d 584, 136 N.E.2d 871 (1956). See also "LIABILITY INSURANCE."

Attorney Malpractice. There must be an attorney-client relationship existing between parties at the time of alleged malpractice. *Cronin v. Scott*, 78 A.D.2d 745, 432 N.Y.S.2d 656 (3d Dep't 1980), appeal dismissed, 52 N.Y.2d 999, 419 N.E.2d 1079 (1981). Briefly, plaintiff must prove that primary case of plaintiff was a prima facie case and that defendant lawyer committed malpractice. *Perini v. Perini*, 154 A.D.2d 360, 546 N.Y.S.2d 971 (2d Dep't 1989).

AUTOMOBILES

See Law Digest Tables.

See also "NO-FAULT"; "NEGLIGENCE"; "LIABILITY INSURANCE"; "DAMAGES."

Age. Minimum age eighteen years, except junior operator's license issued to person over sixteen in districts where population less than one million. N.Y. Veh. & Traf. Law §501. However, no license is misdemeanor and this can go to issue of credibility. *Phass v. MacClenathen*, 274 A.D. 535, 85 N.Y.S.2d 643 (3d Dep't 1948).

Agency. Owner is liable if auto operated by another with permission, express or implied. N.Y. Veh. & Traf. Law §388. Owner loaned car to nephew, forbade nephew's friend to drive, instructions disobeyed, friend drove, nephew in car, owner liable. *Arcara v. Moresse*, 258 N.Y. 211, 179 N.E. 389 (1932). Owner loaned car to son, forbade friend to drive, instructions disobeyed, friend drove, son not in car, owner not liable. *Voorhes v. Tide Water Oil Sales Corp.*, 240 A.D. 710, 264 N.Y.S. 743 (2d Dep't 1933). Law has no extraterritorial effect. *Cherwien v. Geiter*, 272 N.Y. 165, 5 N.E.2d 185 (1936).

Court of Appeals has not limited 'negligence in the operation' to negligence in the actual driving of the vehicle. *Elfeld v. Burkham Auto Renting Corp.*, 299 N.Y. 336, 87 N.E.2d 285 (1949).

Liability of owner for failure to remove key when parked on public street. N.Y. Veh. & Traf. Law §1210; *Delfino v. Ranieri*, 131 Misc. 2d 600, 501 N.Y.S.2d 248 (N.Y. Sup. Ct. 1986).

Dealer loaned plates to purchaser who, at time of accident, was using them beyond scope and period of agreed permission. Defendant dealer may cross-complain against defendant purchaser for indemnification. *Young v. Central Greyhound Lines, Inc.*, 206 Misc. 1045, 136 N.Y.S.2d 519 (N.Y. Sup. Ct. 1955). Vendor owner liable for negligence of purchaser if he fails to remove vendor's plates. *Mastromauro v. Manno*, 120 A.D.2d 496, 501 N.Y.S.2d 697 (2d Dep't 1986).

Bicyclists usually required to comply with N.Y. Veh. & Traf. Law §1231. But see *Secor v. Kohl*, 67 A.D.2d 358, 415 N.Y.S.2d 434 (2d Dep't 1979) ("100 feet before turn continuous signal inapplicable to bicycles").

Comparative Negligence. Statute effective September 1, 1975, Art. 14, CPLR §§1411-13, plaintiff's damages are diminished in proportion to amount of negligence attributable to plaintiff. The pure comparative statute applies to all suits for personal injury, wrongful death or property damage; whatever the legal theory, "Culpable Conduct" of the plaintiff is considered, not just negligent conduct. *Flynn v. City of New York*, 103 A.D.2d 98, 478 N.Y.S.2d 666 (2d Dep't 1984).

Compulsory Coverage. N.Y. Veh. & Traf. Law §341, owner registration requires insurance of at least \$25,000 for bodily injury to one person and \$50,000 for death, and for two or more in one accident \$50,000 bodily injury and \$100,000 deaths, and \$10,000 property damage, or post bond or financial security deposit. Owner operating or permitting without required financial security guilty of misdemeanor. N.Y. Veh. & Traf. Law §319.

Auto Policy Limits Ambiguous. Policy set forth \$100,000/\$300,000 per accident ambiguous, and allowed more than \$100,000 to one, where two or more are injured. *Mostow v. State Farm Ins. Cos.*, 88 N.Y.2d 321, 668 N.E.2d 392 (1996).

Emergency. Defendant who creates emergency is not entitled to benefit from emergency situation law. *Boccaccio v. Longden*, 61 A.D.2d 851, 401 N.Y.S.2d 924 (3d Dep't 1978). Brake failure. *McAllister v. Adam Packing Corp.*, 66 A.D.2d 975, 412 N.Y.S.2d 50 (3d Dep't 1978). "Sudden Emergency Doctrine" defined. *Malatesta v. Hopf*, 163 A.D.2d 651, 557 N.Y.S.2d 994 (3d Dep't 1990); P.J.I. §2:14. Defendant confronted with sudden and unexpected circumstances, with very little time to think and act, then no negligence if act is reasonable in emergency situation. *Caristo v. Sanzone*, 96 N.Y.2d 172, 750 N.E.2d 36 (2001); P.J.I. §2:14.

Defective Brakes. Operator not negligent per se for defective brakes in absence of notice. *Kalkin v. Marken*, 87 N.Y.S.2d 839 (N.Y. Sup. Ct. 1949); *Schaeffer v. Caldwell*, 273 A.D. 263, 78 N.Y.S.2d 652 (4th Dep't 1948).

Invitee takes car as he finds it, and no duty of inspection rests on owner and operator. *Breasette v. Briccoe*, 21 Misc. 2d 968, 197 N.Y.S.2d 866 (N.Y. Sup. Ct. 1960); *Parker v. Helfert*, 140 Misc. 905, 252 N.Y.S. 35 (N.Y. Sup. Ct. 1931).

Sudden Stop. At any time car ahead may violate law by sudden stop without signaling but such facts constitute, as to rear car, nothing more than accident for which its driver cannot be held blameworthy. *Zwilling v. Harrison*, 269 N.Y. 461, 199 N.E. 761 (1936).

Driver looking and not seeing approaching car which from physical facts and time must have been in full view is "incredible testimony as matter of law." *Abrams v. Gerold*, 37 A.D.2d 391, 326 N.Y.S.2d 1 (1st Dep't 1971); *Weigand v. United Traction Co.* 221 N.Y. 39, 116 N.E. 345 (1917).

Guest Cases. No guest statute. Driver owes passenger duty of ordinary and reasonable care not to increase or create danger. *Higgins v. Mason*, 255 N.Y. 104, 174 N.E. 77 (1930). Guest statutes at place of accident not applied to New York residents who were transient to place of accident. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279 (1963), *on remand*, 40 Misc. 2d 757, 243 N.Y.S.2d 715 (N.Y. Sup. Ct. 1963). Host not liable for injury to or death of guest because of mechanical defect, unknown to him, even though defect might have been discovered upon inspection. *Kemp v. Stephenson*, 139 Misc. 38, 247 N.Y.S. 650 (N.Y. Mun. Ct. 1931); *Higgins*, 255 N.Y. at 110. Guest assumes risk of defect in automobile unknown to owner. *Knapp v. Gould Auto Co.*, 252 A.D. 430, 299 N.Y.S. 688 (4th Dep't 1937); *Riemers v. Clark*, 252 A.D. 892, 300 N.Y.S. 31 (2d Dep't 1937).

Last Clear Chance Doctrine is followed. Whether defendant lacked actual knowledge of plaintiff being in state of peril, or simply saw plaintiff and disregarded his presence, is jury issue. *Lee v. General Baking Co.*, 40 A.D.2d 687, 336 N.Y.S.2d 92 (2d Dep't 1972). Infant hesitating and then dashing across highway, doctrine not applicable. *Lloyd-Taylor v. Northern Westchester Builders*, 67 A.D.2d 904, 413 N.Y.S.2d 176 (2d Dep't 1979). Plaintiff running across road, doctrine applied. *Jarrett v. Madifari*, 67 A.D.2d 396, 415 N.Y.S.2d 644 (1st Dep't 1979). Doctrine does not apply where negligent acts of two parties work contemporaneous. *McDaniel v. Clarkstown Cent. School*, 111 A.D.2d 151, 488 N.Y.S.2d 783 (2d Dep't 1985); *Lloyd-Taylor*, 67 A.D.2d at 904, 413 N.Y.S.2d at 176.

Negligent Entrustment. Defendant must have control over vehicle and entrust vehicle to one he knew or in exercise of ordinary care should have known was incompetent to operate it. N.Y. Veh. & Traf. Law §388; *Albert v. Guerrero*, 103 Misc. 2d 530, 426 N.Y.S.2d 393 (N.Y. Sup. Ct. 1980).

Impleader. Third Party Suit. See "NEGLIGENCE."

Imputed Negligence. Negligence of operator is not imputed to passenger. *Tucker v. State*, 178 Misc. 643, 35

N.Y.S.2d 689 (N.Y. Ct. Cl. 1942). Nor of husband to wife. *Jenks v. Veeder Contr. Co.*, 290 N.Y. 810, 50 N.E.2d 231 (1943). Nor of parent or guardian to child. Even when passenger owner sues driver of his car, there is no imputed negligence of driver to owner passenger (plaintiff). *Kalechman v. Drew Auto*, 33 N.Y.2d 397, 308 N.E.2d 886 (1973); *see also Durham v. Holmes*, 79 Misc. 2d 143, 359 N.Y.S.2d 736 (N.Y. Sup. Ct. 1974) (plaintiff, as owner/passenger, is not relieved of statutory derivative liability as owner under N.Y. Veh. & Traf. Law §388).

In automobile owner's action for property damage, negligence of operator, on his own business, will not be imputed to absent owner. *Mills v. Gabriel*, 284 N.Y. 755, 31 N.E.2d 512 (1940).

Learner's Permit. Passenger "assumes risk" of injury caused by driver's lack of skill and experience. *St. Denis v. Skidmore*, 14 A.D.2d 981, 221 N.Y.S.2d 613 (3d Dep't 1961), *aff'd*, 12 N.Y.2d 901, 188 N.E.2d 268 (1963); *Spellman v. Spellman*, 309 N.Y. 663, 128 N.E.2d 317 (1955); *Le Fleur v. Vergilia*, 280 A.D. 1035, 117 N.Y.S.2d 244 (4th Dep't 1952). Licensed driver has duty as instructor and duty of general care in supervision of learner-driver. N.Y. Veh. & Traf. Law §501 (a); *Lazofsky v. City of New York*, 22 A.D.2d 858, 254 N.Y.S.2d 349 (1st Dep't 1964); *Wolpert v. Garrett*, 278 A.D. 893, 105 N.Y.S.2d 21 (4th Dep't 1951).

License. Special junior license 16 to 18 years. N.Y. Veh. & Traf. Law §501. Failure to have driver's license does not raise presumption of negligence. *Adams v. Surllock*, 261 A.D. 874, 25 N.Y.S.2d 1018 (4th Dep't 1941), *aff'd*, 286 N.Y. 667, 36 N.E.2d 699 (1941). It is not prima facie negligence. *Phass v. MacClenathen*, 274 A.D. 535, 85 N.Y.S.2d 643 (3d Dep't 1948). Violation of statute may in some cases (operating without headlights) establish negligence per se. *Martin v. Herzog*, 228 N.Y. 164, 126 N.E. 814 (1920).

Husband and Wife. Auto policy does not cover when spouse sues spouse, where injured spouse must prove liability of insured spouse. Ins. Law §3420(g). Proper counterclaimed impleader. *Sharlow v. Nationwide Mut. Ins. Co.*, 47 A.D.2d 572, 362 N.Y.S.2d 618 (3d Dep't 1975); *State Farm Mut. Auto Ins. v. Westlake*, 35 N.Y.2d 587; 324 N.E.2d 137 (1974).

Loading and Unloading. See "LIABILITY INSURANCE, Loading and Unloading."

Ownership. Motor vehicle department certificate of registration creates presumption of ownership, but not positive or conclusive determination of title. *Zeller v. Preferred Mut.*, 9 Misc. 2d 855, 168 N.Y.S.2d 260 (N.Y. Mun. Ct. 1957). Certificate of Title Act (1972) requires owner to apply for certificate of title. On transfers Motor

Vehicle Department will not re-register unless satisfied as to genuineness of records and application. Article 46, N.Y. Veh. & Traf. Law Owner includes lessee or bailee having exclusive use under lease or otherwise for more than 30 days. N.Y. Veh. & Traf. Law §128.

Pedestrian. Crossing highway other than at intersection is not contributory negligence as matter of law. *Retegi v. Gremelsbacker*, 23 N.Y.2d 794, 244 N.E.2d 870 (1968); *Smith v. Morelli*, 274 A.D. 1020, 85 N.Y.S.2d 3 (3d Dep't 1948). This is culpable conduct of plaintiff and jury decides percentage of comparative negligence.

Jurisdiction. Service of Process Upon Non-Resident Motorists. By serving Secretary of State and registered or certified (return receipt) mailing to or serving copy on defendant personally without state in manner prescribed. N.Y. Veh. & Traf. Law §253. This section applies to all courts having jurisdiction. *La Placa v. Hutcheson*, 191 Misc. 27, 79 N.Y.S.2d 355 (N.Y. Co. Ct. 1948).

No-fault statute effective Feb. 1, 1974 -See this heading.

Rental. Violation of named drivers in car rental is not a bar to liability of owner (lessor) to injured third parties. *Tom Sawyer Country Day School v. Providence Washington*, 108 A.D.2d 810, 485 N.Y.S.2d 126 (2d Dep't 1985); *MVAIC v. Cont'l Nat'l*, 35 N.Y.2d 260, 319 N.E.2d 182 (1974); N.Y. Veh. & Traf. Law §388. However, 49 USC 30106, the "Graves Amendment," bars State law vicarious liability actions commenced on or after August 10, 2005, against owners of motor vehicles engaged in the trade or business of renting or leasing motor vehicles. *Hernandez v. Sanchez*, 40 A.D.3d 446, 836 N.Y.S.2d 577 (1st Dep't 2006).

Statute applies to accident arising out of "operation" of auto. Unloading not "operation." *Brown v. Hertz Drivurself Stations*, 203 Misc. 728, 116 N.Y.S.2d 412 (N.Y. Sup. Ct. 1952); *Mulligan v. Jersey Truck Renters*, 196 Misc. 828, 95 N.Y.S.2d 232 (N.Y. City Ct. 1949). Assault by non-resident after auto accident, not within statute. *Feinberg v. Apone*, 201 Misc. 437, 114 N.Y.S.2d 472 (N.Y. Sup. Ct. 1952).

Motorized bicycle is "motor vehicle" within N.Y. Veh. & Traf. Law. *People v. Farina*, 65 Misc. 2d 970, 319 N.Y.S.2d 166 (N.Y. Dist. Ct. 1971). See also "LIABILITY INSURANCE, Coverage." An all-terrain vehicle is not a motor vehicle under the N.Y. Veh. & Traf. Law or Ins. Law. *Guay v. NY Central Mut. Fire Ins. Co.*, 144 Misc. 2d 785, 545 N.Y.S.2d 265 (N.Y. Sup. Ct. 1989).

Seat Belts. Passenger car use of seat belts is mandatory. Non-use of seat belt is only for jury's determination of damages and not on issue of liability. Burden of

pleading and proving use would have mitigated injuries is on defendant from expert testimony. *Spier v. Barker*, 35 N.Y.2d 444, 323 N.E.2d 164 (1974). However, the seat belt defense need not be specifically pleaded where the defendant has pleaded comparative negligence. *Costanza v. City of New York*, 147 Misc. 2d 94, 553 N.Y.S.2d 616 (N.Y. City Ct. 1990). Safety belts and anchorage assemblies. N.Y. Veh. & Traf. Law §383. Expert testimony regarding ejection from car creates an issue of casual connection of injuries and non-use of seat belt. *Cappadona v. State*, 154 A.D.2d 498, 546 N.Y.S.2d 124 (2d Dep't 1989).

Sudden Emergency. See "NEGLIGENCE."

Trailer is motor vehicle under N.Y. Veh. & Traf. Law §388. Non-resident owner not subject to service of process on Secretary of State. *Lowe v. Western Express Co.*, 189 Misc. 177, 68 N.Y.S.2d 873 (N.Y. Sup. Ct. 1947). Same with respect to farm tractor. *Wilson v. Heidenreich*, 201 Misc. 333, 109 N.Y.S.2d 428 (N.Y. Sup. Ct. 1951). Regarding coverage, see "LIABILITY INSURANCE."

Unattended requires removal of key; stop engine, set brake and on grade turn wheels to curb. N.Y. Veh. & Traf. Law §1210. Leaving key under book on front seat but locking door, court found was not a violation of statute and no liability for injuries caused by thief. *Banellis v. Yackel*, 69 A.D.2d 1013, 416 N.Y.S.2d 151 (4th Dep't 1979). Statute does not apply to car in privately owned parking lot, thus owner of car has no liability for use by juvenile thief. *Podstupka v. Brannon*, 81 Misc. 2d 338, 365 N.Y.S.2d 670 (N.Y. Sup. Ct. 1975).

It is negligence as matter of law if stopped car is hit in rear in absence of some excuse. *Cohen v. Terranella*, 112 A.D.2d 264, 491 N.Y.S.2d 711 (2d Dep't 1985).

Uninsured Motorist Endorsement. Policy requires binding arbitration only on two issues: 1) liability legally of uninsured motorist and 2) amount of damages. *Matter of Rosenbaum*, 11 N.Y.2d 310, 183 N.E.2d 667 (1962).

AVIATION

See "DEATH."

Fare paying passenger on regularly scheduled flight over established air route, not "engaged in aviation or aeronautics." *Hartol Products Co. v. Prudential Ins. Co.*, 290 N.Y. 44, 47 N.E.2d 687 (1943); *Lee v. Guardian Ins. Co.*, 187 Misc. 221, 46 N.Y.S.2d 241 (N.Y. Sup. Ct. 1944).

Printed conditions on ticket relieving air carrier from liability for negligence, held invalid. *Conklin v. Canadian-Colonial Airways*, 266 N.Y. 244, 194 N.E. 692 (1935). Contra with respect to international flight



governed by Warsaw Convention. *See* decision and discussion in *Ross v. Pan Am.*, 299 N.Y. 88, 85 N.E.2d 880 (1949).

Action for wrongful death, extent and distribution of damages recoverable governed by laws of place of accident. *Faron v. Eastern Airlines*, 193 Misc. 395, 84 N.Y.S.2d 568 (N.Y. Sup. Ct. 1948); *Matter of Petrusek*, 191 Misc. 9, 79 N.Y.S.2d 561 (N.Y. Sup. Ct. 1948).

Warsaw Convention. Applies to international flights and countries agreeing to the treaty. It limits recovery but creates presumption of liability. List of countries to Warsaw Convention, write: Dept. of State, Treaty Div., Int. Civil Aviation Organization, Montreal, Canada.

Service of process upon non-resident owners and operators of aircraft. By serving Secretary of State and otherwise complying with General Business Law §250.

BROKERS

See "AGENTS AND BROKERS."

CANCELLATION

See "LIABILITY INSURANCE."

Carrier not permitted to rescind assigned risk auto policy on basis of fraud or misrepresentation. *Aetna v. O'Connor*, 8 N.Y.2d 359, 170 N.E.2d 681 (1960).

Regulated. Ins. Law §3427. Insured entitled to gross return premium without deduction of broker's commission. *1501 Sixty-Ninth St. Corp. v. Consolidated*, 176 Misc. 747, 29 N.Y.S.2d 269 (N.Y. Mun. Ct. 1941).

Exclusive method to terminate auto insurance is set forth in N.Y. Veh. & Traf. Law §313.

Liability Insurance. When effective. *Lesk v. London*, 286 N.Y. 443, 36 N.E.2d 655 (1941).

CONSTRUCTION OF POLICY

See also details under "LIABILITY INSURANCE."

Policy and endorsement provisions, where inconsistent, must be read together. Endorsement does not abrogate policy provisions unless so provided. *Thompson v. American Mut. Liab. Ins. Co.*, 276 N.Y. 266, 11 N.E.2d 905 (1937). Effect of reinstatement endorsement on marine liability policy. *Connors v. British*, N.Y.L.J., 4/16/38, pg. 1839.

Ambiguities in policy usually construed against insurer. *Utica v. World*, 277 A.D. 483, 100 N.Y.S.2d 941 (4th Dep't 1950).

CONTRIBUTION

See also "IMPLEADER" and "RELEASE"-Joint tortfeasors. Contribution and Indemnity distinguished. *Smart v. Morard*, 124 N.Y.S.2d 634 (N.Y. Sup. 1953).

Cross complaints can be served between co-defendants for contribution in accordance with percentage of each defendant's negligence. CPLR §3011; *Bush Terminal v. Luckenbach S.S.*, 9 N.Y.2d 426, 174 N.E.2d 516 (1961). Plaintiff's general release to one defendant bars cross-complaint of co-defendant tortfeasor as to contribution but not for indemnification. *See* Gen. Oblig. Law §15-108.

Generally successive tortfeasors may not seek apportionment of damages, each liable for damages by specific conduct for aggravation. *Helmrich v. Eli Lilly*, 89 A.D.2d 441, 455 N.Y.S.2d 460 (4th Dep't 1982); *see also Glaser v. M. Fortunoff*, 71 N.Y.2d 643, 524 N.E.2d 413 (1988) (general obligations statute bars successive tortfeasor).

DAMAGES

See also "CONTRIBUTION"; "RELEASE"; "IMPLEADER"; "DEATH."

Arbitration Awards Collateral Estoppel. Arbitrator's award denying plaintiff's No-Fault injury benefits claim is binding in subsequent personal injury liability suit and is bar against plaintiff on same issues. *Kilduff v. Donna Oil Corp.*, 74 A.D.2d 562, 424 N.Y.S.2d 282 (2d Dep't 1980); *see also Schwartz v. Public Adm'r*, 24 N.Y.2d 65, 246 N.E.2d 725 (1969); *Matter of American Ins. Co.*, 43 N.Y.2d 184, 371 N.E.2d 798, 401 N.Y.S.2d 36 (1977); *Baldwin v. Brooks*, 83 A.D.2d 85, 443 N.Y.S.2d 906 (4th Dep't 1981) (not binding since defendant not present at and no interest in arbitration. Collateral estoppel is applied by court to issues decided by arbitrator). *Clemens v. Apple*, 102 A.D.2d 236, 477 N.Y.S.2d 774 (3d Dep't 1984), *aff'd*, 65 N.Y.2d 746, 481 N.E.2d 560 (1985).

Collateral Sources. In all personal injury, property damage or wrongful death suits started on or after 6/30/86, Court shall reduce verdict by amount equal to past and projected future collateral sources. Excluded are life insurance, Social Security from title XVIII, or where source is entitled by law to liens against plaintiff's recovery. CPLR §4545 (c). It is generally believed that it should be pleaded as an affirmative defense. 1988 amendment of CPLR §4111 requires detailed itemization in the verdict. Applies to all cases on trial after July, 1988. Extends required "Collateral Source" itemization. *Fleming v. Bernauer*, 138 Misc. 2d 267, 524 N.Y.S.2d 143 (N.Y. Sup. Ct. 1987).



Comparative Negligence. In action for personal injury, property damage or wrongful death, amount of damages otherwise recoverable shall be diminished in proportion that culpable conduct attributable to plaintiff, regardless of amount or percentage, bears to culpable conduct of defendants. CPLR §1411. It must be pleaded as affirmative defense and burden of proof is on defendant.

Joint and Several Liability. Doctrine of joint and several liability is modified in suits started after 7/30/86, so that if defendant joint tortfeasors are found to be 50 percent or less liable for non-economic damages, that defendant is liable only for his or her equitable share of non-economic damages. CPLR §1601. However, this limitation applies only to "non economic loss" (*i.e.*, pain and suffering, loss of consortium, etc.); does not apply to medical expenses, loss of wages, property damage; has no effect upon Gen. Oblig. Law §15-108 release; and does not apply to: 1) written contracts of indemnity in which it was "expressly" agreed that indemnification would apply to type of loss suffered; 2) claim for indemnification by public employee; 3) claims between defendant and third party defendant who is employer of plaintiff; 4) any claim in which intent or reckless disregard for safety of others is element of proof; 5) any defendant found liable by reason of use, operation or ownership of motor vehicle, 6) product liability action in which manufacturer is not defendant because plaintiff could not obtain jurisdiction over defendant and where plaintiff proves that manufacturer would have been strictly liable if jurisdiction had been obtained; 7) situations where non-parties share in culpability, if plaintiff can prove that with due diligence he was unable to obtain jurisdiction over that person; 8) actions which allege conspiracy among tortfeasors. CPLR §1602; *See also* "CONTRIBUTION." Generally, in negligence and malpractice actions, if one defendant is vicariously liable they will not be considered joint tortfeasors but "united in interest." *Raschel v. Rish*, 69 N.Y.2d 694, 504 N.E.2d 389 (1986).

Death. *See* "DEATH."

Plaintiff entitled to fair compensation for conscious pain endured provided jury finds he was conscious prior to his death. *Morico v. Green Bus Lines, Inc.*, 429 F. Supp. 23 (E.D.N.Y. 1977); *Zalewski v. State*, 53 A.D.2d 781, 384 N.Y.S.2d 545 (3d Dep't 1976). Cause dismissed medical testimony was inconclusive. Court set \$10,000 where death two hours after in hospital. *Henry v. DeCuya*, 387 N.Y.S.2d 112 (1st Dep't 1976). Award for pain and suffering increased to \$900,000 for a plaintiff who survived 15-30 minutes before death. *Ramos v. La Montana Moving*, 247 A.D.2d 333, 669 N.Y.S.2d 529 (1st Dep't 1998). Drastically increased pain and suf-

fering damages for a plaintiff who survived a short while after accident/before death. Loss of enjoyment of life is a factor in assessing conscious pain and suffering. *Nussbaum v. Gibstein*, 73 N.Y.2d 912, 536 N.E.2d 618 (1989). As to coma, "some level of awareness" of plaintiff is the standard. Loss of enjoyment of life allowed when there is "some level of awareness." *McDougald v. Garber*, 73 N.Y.2d 246, 536 N.E.2d 372 (1989); *see also Nussbaum*, 73 N.Y.2d at 914. Court of Appeals indicates that this is not a separate item of damages.

Special statute allows damages for mental suffering due to mutilation of dead body without consent, including unauthorized autopsy. *Grawunder v. Beth Israel Hosp.*, 242 A.D. 56, 272 N.Y.S. 171 (2d Dep't 1934), *aff'd*, 266 N.Y. 605, 195 N.E. 221 (1935); *Beller v. City of New York*, 269 A.D. 642, 58 N.Y.S.2d 112 (1st Dep't 1945). Tort action exists for prenatal injuries negligently inflicted regardless of whether unborn child was viable, provided that it was born alive, *Endresz v. Friedberg*, 24 N.Y.2d 478, 248 N.E.2d 901 (1969); *Matter of Peabody*, 5 N.Y.2d 541, 158 N.E.2d 841 (1959); *Liebler v. Our Lady of Victory Hosp.*, 43 A.D.2d 898, 351 N.Y.S.2d 480 (4th Dep't 1974). No remedy is indicated for being born under handicap when only alternative is not to have been born at all. *Stewart v. Long Island College Hosp.*, 35 A.D.2d 531, 313 N.Y.S.2d 502 (2d Dep't 1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616 (1972); *Greenberg v. Klot*, 47 A.D.2d 765, 367 N.Y.S.2d 966 (2d Dep't 1975); *Johnson v. Yeshiva University*, 53 A.D.2d 523, 384 N.Y.S.2d 455 (1st Dep't 1976). Court does not recognize cause of action for wrongful life, in suit by child suffering from Down's Syndrome. *Alquijay v. St. Lukes-Roosevelt Hosp. Ctr.*, 63 N.Y.2d 978, 473 N.E.2d 244 (1984).

Excessive Verdict. Trial judge can order new trial on damages unless plaintiff consents to reduce amount. CPLR §4213. Appellate Division on appeal can find award excessive or inadequate, "if jury award deviates materially from reasonable compensation." CPLR §5501. Must set forth reasons for setting verdict aside. CPLR §5522 (B). Jury award of \$200,000 for one hour of conscious pain and suffering was upheld. *Lanera v. Hertz Corp.*, 161 A.D.2d 183, 554 N.Y.S.2d 570 (1st Dep't 1990).

Frivolous Claims. Any personal injury, property damage, or wrongful death claim, counterclaim, defense or crossclaim which is found by court to be frivolous will subject unsuccessful proponent to costs and reasonable attorney fees, not to exceed \$10,000. These may be assessed against attorney or party or both. CPLR §8303-a.

Inadequate Verdict. Trial court cannot increase, but can direct new trial on damages alone unless defendant

agrees to increase. *Ladd v. Parkhurst*, 87 A.D.2d 971, 450 N.Y.S.2d 92 (4th Dep't 1982).

Itemized Verdicts. CPLR §4111(d). Statutes very difficult to apply. *Jeras v. East Mfg.*, 143 Misc. 2d 188, 540 N.Y.S.2d 656 (N.Y. Sup. Ct. 1989). In personal injury, property damage, and wrongful death suits started on or after 7/30/86, verdict must specify special and general damages and item amounts for past and future damages and number of years over which such damages are to compensate plaintiff. CPLR §4111 (d) and (f). Also article 50-1 (CPLR §5031-Medical & Dental). Verdicts in wrongful death actions must reflect impact of taxes on deceased's income. E.P.T.L. §5-4.3. Judge tells jury personal injury award not taxable and not to consider tax consequences in figuring amount. *Lanzano v. City of New York*, 71 N.Y.2d 208, 519 N.E.2d 331 (1988). In medical malpractice. *Johnson v. Manhattan & Bronx Transit*, 71 N.Y.2d 198, 519 N.E.2d 326 (1988).

Periodic Payment of Judgments. Article 50-A CPLR for Medical Malpractice suits and Article 50-B CPLR for tort actions generally are very ambiguous and cases interpreting statutes are essential to some understanding. Court of Appeals, "statute[s] [are] patently ambiguous." *Rohring v. City of Niagara Falls*, 84 N.Y.2d 60, 638 N.E.2d 62 (1994). The two articles are identical and require judgments for future damages in excess of \$250,000 be structured. See CPLR §5041. The *Rohring* case interprets statutes, "reduction for attorneys fees" and "interest." See CPLR §§5031-5049. New appellate standards for review of verdicts. CPLR §§5501 (c), 5522 amended.

Indemnification. Common law right of full indemnity by vicariously liable defendant solely by statute not acts against active tort defendant recognized. *Kelly v. Diesel*, 35 N.Y.2d 1, 315 N.E.2d 751 (1974); *Rogers v. Dorchester*, 32 N.Y.2d 553, 300 N.E.2d 403 (1973). Wording of contractual indemnity clause must show "intention in unequivocal terms." *Kurek v. Port Chester Housing Auth.*, 18 N.Y.2d 450, 223 N.E.2d 25 (1966); *Murray v. Rupp Rental*, 39 A.D.2d 637, 332 N.Y.S.2d 552 (4th Dep't 1972). Gen. Oblig. Law §5-322.1 (8/30/75) voided certain future indemnification clauses in construction, alteration or repair building where attempt to exculpate from damages "resulting from sole negligence of promisee." Common law indemnification only if party seeking indemnification may not be held responsible in any degree. *Rosado v. Proctor & Schwartz*, 66 N.Y.2d 21, 484 N.E. 2d 1354 (1985).

Construction. In construction industry contracts to indemnify for liability caused by contractors' own negligence are void. Gen. Oblig. Law §5-322.1. *But see Brown v. Two Exchange Plaza Partners*, 146 A.D.2d 129, 539 N.Y.S.2d 889 (1st Dep't 1989), *aff'd*, 76

N.Y.2d 172, 556 N.E.2d 430 (1990). General contractor, not in control of the work but vicariously liable under labor law, may obtain contractual indemnity from a non-negligent subcontractor unless general contractor actively negligent. Gen. Oblig. Law §5-322.1 does not void indemnification. See also "INDEMNITY." Owner of premises out of control of work is liable to plaintiff under Labor Law but has right to full common law indemnification from active tortfeasor. *Francavilla v. Nagar Const. Co., Inc.*, 151 A.D.2d 282, 542 N.Y.S.2d 557 (1st Dep't 1989). See also under "NEGLIGENCE, Construction, Labor Law."

Severe emotional and neurological disturbances with residual physical manifestation caused by fright and hysteria, without physical trauma, are recognized. *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729 (1961); see also, *Howard v. Lecher*, 42 N.Y.2d 109, 366 N.E.2d 64 (1977); *Bovsun v. Sanperi*, 61 N.Y.2d 219, 461 N.E.2d 843 (1984). *But see Kalina v. General Hosp.*, 31 Misc. 2d 18, 220 N.Y.S.2d 733 (N.Y. Sup. Ct. 1961), *aff'd*, 13 N.Y.2d 1023, 195 N.E.2d 309 (1963). Complaint for mental anguish due to operation by doctor who was not qualified under Jewish religion was dismissed. *Kalina v. General Hosp.*, 18 A.D.2d 757, 235 N.Y.S.2d 808 (4th Dep't 1962). "Cancerphobia" case. *Ferrara v. Galluchio*, 5 N.Y.2d 16, 152 N.E.2d 249 (1958). No cause of action for "psychic" injury to mother who ran to accident scene and saw injuries sustained by her 2-year old child. *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E. 2d 419 (1969).

Court of Appeals allowed damages for emotional distress, "where plaintiff is in zone of danger," such that defendant's negligence exposes plaintiff to unreasonable risk of injury. *Bovsun v. Sanperi*, 61 N.Y.2d 219, 461 N.E.2d 843 (1984). Daughter in car suffered "serious emotional disturbance" observing parents injuries allowed \$250,000 award. *Van Norden v. Kliternick*, 178 A.D.2d 167, 577 N.Y.S.2d 27 (1st Dep't 1991). Niece is not in "immediate family" and cannot sue for emotional injuries from seeing aunt killed by truck. *Trombetta v. Conkling*, 82 N.Y.2d 549, 626 N.E.2d 653 (1993).

Seat Belts. Non-use of seat belt must be pleaded and proven by defendant in mitigation of plaintiff's injuries by use of expert testimony. *Spier v. Barker*, 35 N.Y.2d 444, 323 N.E.2d 164 (1974).

Settlement. Verdict or claim of plaintiff against non-settling defendants is reduced by amount of settlement or in amount of released tortfeasors equitable share of damages. CPLR §4533-b. Applied even when jury found no fault as to defendant who paid settlement prior to verdict. *Purcell v. Doherty*, 102 Misc. 2d 1049, 424 N.Y.S.2d 991 (N.Y. Sup. Ct. 1980), *aff'd*, 55 N.Y.2d 985, 434 N.E.2d 270 (1982). See also Gen. Oblig. Law



§15-108 and section here in "RELEASE." Plaintiff release to third party defendant (employer) and tortfeasor required dismissal of third party complaint and cross complaint as to contribution. *Madaffari v. Wilmod Co.*, 96 Misc. 2d 729, 409 N.Y.S.2d 587 (N.Y. Sup. Ct. 1978). Prejudgment settlement with one defendant, where effect of settlement was postponed until after judgment, precluded settling defendant from seeking contribution from other defendants. *Lettiere v. Martin*, 62 A.D.2d 810, 406 N.Y.S.2d 510 (2d Dep't 1978). See also "RELEASE" and Gen. Oblig. Law §15-108(a). Settlement by some defendants shall leave reduction of verdicts "as to each non-settling defendant, responsible only for its equitable share." No single formula or method, court decides within objectives of statute. *Williams v. Niske*, 81 N.Y.2d 437, 615 N.E.2d 1003 (1993).

Defendant shall pay plaintiff within 21 days of tender (receipt) of proper closing papers, *i.e.* release, signed discontinuance, any required court order. Otherwise plaintiff may enter judgment, without further notice, including costs, disbursements, and interest. CPLR §5003.

Generally defendant, as wrongdoer, may not claim plaintiff's proceeds of insurance policy in mitigation of damages, but exception is where defendant procured medical payment coverage for benefit of such injured plaintiff, and defendant alone paid premium, then defendant was entitled to benefit of such foresight and reduction of damages to extent paid by insurance policy. *Moore v. Leggette*, 24 A.D.2d 891, 264 N.Y.S.2d 765 (2d Dep't 1965).

Medical malpractice verdicts under special statutes, *see* "MALPRACTICE."

Punitive. Since punitive (exemplary) damages are to punish defendant, and as warning to others, it would defeat public policy to allow insurance coverage. *Am. Surety v. Gold*, 375 F.2d 523 (10th Cir. 1967); *Teska v. Atlantic Nat'l Ins. Co.*, 59 Misc. 2d 615, 300 N.Y.S.2d 375 (N.Y. Dist. Ct. 1969); *Padavan v. Clemente*, 43 A.D.2d 729, 350 N.Y.S.2d 694 (2d Dep't 1973); *Home Ins. v. Am. Home Products*, 75 N.Y.2d 196, 550 N.E.2d 930 (1990). No punitive damages in wrongful death action as statute, E.P.T.L. §5-4.3 allows only compensatory. *Robert v. Ford Motor Co.*, 73 A.D.2d 1025, 424 N.Y.S.2d 747 (3d Dep't 1980). Court of Appeals set forth that insurance coverage for punitive damages is against public policy and policy provisions affording such coverage are void. *Hartford Acc. & Indem. v. Village of Hempstead*, 48 N.Y.2d 218, 397 N.E.2d 737 (1979). Punitive not recoverable for breach of isolated insurance policy. *Hebert v. State Farm Mut.*, 124 A.D.2d 958, 508 N.Y.S.2d 710 (3d Dep't 1986). Intoxicated driving insufficient in law for punitive damages. There must be a showing of wanton or reckless conduct. *Swee-*

ney v. McCormick, 159 A.D.2d 832, 552 N.Y.S.2d 707 (3d Dep't 1990). *But see Rinaldo v. Mashayekhi*, 185 A.D.2d 435, 585 N.Y.S.2d 615 (3d Dep't 1992) (driver intoxicated, and speeding in heavy traffic, punitive \$7,500 allowed).

DEATH

See Law Digest Tables.

See "AVIATION."

Abatement and Survival. No cause of action for injury to person or property shall be lost because of death of person in whose favor cause of action existed or death of person liable for injury, whether such person died before or after occurrence of injuries. E.P.T.L. §§11-3.2 (a), (b) (McKinney 2007).

No wrongful death action for death of unborn child. No viable cause of action exists for wrongful death of unborn infant, but mother has action for mental and emotional upset attending stillbirths and father for funeral expense. *Endresz v. Friedberg*, 24 N.Y.2d 478, 248 N.E.2d 901 (1969).

Action for Wrongful Death. Next of kin have cause of action for wrongful death. E.P.T.L. §5-4.1. However, decedent's estate has action for personal injuries or property damage. Damages in suit for personal injuries, when injuries cause death, limited to those accruing before death. E.P.T.L. §11-3.3. For amount of recovery for wrongful death, *see* E.P.T.L. §5-4.3. Rule for distribution of damages pursuant to E.P.T.L. §5-4.4 provides for distribution in proportion to pecuniary injuries suffered by surviving spouse and next of kin. Statute does not give representative separate cause of action and he may not maintain action where deceased compromised claim during lifetime. *Fontheim v. Third Ave. Ry. Co.*, 257 A.D. 147, 12 N.Y.S.2d 90 (1st Dep't 1939), *appeal denied*, 289 N.Y. 624, 43 N.E.2d 840 (1942). Where death is after September 1, 1982, punitive damages are allowed. E.P.T.L. §5-4.3 (b). However, no liability insurance coverage for punitive damages. *See* "DAMAGES, Punitive." Plaintiff entitled to prejudgment interest on wrongful death verdict but not on conscious pain and suffering verdict. *Sleeman v. Reifenstein*, 90 A.D.2d 996, 456 N.Y.S.2d 597 (4th Dep't 1982).

Plaintiff's burden of proof. Legal obligation to support or evidence decedent would have volunteered to support. *Public Adm'r of Kings County v. U.S. Fleet Leasing*, 159 A.D.2d 331, 552 N.Y.S.2d 608 (1st Dep't 1990). Award to mother, age 36 years, two minor children, loss of household services, and intention to work in future; \$890,000 not excessive. *Allen v. New York City Tr. Auth.*, 148 A.D.2d 563, 539 N.Y.S.2d 19 (2d Dep't 1989).



Where injury causes death, an action may include claim for conscious pain and suffering of deceased from time of injury until death. E.P.T.L. §5-4.1. Award of \$300,000 for five hours conscious and severe pain before death is upheld. *Van Norden v. Kliternick*, 178 A.D.2d 167, 577 N.Y.S.2d 27 (1st Dep't 1991). Wrongful death judgment carries interest from date of death. E.P.T.L. §5-4.3. Elements of damage are: age, health, life expectancy, earning ability and income, age and number of dependents, etc. *Dimitroff v. State*, 171 Misc. 635, 13 N.Y.S.2d 458 (N.Y. Ct. Cl. 1939); *Grasso v. State*, 289 N.Y. 552, 43 N.E.2d 530 (1942). Also, may include loss of enjoyment of life, if there is proof of "some level of awareness." *McDougald v. Garber*, 73 N.Y.2d 246, 536 N.E. 2d 372 (1989).

Plaintiff in a death action is not held to as high a degree of proof. It is sufficient to prove facts from which negligence might reasonably be inferred. *Archie v. Todd Shipyards Corp.*, 65 A.D.2d 699, 410 N.Y.S.2d 69 (1st Dep't 1978). Inapplicable where death not caused by the accident. *Jordan v. Parrinello*, 144 A.D.2d 540, 534 N.Y.S.2d 686 (2d Dep't 1988).

Awards in wrongful death suits shall reflect decedent's post-tax income. E.P.T.L. §5-4.3.

Presumption from unexplained absence. Death presumed after seven years unexplained absence. *D'Avignon v. Travelers*, 230 N.Y. 560, 130 N.E. 893 (1920). Claimant bears burden of establishing facts giving rise to presumption. *Butler v. Mutual Life Ins. Co.*, 225 N.Y. 197, 121 N.E. 758 (1919); *Gardner v. Northwestern Mut. Life Ins. Co.*, 272 N.Y. 592, 4 N.E.2d 818 (1936); *Gellman v. Metropolitan Life Ins. Co.*, 286 N.Y. 619, 36 N.E.2d 457 (1941).

No presumption of death from disappearance will be indulged short of seven years except where irresistible inference demonstrates death occurred in clearly identified disaster. *Matter of Katz*, 135 Misc. 861, 239 N.Y.S. 722 (Sur. Ct. Kings County 1930); *In re Mount Vernon Trust Co.*, 193 Misc. 226, 83 N.Y.S.2d 902 (Sup. Ct. Westchester County 1948).

Seven years unexplained absence does not necessarily raise presumption of death so as to commence running of Statute of Limitations. *Gardner v. Northwestern Mut. Life Ins. Co.*, 225 N.Y. at 592.

DISABILITY

See "ACCIDENT AND HEALTH INSURANCE."

No statute. Two general classifications: indemnifying against disability from transacting duties pertaining to occupation, and indemnifying against disability from performing any work or following any occupation. Lib-

eral construction generally in favor of insured. "It is difficult to conceive of case where a [person] could be so severely injured as to be unable to" carry on some kind of occupation or business. *Beach v. Supreme Tent*, 74 A.D. 527, 77 N.Y.S. 770 (4th Dep't 1902), *aff'd*, 177 N.Y. 100, 69 N.E. 281 (1904). One designated self "retired" (gentleman) not entitled to recover for injury to hand caused by buzz saw. *Knapp v. Preferred*, 6 N.Y.S. 57 (Sup. Ct. N.Y. 1889), *reargument denied*, 8 N.Y.S. 946, *appeal dismissed*, 130 N.Y. 635, 29 N.E. 150 (1891). Physician kicked in face by lunatic, resulting in paralysis thirty-six days later, not entitled to recovery under policy insuring against accidents immediately and wholly disabling him. *Hagadorn v. Masonic Acc. Assn.*, 59 A.D. 321, 69 N.Y.S. 831 (3d Dep't 1901). Same in case of insured who continued regular occupation for five weeks. *Johnson v. Travelers Ins. Co.*, 269 N.Y. 401, 199 N.E. 637 (1936). Insured gave occupation as "ice-man, proprietor," although he performed manual labor of delivery. Held totally disabled although able to direct business during disability. *Neafie v. Manufacturers'*, 8 N.Y.S. 202 (Sup. Ct. N.Y. 1889). Under policy indemnifying against total disability resulting from external, violent and accidental injuries, physician injured by fall entitled to recover, despite occasionally permitted patients to come to bedside, made some examinations, and prescribed for them, but never left his bed. *Wolcott v. United*, 8 N.Y.S. 263 (Sup. Ct. N.Y. 1889). Attempt of insured to work for two weeks following injury, held not to defeat right to recover under policy indemnifying against injuries which "immediately, continuously and wholly disabled and prevent the insured from the date of the accident from performing every duty pertaining to any business or occupation." *Harasymczuk v. Massachusetts*, 127 Misc. 344, 216 N.Y.S. 97 (Sup. Ct. N.Y. 1926). Under policy insuring against accidents immediately, continuously and wholly disabling, physician permitted to recover where despite serious leg injury he visited patient on day after accident but confined to bed for several weeks thereafter. *Brendon v. Traders'*, 84 A.D. 530, 82 N.Y.S. 860 (1st Dep't 1903). Railroad switchman injured, necessitating amputation of fingers of right hand was disabled within contemplation of charter of fraternal organization providing "member who, by reason of disability incurred... becomes unable to direct or perform kind of business or labor which he has always followed and by which alone he can thereafter earn livelihood." *Hutchinson v. Supreme Tent*, 22 N.Y.S. 801 (Sup. Ct. N.Y. 1893). Insured afflicted with incurable Buerger's Disease, requiring constant care and treatment for eight hours day was "totally and permanently disabled" and "prevented thereby from engaging in any occupation or performing any work for compensation of financial value." *Halperin v. Equitable Life Assur. Soc'y*, 125 Misc. 422, 210 N.Y.S. 720 (N.Y. Mun. Ct. 1925).

Collector working several days after injury was not entitled to recover under policy providing indemnity for injuries which "shall... continuously and wholly disable and prevent insured from date of accident, from performing any and every kind of duty permitting to his occupation." *Oka v. United States Fid. & Guar. Co.*, 213 A.D. 746, 210 N.Y.S. 96 (1st Dep't 1925). Farmer, sometimes operating portable saw mill, injured so that arm became practically useless, found entitled to disability benefits under by-law of fraternal organization providing if member becomes "unable to direct or perform kind of business or labor which he has always followed and by which alone he can thereafter earn livelihood." *Beach v. Supreme Tent*, 177 N.Y. 100, 69 N.E. 281 (1904). By-law of fraternal organization provided disability benefits for member who by reason of disease or accident "becomes permanently disabled from following his usual or some other occupation." *Neill v. Order of United Friends*, 149 N.Y. 430, 44 N.E.145 (1896). Railroad brakeman suffered amputation of leg. *Id.* at 430. Held: "or some other occupation" should not be construed to mean "any occupation" but one requiring substantially same physical and mental ability as that in which he usually engaged, and insured entitled to benefit. *Id.* Presumption of permanency discussed. *Mackenzie v. Equitable Life Assur. Soc'y*, 140 Misc. 655, 251 N.Y.S. 528 (1st Dept. 1931).

Permanent total disability from tuberculosis not established. *Herbert v. Metropolitan Life Ins. Co.*, 39 N.Y.S.2d 567 (Sup. Ct. Broome County 1943).

Disability is not permanent if insured may alleviate or control it by standard form of treatment not inherently dangerous. *Papas v. Equitable Life Assur. Soc'y*, 265 A.D. 128, 37 N.Y.S.2d 811 (2d Dep't 1942) (diabetic refused insulin therapy). Cited by dissent *Mondello v. Beekman*, 78 A.D.2d 824, 433 N.Y.S.2d 439 (1st Dep't 1980) (Lupiano, J., dissenting), *aff'd*, 56 N.Y.2d 513, 449 N.Y.S.2d 963 (1982).

Insured not entitled to benefits where he unreasonably refuses to submit to operation advised by his own doctor. *Finkelstein v. Metropolitan Life Ins.*, 152 Misc. 439, 273 N.Y.S. 629 (1st Dep't 1934). An insured disabled by felonious assault who recovered temporarily before disability recurred was held not entitled to benefit for second period of disability under policy provision requiring continuous disability from date of accident. *Irwin v. Travelers' Ins. Co.*, 243 A.D. 377, 277 N.Y.S. 724 (2d Dep't 1935). Same holding where disabling heart condition developed 3 weeks after fall. *McGrail v. Equitable Life Assur. Soc'y*, 263 A.D. 439, 33 N.Y.S.2d 742 (3d Dep't 1942), *rev'd on other grounds*, 292 N.Y. 419, 55 N.E.2d 483 (1944), *reargument denied*, 293 N.Y. 663, 56 N.E.2d 258 (1944).

Benefits recoverable for disability sustained prior to surrender, cancellation or forfeiture. *Magaliff v. New York Life Ins. Co.*, 272 N.Y. 521, 4 N.E.2d 428 (1936). Insured entitled to benefits for disability incurred prior to, but not established until after, cancellation of disability provisions at his request. *Gross v. Equitable Life Assur. Soc'y*, 276 N.Y. 517, 12 N.E.2d 456 (1937). Incurable varicose ulcer on leg, held not total disability of building appraiser. *Jersey v. Travelers Ins. Co.*, 163 Misc. 25, 294 N.Y.S. 938 (Sup. Ct. N.Y. 1936), *aff'd*, 250 A.D. 768, 294 N.Y.S. 940 (2d Dep't 1937). "Permanent" and "presumably permanent" distinguished. *Finkelstein v. Equitable Life Assur. Soc'y*, 256 A.D. 593, 11 N.Y.S.2d 135 (2d Dep't 1939), *aff'd*, 281 N.Y. 690, 23 N.E.2d 19 (1939).

Where insured able to engage in profitable employment though unable to follow usual occupation, not entitled to disability benefits. *Garms v. Travelers' Ins. Co.*, 266 N.Y. 446, 195 N.E. 147 (1934). Or where, although insured could not follow regular profession, could engage in some gainful employment. *Waldman v. Mutual Life Ins. Co.*, 252 A.D. 448, 299 N.Y.S. 490 (2d Dep't 1937). Salesman becoming deaf, held not permanently and totally disabled. *Fuchs v. Metropolitan*, 253 A.D. 665, 3 N.Y.S.2d 707 (1st Dep't 1938).

Tuberculosis as disability. *Turczynski v. John Hancock*, 245 A.D. 903, 282 N.Y.S. 380 (3d Dep't 1935), *aff'd*, 271 N.Y. 573, 3 N.E.2d 191 (1936); *Silverstein v. Prudential Ins. Co.*, 246 A.D. 359, 286 N.Y.S. 211 (3d Dep't 1936). Butcher suffering from chronic osteomyelitis, held totally disabled. *Mintz v. Equitable Life Assur. Soc'y*, 276 N.Y. 546, 12 N.E.2d 569 (1937).

Heart disease. *Shabotzky v. Equitable Life Assur. Soc'y*, 257 A.D. 257, 12 N.Y.S.2d 848 (1st Dep't 1939), *appeal and reargument denied*, 257 A.D. 957, 14 N.Y.S.2d 279 (1st Dep't 1939). Heart trouble, arteriosclerosis. *Starr v. Equitable Life Assur. Soc'y*, 257 A.D. 261, 12 N.Y.S.2d 953 (1st Dep't 1939). Removal of brain tumor. *Weisser v. Travelers Ins. Co.*, 258 A.D. 755, 15 N.Y.S.2d 430 (2d Dep't 1939). Self-inflicted gunshot wound, no recovery. *Fanti v. Travelers Ins. Co.*, 264 A.D. 724, 34 N.Y.S.2d 34 (2d Dep't 1942), *appeal denied*, 264 A.D. 779, 35 N.Y.S.2d 726 (2d Dep't 1942), *aff'd*, 290 N.Y. 782, 50 N.E.2d 107 (1943). After-effects of childhood manipulation of club feet. *Reiser v. Metropolitan Life Ins. Co.*, 262 A.D. 171, 28 N.Y.S.2d 283 (1st Dep't 1941), *aff'd*, 289 N.Y. 561, 43 N.E.2d 534 (1942).

Proof of condition precedent to right to benefits. *New York Life v. Chanson*, 154 Misc. 643, 278 N.Y.S. 220 (Sup. Ct. N.Y. 1934); *Morrison v. New York Life*, 247 A.D. 715, 285 N.Y.S. 644 (1st Dep't 1936); *Mutch-*

nick v. John Hancock Mut. Life Ins. Co., 157 Misc. 598, 284 N.Y.S. 565 (N.Y. Mun. Ct. 1935).

FINANCIAL RESPONSIBILITY LAW

See "AUTOMOBILES, Compulsory Coverage."

Safety Responsibility Act. N.Y. Veh. & Traf. Law §341, sets forth required minimum proof of financial responsibility in policy or bond.

Required terms in "motor vehicle liability policy." N.Y. Veh. & Traf. Law §345. Vehicles with passenger fares. N.Y. Veh. & Traf. Law §370 (1).

Motor Carriers. New York Transportation Law §§170-181 regulates transportation in New York. N.Y. Transp. Law §181 requires security for protection of public against bodily injury or death resulting from negligent operation of motor truck, property damage or cargo loss. Public Service Commission shall prescribe rules and regulations governing filing and approval of surety bonds, policies of insurance, qualifications as self-insurers or other securities or agreements conditioned to pay final judgments against carriers by reason of foregoing.

Law requiring Public Service Commission endorsement to policy covering bus does not require financial responsibility to be established by judgment other than against the carrier itself; insurer of lessor of bus which was involved in accident while being driven on a run franchised to lessee of bus driver was obligated to defend the owner of the bus and its driver employee. N.Y. Transp. Law §170; *Kansas City Fire v. Hartford Ins. Group*, 82 Misc. 2d 109, 368 N.Y.S.2d 791 (Sup. Ct. Erie County 1975).

Interstate motor carriers subject to Federal jurisdiction. See Motor Carrier Act, 49 U.S.C.A. §306 *et seq.*

FIRE INSURANCE

Appraisal. Discussion of reason for setting aside award as inadequate. *Gervant v. New England Fire Ins.*, 306 N.Y. 393, 118 N.E.2d 574 (1954).

Assignment. Consent of insurer. Before loss, contract is personal as to insured, and may not be assigned without consent of insurer. Contra after loss. *Beck-Brown v. Liberty Bell*, 137 Misc. 263, 241 N.Y.S. 727 (Sup. Ct. Kings County 1930). Purchaser of real property cannot recover on policy assigned to him without insurer's consent. *Greentaner v. Connecticut Fire Ins. Co.*, 228 N.Y. 388, 127 N.E. 249 (1920).

Binder. Description of property in is warranty. *Am. Surety Co. v. Patriotic Assur. Co.*, 242 N.Y. 54, 150 N.E. 599 (1926), *reargument denied*, 243 N.Y. 553, 154

N.E. 602 (1926); *but see Shapiro v. Am. Eagle*, 94 N.Y.S.2d 137 (Sup. Ct. N.Y. 1949), *rev'd*, 278 A.D. 694, 103 N.Y.S.2d 454 (1st Dep't 1951).

Cancellation. See "CANCELLATION."

Co-insurance. Eighty percent co-insurance clause not inconsistent with requirements of standard policy. History of rule. *Aldrich v. Great Am. Ins. Co.*, 195 A.D. 174, 186 N.Y.S. 569 (1st Dep't 1921).

Discovery. Policyholder's refusal to submit to examination or answer pertinent questions, on grounds he is charged with arson, nevertheless constitutes breach of policy terms and bar to recovery thereon. *Gross v. U.S. Fire Ins.*, 71 Misc. 2d 815, 337 N.Y.S.2d 221 (Sup. Ct. Kings County 1972).

Excess Policies. Mutual excess policies, neither policy had clause making one excess over other excess, each contribute equally. *Kansas City Fire v. Hartford Ins.*, 57 N.Y.2d 920, 442 N.E.2d 1271 (1982), *reargument denied*, 58 N.Y.2d 824, 445 N.E.2d 657 (1983), *motion denied*, 58 N.Y.2d 898, 447 N.E.2d 78 (1983).

Explosions. Damage caused by explosion, not fire. *Nasello v. Home Ins. Co.*, 277 N.Y. 632, 14 N.E.2d 196 (1938). Explosion damage covered only when preceded by fire. *Jefferson v. Home Ins. Co.*, 180 Misc. 30, 42 N.Y.S.2d 392 (Sup. Ct. N.Y. 1942), *aff'd*, 266 A.D. 651, 40 N.Y.S.2d 862 (1st Dep't 1943), *appeal denied*, 266 A.D. 720, 42 N.Y.S.2d 917 (1st Dep't 1943).

Fixtures. Motion picture apparatus held to be. *Emmett v. American*, 194 Misc. 529, 88 N.Y.S.2d 163 (N.Y. City Ct. 1949), *aff'd*, 198 Misc. 193, 100 N.Y.S.2d 835 (2d Dep't 1950).

Friendly Fires. Damage caused by smoke from lamp not covered by fire policy. *Fitzgerald v. German-American Ins. Co.*, 30 Misc. 72, 62 N.Y.S. 824 (N.Y. Co. Ct. 1899). Flame of lamp caused explosion of vapors from rectifying plant. Slight fire followed. Great damage caused by explosion, slight damage by fire. Policy exempted company from loss "caused by lightning or explosions of any kind unless fire ensues, and then for loss or damage caused by fire only." Held insured entitled to recover only for loss actually caused by fire. Flame of lamp not fire. *Briggs v. North British and Mercantile Ins. Co.*, 53 N.Y. 446 (1873).

Smoke and soot damage from flames confined to furnace not covered. *Davis v. Law Union*, 166 Misc. 75, 1 N.Y.S.2d 344 (N.Y. Mun. Ct. 1937).

Burning or charring of electric wire not covered. *Baron Corp. v. Piedmont Fire Ins. Co.*, 166 Misc. 69, 1 N.Y.S.2d 713 (1st Dep't 1937).



Hostile Fires. Leaking oil ignited outside of furnace covered. *Giambalvo v. Phoenix Ins. Co.*, 178 Misc. 887, 36 N.Y.S.2d 598 (N.Y. City Ct. 1942).

Appraisal made or proof of loss filed without mortgagee's knowledge, not binding on mortgagee. *Syracuse Sav. Bank v. Yorkshire Ins.*, 301 N.Y. 403, 94 N.E.2d 73 (1950), *reargument denied*, 301 N.Y. 731, 95 N.E.2d 408 (1950).

Change of Title. *Rosenbloom v. Maryland Ins.*, 258 A.D. 14, 15 N.Y.S.2d 304 (4th Dep't 1939).

Proof of Loss. Fraud or willful misrepresentation of material fact voids policy. *Werber v. Niagara Falls Ins. Co.*, 254 A.D. 298, 5 N.Y.S.2d 1 (2d Dep't 1938).

Reformation. Permitted, after loss, to show correct location of property, *Northeastern v. International Ins. Co.*, 265 N.Y. 574, 193 N.E. 326 (1934); *Shapiro v. Am. Eagle Fire Ins. Co.*, 94 N.Y.S.2d 137 (Sup. Ct. N.Y. 1949), *rev'd on other grounds*, 278 A.D. 694, 103 N.Y.S.2d 454 (1st Dep't 1951). To show correct interest of insured in property. *Cardinal v. Mercury Ins. Co.*, 242 A.D. 98; 273 N.Y.S. 487 (3d Dep't 1934), *rev'd on other grounds*, 266 N.Y. 448, 195 N.E. 148 (1934), *reargument denied*, 266 N.Y. 542, 195 N.E. 191 (1935).

Severable Contracts. Real property policy severable where parcels separately valued and insured. *Donley v. Glens Falls Ins.*, 184 N.Y. 107, 76 N.E. 914 (1906). Policy covering realty and personalty held divisible. *Palma v. National Fire Ins.*, 246 A.D. 488, 284 N.Y.S. 654 (4th Dep't 1935), *motion denied*, 249 A.D. 796, 293 N.Y.S. 499 (4th Dep't 1936).

Smoke and Soot. See "Friendly Fires."

Standard Provisions. Form of fire policy set forth in N.Y. Ins. Law §3404.

FOSTER CARE

When a child is placed in custodial setting such as foster care, local county owes child a duty to exercise due care in the selection of foster parents and to oversee diligently the rendition of proper care by foster parents. Breach of this duty will result in liability. *Blanca C. v. County of Nassau*, 103 A.D.2d 524, 480 N.Y.S.2d 747 (2d Dep't 1984), *aff'd*, 65 N.Y.2d 712, 481 N.E.2d 545 (1985), *citing Bartels v. County of Westchester*, 76 A.D.2d 517, 429 N.Y.S.2d 906 (2d Dep't 1980); *see also Barnes v. County of Nassau*, 108 A.D.2d 50, 487 N.Y.S.2d 827 (2d Dep't 1985) (duty to place children in foster homes under proper safeguards, to supervise children while in foster homes and to remove them from foster homes when necessary). The standard is one of reasonable care. *Barnes*, 108 A.D.2d at 54, 487 N.Y.S.2d at 830; *Andrews v. County of Otsego*, 112

Misc. 2d 37, 446 N.Y.S.2d 169 (Sup. Ct. Otsego County 1982).

Since foster parents to whom county entrusts children are independent contractors, county is not vicariously liable for their acts or omissions. *Blanca C.*, 65 N.Y.2d at 713, 481 N.E.2d at 546.

Once child is placed in foster home, it is no longer feasible for county to provide day-to-day supervision of child. Hence, foster parent is contractually obliged to provide constant reasonable care and supervision. *Andrews*, 112 Misc. 2d at 38, 446 N.Y.S.2d at 171.

FRAUD

See "AGENTS AND BROKERS"; "FIRE INSURANCE, Proof of loss"; "REPRESENTATIONS AND WARRANTIES."

GUEST CASES

See "AUTOMOBILES, no guest statute."

HOSPITAL

See also "MALPRACTICE"; "RELEASE."

Liens. Created by N.Y. Lien Law §189. Strict compliance required. *Ferguson v. Ruppert*, 166 Misc. 427, 1 N.Y.S.2d 967 (Sup. Ct. N.Y. 1938). Insurer liable to hospital where it failed to honor assignment executed by injured third party. *Reddy v. Zurich Gen. Accid. & Liab. Ins. Co.*, 171 Misc. 69, 11 N.Y.S.2d 88 (Sup. Ct. N.Y. County 1939). Hospital has no lien if settlement or recovery less than \$300. *Rookus v. Janowski*, 177 Misc. 1075, 32 N.Y.S.2d 947 (Sup. Ct. Monroe County 1942); *Goldwater v. Mendelson*, 170 Misc. 422, 8 N.Y.S.2d 627 (N.Y. Mun. Ct. 1938). 1950 amendment permits court determination of validity and amount of lien.

Party liable for hospital lien may examine hospital records as to treatment, maintenance and care of patient. N.Y. Lien Law §189(5) (McKinney 2007); *Matter of Larchmont Gables, Inc.*, 188 Misc. 164, 64 N.Y.S.2d 623 (Sup. Ct. Westchester County 1946).

Liability for agents and employees applied to hospitals and abolished "Medical-Administrative" Rule. *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3 (1957). See "MALPRACTICE."

No Warranty. Transfusion of impure blood is not sale of blood by hospital to patient; it is only incidental to hospital service, and therefore, no breach of implied warranty by hospital. *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 123 N.E.2d 792 (1954), *reargument denied*, 308 N.Y. 812, 125 N.E.2d 869 (1955). But hospital may be liable for improper administration or failure to use reasonable precautions to eliminate or minimize use



of infected blood. *Davidson v. Hillcrest Gen. Hosp.*, 40 A.D.2d 693, 336 N.Y.S.2d 296 (2d Dep't 1972).

HUSBAND AND WIFE

See also "INFANTS"; "NEGLIGENCE."

Spouses have causes of action against each other for any wrongful or tortious act causing injury. Gen. Oblig. Law §3-313 (2) (McKinney 2007).

Implied statutory exclusion of spouse in liability coverage where suit is by other spouse applies only in direct suits, where injured spouse must prove culpable conduct (negligence) of insured spouse, not in counterclaims or impleaders. N.Y. Ins. Law §3420(g) (McKinney 2007). Purpose of statute was to protect carriers against collusive suits between spouses. *United States Fid. & Guar. Co. v. Franklin*, 74 Misc. 2d 506, 344 N.Y.S.2d 251 (Sup. Ct. Westchester County 1973), *aff'd*, 43 A.D.2d 844, 352 N.Y.S.2d 1009 (2d Dep't 1974).

Wife shall also have full cause of action for loss of consortium due to negligent personal injuries to husband. *Millington v. Southeastern El. Co.*, 22 N.Y.2d 498, 239 N.E.2d 897 (1968).

IMPLEADER

Indemnification. See "DAMAGES"; "INDEMNITY"; "NEGLIGENCE."

Third party suits against additional third party defendants permitted. See "NEGLIGENCE." Unless plaintiff amends complaint, primary suit is only against primary defendant and latter must prove right against third party defendant for entire or portion of judgment. *Rogers v. Dorchester Assoc.*, 32 N.Y.2d 553, 300 N.E.2d 403 (1973); *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288 (1972) (superseded by Gen. Oblig. Law §15-108). Plaintiff's employer can be impleaded by defendant, if "grave injury" as defined in N.Y. Workers' Comp. Law §11 (McKinney 2007). Workers' compensation benefits paid are lien against any settlement or verdict. N.Y. Workers' Comp. Law §29.

Plaintiff is limited to assets (coverage) of his primary defendant, even when liability over is established and third party defendant has larger assets. *Klinger v. Dudley*, 41 N.Y.2d 362, 361 N.E.2d 974 (1977).

Impleader can be used to interpose claims for more than indemnity, and can seek greater damages than plaintiff is seeking against primary defendant. *George Cohen Agency v. Donald S. Perlman Agency*, 51 N.Y.2d 358, 414 N.E.2d 689 (1980). Whether third party defendant can remove to Federal Court is solely for that court. *Id.* at 367.

INDEMNITY

See also "DAMAGES"; "IMPLEADER."

Defendant can cross-complain against co-defendant or implead a third party for indemnification from that party on the basis of a contract or common law right. *Menorah Nursing Home v. Zukov*, 153 A.D.2d 13, 548 N.Y.S.2d 702 (2d Dep't 1989).

The wording for indemnification must evince "unmistakable intent" that owner would indemnify for employer's own negligence. *Ebbecke v. Bay View Envtl. Servs.*, 145 A.D.2d 524, 535 N.Y.S.2d 746 (2d Dep't 1988), *appeal denied*, 74 N.Y.2d 606, 543 N.E.2d 85 (1989).

Gen. Oblig. Law §5-322.1 voids certain indemnification clauses to owners or general contractors if they were negligent "in whole or in part." See *Robert De-Filippis Crane Serv. v. Joannco Contr. Corp.*, 132 A.D.2d 517, 517 N.Y.S.2d 259 (2d Dep't 1987).

Indemnity shifts entire loss or damages, by contract and/or common law right of indemnification. Latter is often implied by law to prevent unjust enrichment or unfair result. Law frowns on contracts to exculpate party from liability for his own negligence. *Willard Van Dyke Prods. v. Eastman Kodak Co.*, 12 N.Y.2d 301, 189 N.E.2d 693 (1963). Terms must be unequivocal. *Gross v. Sweet*, 49 N.Y.2d 102, 400 N.E.2d 306 (1979). Parties to a contract may agree to right of indemnification. *Trustees of Columbia Univ. v. Mitchell/Giurgola Assocs.*, 109 A.D.2d 449, 492 N.Y.S.2d 371 (1st Dep't 1985).

Indemnification of lessor in gas station lease, for loss or damages except as caused by lessor's "sole negligence" and to obtain insurance covering lessor, did not violate statute voiding contracts to exempt landlord from liability for his own negligence. *Jensen v. Chevron Corp.*, 160 A.D.2d 767, 553 N.Y.S.2d 485 (2d Dep't 1990).

Where liability is solely because of negligence of another, "indemnification," not contribution is applied to shift the entire liability to one who is negligent; where party is partially liable because of his own negligence, contribution applies to shift to the other culpable tortfeasor their relative share of the loss. *Glaser v. Fortunoff of Westbury Corp.*, 71 N.Y.2d 643, 524 N.E.2d 413 (1988) (finding doctor's medical malpractice to one who slipped in primary defendant's store a successive tortfeasor, thus, contribution applies and doctor's release is a bar as to primary defendant); *see also* Gen. Oblig. Law §15-108 (c).

The bar of Gen. Oblig. Law §5-322.1 applies only if the indemnitee was in some degree negligent. The general contractor's vicarious liability under Labor Law



§240 (1) was not the equivalent of negligence. *Brown v. Two Exch. Plaza Partners*, 146 A.D.2d 129, 539 N.Y.S.2d 889 (1st Dep't 1989) (holding indemnification agreement between a general contractor and subcontractor for liability via Labor Law §240 was enforceable to the extent it requires indemnification in the absence of negligence), *aff'd*, 76 N.Y.2d 172, 556 N.E.2d 430 (1990). General contractor vicariously liable under Labor Law is not negligent and can obtain contractual indemnity. Since defendant was not the promisee in the indemnity contract and only found partially at fault for plaintiff's injuries, judgment over on indemnification contract is proper. *Kilfeather v. Astoria 31st St. Assocs.*, 156 A.D.2d 428, 548 N.Y.S.2d 545 (2d Dep't 1989); *see also Robert DeFilippis Crane Serv., Inc.*, 132 A.D.2d at 517-18, 517 N.Y.S.2d at 260-61; *cf. Quevedo v. City of New York*, 56 N.Y.2d 150, 436 N.E.2d 1253 (1982), *re-argument denied*, 57 N.Y.2d 674, 439 N.E.2d 1247 (1982).

Contribution statute, CPLR §1401, does not permit contribution between two parties whose potential liability to third party is based on economic loss resulting only from breach of contract. Theory of indemnification or implied indemnification requires a duty between the parties. *Board of Educ. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 517 N.E.2d 1360 (1987); *Prudential-Bache Sec. v. Resnick Water St. Dev. Co.*, 161 A.D.2d 456, 555 N.Y.S.2d 367 (1st Dep't 1990); *see also Ossining Union Free School Dist. v. Anderson La-Rocca Anderson*, 73 N.Y.2d 417, 539 N.E.2d 91 (1989); *SSDW Co. v. Feldman-Misthopoulos Assoc.*, 151 A.D.2d 293, 542 N.Y.S.2d 565 (1st Dep't 1989).

INFANTS

See "AUTOMOBILES, Age"; "LIABILITY INSURANCE, Infants and Violation of Law"; "NEGLIGENCE, Age"; "FOSTER CARE."

Child cannot sue parent directly or indirectly (impleader) for injury caused by negligent supervision of parent, but child can sue for parent's negligent operation of vehicle. *Holodook v. Spencer*, 36 N.Y.2d 35, 324 N.E.2d 338 (1974); *but see Nolechek v. Gesuale*, 46 N.Y.2d 332, 385 N.E.2d 1268 (1978). This rule does not apply to "grandparents" where they exercise temporary custody of infant. *Costello v. Marchese*, 137 A.D.2d 482, 524 N.Y.S.2d 232 (2d Dep't 1988). However, not where grandparent acting in "loco parentis," *i.e.* put in place of parent, assume all obligations, etc. *Gelbman v. Gelbman*, 23 N.Y.2d 434, 245 N.E.2d 192 (1969) (abolished defense of intrafamilial immunity for unintentional torts, when mother passenger sued 16 year old unemancipated son for negligent driving).

Parent not liable to unemancipated child for injuries on theory of negligent supervision. *Lastowski v. Norge Coin-O-Matic*, 44 A.D.2d 127, 355 N.Y.S.2d 432 (2d Dep't 1974).

Negligent Supervision Distinguished. Immunity of parent from third party (impleader) liability for inadequate supervision of child. *Holodook*, 36 N.Y.2d at 51, 324 N.E.2d at 346; *but see Nolechek v. Gesuale*, 46 N.Y.2d 332, 385 N.E.2d 1268 (1978) (holding parent liable to third party for entrusting motorcycle to partially blind child).

Parent liable for injury to third party for entrusting potentially dangerous instrument to child. *Steinberg v. Cauchois*, 249 A.D. 518, 293 N.Y.S. 147 (2d Dep't 1937); *see also Holodook*, 36 N.Y.2d at 35, 324 N.E.2d at 338. Leaving infant with accessibility to pool is a duty separate from family relationship. *Semmens v. Hopper*, 128 A.D.2d 767, 513 N.Y.S.2d 472 (2d Dep't 1987); *see also Grivas v. Grivas*, 113 A.D.2d 264, 496 N.Y.S.2d 757 (2d Dep't 1985); *Hurst v. Titus*, 77 A.D.2d 157, 432 N.Y.S.2d 938 (4th Dep't 1980).

Parent or guardian of child over 10 years and under 18 years is liable in civil suit for damages to real or personal property up to \$5,000 where unemancipated child causes it "willfully," "maliciously" or "unlawfully." Gen. Oblig. Law §3-112.

Emancipation is question for jury. *Terwilliger v. Terwilliger*, 280 A.D. 1020, 116 N.Y.S.2d 739 (3d Dep't 1952).

INLAND MARINE

Specific and Floater Insurance. Several policies in effect; each claimed they provided excess insurance and did not cover if merchandise otherwise insured. All required to contribute. *Davis Yarn Co. v. Brooklyn Yarn Dye Co.*, 293 N.Y. 236, 56 N.E.2d 564 (1944).

ISSUANCE OF POLICY

"Delivery and acceptance" and "preparation and signing" of policy discussed. *Taggart v. Security Ins. Co.*, 277 A.D. 1051, 100 N.Y.S.2d 563 (2d Dep't 1950).

JOINT AND SEVERAL LIABILITY

See paragraphs under "DAMAGES."

CPLR §1601, for suits filed after July, 1986, defendant found liable 50% or less is relieved from joint and several liability for non-economic damages; liability only for equitable share of non-economic damages. Not applicable in motor vehicle cases. See exceptions cited in paragraphs under "DAMAGES."



LABOR LAW

Construction. See "NEGLIGENCE."

LIABILITY INSURANCE

See "NO-FAULT" and "WAIVER AND ESTOPPEL."

Standard provisions and rights of injured persons. See Ins. Law §3420 (McKinney 2007).

"Accidents" under Commercial General Liability policy covers damages from gradual cracking and settling of building caused by construction on adjacent property even though insured willfully continued construction. *McGroarty v. Great Am. Ins. Co.*, 36 N.Y.2d 358, 329 N.E.2d 172 (1975), *reargument denied*, 36 N.Y.2d 874, 332 N.E.2d 364 (1975); *see also Continental Cas. Co. v. Plattsburgh Beauty & Barber Supply*, 48 A.D.2d 385, 370 N.Y.S.2d 225 (3d Dep't 1975) (damage/injury caused by wrongful levy by sheriff is "occurrence" within the terms of the liability policy).

Assault alleged. Wording of complaint alleging negligence does not control coverage issue where acts constitute an assault. Security guard shot plaintiff; insurer denied coverage under unambiguous language excluding suits based on assault and battery; allegations of "negligent shooting" and "negligent hiring" do not change the proximate cause of injury (*i.e.* assault and battery). *U.S. Underwriters Ins. Co. v. Val-Blue Corp.*, 85 N.Y.2d 821, 647 N.E.2d 1342 (1995). Where there is intentional discharge of pollutants, lack of intent to harm is irrelevant. *Technicon Elecs. Corp. v. Am. Home Assur. Co.*, 74 N.Y.2d 66, 542 N.E.2d 1048 (1989), *reargument denied*, 74 N.Y.2d 893, 547 N.E.2d 105 (1989); *see also Mount Vernon Fire Ins. Co. v. Creative Hous.*, 88 N.Y.2d 347, 668 N.E.2d 404 (1996). Insurance defense required unless complaint allegations bring the case solely within the policy exclusion for assault. *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153, 589 N.E.2d 365 (1992).

Assault by employee, neither expected nor intended by insured, covered as "occurrence" and "accident" where policy contained no assault exclusion. *Hanover Ins. Co. v. 21 Mott St. Rest. Corp.*, 95 Misc. 2d 427, 407 N.Y.S.2d 952 (Sup. Ct. Kings County 1978). Occurrence may be accident although result of originally intentional act. *McGroarty*, 36 N.Y.2d at 364, 329 N.E.2d at 175; *see also Nallan v. Union Labor Life Ins. Co.*, 42 N.Y.2d 884, 366 N.E.2d 874 (1977). Insured fired round of buckshot at front door, patrons' injuries accidental even though act was intentional. *Barry v. Romanosky*, 147 A.D.2d 605, 538 N.Y.S.2d 14 (2d Dep't 1989).

Insured's conviction of intent-based crime precludes coverage. First degree assault conviction con-

cludes intent. *Matter of Nassau Ins. Co.*, 78 N.Y.2d 888, 577 N.E.2d 1039 (1991); *D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659, 564 N.E.2d 634 (1990); *see also Allstate Ins. Co. v. Zuk*, 78 N.Y.2d 41, 574 N.E.2d 1035 (1991) (criminal conviction for non-intent based crime did not conclusively resolve issue of policy exclusion, therefore, duty to defend).

Anti-subrogation Rule. Where owner of property is an additional insured on contractor's policy, owner is precluded from impleading contractor for indemnity, up to the limit of the policy. An insurer cannot seek recovery from its own insured for damages from a risk for which insured was covered. *North Star Reins. Corp. v. Continental Ins. Co.*, 82 N.Y.2d 281, 624 N.E.2d 647 (1993); *Pennsylvania Gen. Ins. Co. v. Austin Powder Co.*, 68 N.Y.2d 465, 502 N.E.2d 982 (1986); *Small v. Yonkers Contracting, Inc.*, 242 A.D.2d 378, 662 N.Y.S.2d 67 (2d Dep't 1997).

Contractual Coverage in Commercial General Liability, incidental contracts, shifts employer's liability coverage from workers' compensation policy to Commercial General Liability.

Exclusion in commercial general liability policy against contractually assumed indemnification claims does not bar coverage for common-law liability, and common-law liability excluding contractual liability may coexist. *White v. Hotel D'Artistes*, 230 A.D.2d 657, 646 N.Y.S.2d 793 (1st Dep't 1996).

Workers' Compensation Law §11, amended January, 1996, limits rights of third parties to implead injured plaintiff's employer for indemnification or contribution unless injuries are "grave." It is not retroactive. N.Y. Workers' Comp. Law §11 (McKinney 2007) (also known as Omnibus Workers Compensation Act); *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 696 N.E.2d 978 (1998); *Small v. Yonkers Contr.*, 242 A.D.2d 378, 662 N.Y.S.2d 67 (2d Dep't 1997); *Morales v. Gross*, 230 A.D.2d 7, 657 N.Y.S.2d 711 (2d Dep't 1997).

Standard Commercial General Liability excludes suits, direct or indirect, by employees of the insured.

Labor Law §240, absolute liability of owner and general contractor, in fall from ladder, depends on jury finding if plaintiff's misuse-conduct was the proximate cause. *Aragon v. 233 West 21st St.*, 201 A.D.2d 353, 607 N.Y.S.2d 642 (1st Dep't 1994).

Breach of Warranty. Insured's breach of warranty in its insurance policy bars recovery if breach materially increases risk of loss, damage or injury within the policy. Ins. Law §3106 (b); *M. Fabrikant & Sons v. Overton & Co. Customs Brokers*, 209 A.D.2d 206, 618 N.Y.S.2d



294 (1st Dep't 1994). Ordinarily it is issue of fact for jury. *Sebring v. Fidelity-Phenix Fire Ins. Co.*, 255 N.Y. 382, 174 N.E. 761 (1931). If evidence is clear and substantially uncontradicted, then it is an issue of law for the court. *Process Plants Corp. v. Beneficial Nat'l Life Ins. Co.*, 53 A.D.2d 214, 385 N.Y.S.2d 308 (1st Dep't 1976), *aff'd*, 42 N.Y.2d 928, 366 N.E.2d 1361 (1977).

Bad Faith. No liability in excess of policy for failure to settle, unless fraud or bad faith by insurer. *Best Bldg Co. v. Employers' Liab. Assur. Corp.*, 247 N.Y. 451, 160 N.E. 911 (1928); *see also U.S. Fid. & Guar. Co. v. Copfer*, 48 N.Y.2d 871, 400 N.E.2d 298 (1979). Insurer has implied duty to act in good faith and make reasonable attempt to settle within policy limits. *Pavia v. State Farm Mut. Auto. Ins. Co.*, 82 N.Y.2d 445, 626 N.E.2d 24 (1993), *reargument denied*, 83 N.Y.2d 779, 633 N.E.2d 480 (1994). Where insured is insolvent, or only barely solvent, judgment in excess of policy amount as result of "bad faith" is not measure of damages, since such judgment would be uncollectible. *Gordon v. Nationwide Mut. Ins. Co.*, 30 N.Y.2d 427, 285 N.E.2d 849 (1972), *reargument denied*, 31 N.Y.2d 709, 289 N.E.2d 569 (1972), *cert. denied*, 410 U.S. 931, 93 S. Ct. 1374 (1973). Plaintiff must prove more than mere negligence of insurer. Proof must show refusal to settle within policy was deliberate or at least in reckless disregard of interests of insured. *Roldan v. Allstate Ins. Co.*, 149 A.D.2d 20, 544 N.Y.S.2d 359 (2d Dep't 1989). Only if insurer acts in "gross disregard" of insured's interest may insured recover. *Pavia*, 82 N.Y.2d at 451-52, 626 N.E.2d at 26.

Where carrier defended two parties with conflicting interests, they are liable for all damages resulting from such conduct, including damages in excess of policy limits. *McAleenan v. Mass. Bonding & Ins. Co.*, 232 N.Y. 199, 133 N.E. 444 (1921); *Cornwell v. Safeco Ins. Co.*, 42 A.D.2d 127, 346 N.Y.S.2d 59 (4th Dep't 1973); *Cappano v. Phoenix Assurance Co.*, 28 A.D.2d 639, 280 N.Y.S.2d 695 (4th Dep't 1967).

Insured who steadfastly proclaims his own freedom from fault cannot complain if his carrier believes him and acts accordingly. *Pipoli v. United States Fid. & Guar. Co.*, 38 A.D.2d 249, 328 N.Y.S.2d 688 (1st Dep't 1972), *aff'd*, 31 N.Y.2d 679, 289 N.E.2d 178 (1972); *Colbert v. Home Indem. Co.*, 35 A.D.2d 326, 315 N.Y.S.2d 949 (4th Dep't 1970), *appeal denied*, 28 N.Y.2d 483 (1971).

Tender of policy limits on eve of trial, while material to issue of "bad faith," does not always operate without more to exonerate carrier from preexisting liability for such failure to settle within policy limits. *Knobloch v. Royal Globe Ins. Co.*, 38 N.Y.2d 471, 344 N.E.2d 364 (1976) (noting insurer failed to answer in-

sured's inquiry as to offers and demands, and insurer failed to show any proof of significant settlement evaluation). An insurer's failure to apprise insured of settlement negotiations may be evidence of bad faith. *Smith v. General Acc. Ins. Co.*, 91 N.Y.2d 648, 697 N.E.2d 168 (1998). Punitive damages dismissed, must show high moral turpitude as to imply criminal indifference to civil obligation. *Reifenstein v. Allstate Ins. Co.*, 92 A.D.2d 715, 461 N.Y.S.2d 104 (4th Dep't 1983).

Cancellation. Auto insurers must give named insured 20 days notice of cancellation, 15 days notice of cancellation for premium non-payment. Statute abrogates insurers common law right to rescind policy for fraud or misrepresentation. N.Y. Veh. & Traf. Law §313; *Aetna Cas. & Sur. Co. v. O'Connor*, 8 N.Y.2d 359, 170 N.E.2d 681 (1960); *see also Travelers Indem. Co. v. Avelino*, 191 A.D.2d 229, 594 N.Y.S.2d 249 (1st Dep't 1993). Insurer may rescind where claimant participated in fraud. See also "REPRESENTATIONS AND WARRANTIES."

Disclosure. Other parties can obtain discovery of contents of defendant's insurance policy. CPLR §3101. Contractual duty to maintain insurance for another did not require coverage for that party's negligence. *Nuzzo v. Griffin Tech. Inc.*, 212 A.D.2d 980, 624 N.Y.S.2d 703 (4th Dep't 1995).

Compromise of Claims. Under public liability policy insurer has complete control of defense. May settle or litigate at option and cannot be held liable [except for gross negligence, for failure to settle if possible] within policy limits, with result and judgment in excess of those limits which excess insured must pay. *Best Bldg. Co.*, 247 N.Y. at 456, 160 N.E. at 913; *Auerbach v. Maryland Cas. Co.*, 236 N.Y. 247, 140 N.E. 577 (1923).

See also "SETTLEMENT."

Concurrent Coverage. Two Commercial General Liability policies to same insured for same risk creates coinsurers even if one insured is an additional insured on its policy and both policies provide coverage pursuant to coinsurance terms in policies. *B.K. Gen. Contrs. v. Michigan Mut. Ins. Co.*, 204 A.D.2d 584, 612 N.Y.S.2d 198 (2d Dep't 1994); *but see Charter Oak Fire Ins. Co. v. Trustees of Columbia Univ.*, 198 A.D.2d 134, 604 N.Y.S.2d 55 (1st Dep't 1993).

Basis of contribution for liability based on ownership is according to ownership interest and not by arithmetical method of dividing judgment by number of persons against whom obtained. *Wold v. Grozalsky*, 277 N.Y. 364, 14 N.E.2d 437 (1938). Same rule applied in automobile collision case involving guest suit. *Martindale v. Griffin*, 233 A.D. 510, 253 N.Y.S. 578 (4th Dep't 1931), *aff'd*, 259 N.Y. 530, 182 N.E. 167 (1932).

Commercial General Liability policy which excludes coverage for injuries to employees of insured, applies also to additional insured. *Tardy v. Morgan Guar. Trust Co.*, 213 A.D.2d 296, 624 N.Y.S.2d 34 (1st Dep't 1995).

Where issue of liability as between defendants was not litigated in third party negligence suit, and jury held both as joint tortfeasors, defendants in separate action are not precluded on that issue by statute, unless judgment in negligence suit based on facts which preclude liability. *Employers' Liab. Assur. Corp. v. Post & McCord*, 286 N.Y. 254, 36 N.E.2d 135 (1941).

Contribution and Indemnity distinguished. Contribution is a sharing of fault and liability among defendants. Indemnity is shifting of loss from one party to another via contract or common law right of recovery. *Smart v. Morard*, 124 N.Y.S.2d 634 (Sup. Ct. Suffolk County 1953).

Cooperation of Insured in Defense of Action. Failure of insured to cooperate with company in defense of negligence action, even though such cooperation might not defeat plaintiff's claim, constitutes good defense by company in action by injured person against it on judgment against insured which has been returned unsatisfied. *Schoenfeld v. N.J. Fid. & Plate Glass Ins. Co.*, 203 A.D. 796, 197 N.Y.S. 606 (2d Dep't 1922). While insured is not obliged to combine with insurer in presentation of sham defense, he is required to fairly and frankly disclose all facts necessary to enable insurer to determine if there is valid defense. *Coleman v. New Amsterdam Cas. Co.*, 247 N.Y. 271, 160 N.E. 367 (1928). Insurer is entitled to assert, in action by injured party, any defense it might have asserted against insured. *Gerka v. Fid. & Cas. Co.*, 251 N.Y. 51, 167 N.E.169 (1929).

Testimony of insured at trial on facts, which materially conflicted with his signed statement, held failure of cooperation. *See also discussion of lack of evidence of collusion. Shafer v. Utica Mut. Ins. Co.*, 248 A.D. 279, 289 N.Y.S. 577 (4th Dep't 1936).

Jury found failure of cooperation where insured corporation refused to verify answer denying negligence arguing its driver was negligent as to plaintiff, officer in insured corporation. *Mangano v. Sunbright Steam Laundry Co.*, 248 A.D. 731, 289 N.Y.S. 831 (2d Dep't 1936), *aff'd*, 273 N.Y. 642, 8 N.E.2d 34 (1937).

Generally question of cooperation is issue of fact for jury. *Compare American Sur. Co. v. Diamond*, 1 N.Y.2d 594, 136 N.E.2d 876 (1956) (not breach of cooperation clause if insured refuses to verify third party complaint); *Albert v. Pub. Serv. Mut. Cas. Ins. Corp.*, 266 A.D. 284, 42 N.Y.S.2d 124 (1st Dep't 1943), *aff'd*, 292 N.Y. 633, 55 N.E.2d 507 (1944) (no breach where

insured changed facts between policy statement and trial testimony), *United States Fid. & Guar. Co. v. Von Bargen*, 7 A.D.2d 872, 182 N.Y.S.2d 121 (2d Dep't 1959), *aff'd*, 7 N.Y.2d 932, 165 N.E.2d 579 (1960) (insured breached by contradicting facts in written statement to insurer at motor vehicle hearing and depositions); *Schafer*, 248 A.D. at 285, 289 N.Y.S. at 583 (4th Dep't 1936) (breach where insured gave no notice of negligent facts until trial).

Insured's admission of negligence held not failure to cooperate. *Wenig v. Glens Falls Indem. Co.*, 294 N.Y. 195, 61 N.E.2d 442 (1945).

Spouses Coverage. Implied statutory exclusion of spouse in liability coverage where suit is by other spouse applies only in direct suits where injured spouse must prove culpable conduct (negligence) of insured spouse, not in counterclaims or impleaders. Ins. Law. §3420(g). Purpose of statute was to protect carriers against collusive suits between spouses. *United States Fid. & Guar. Co. v. Franklin*, 74 Misc. 2d 506, 344 N.Y.S.2d 251 (N.Y. Sup. Ct. 1973), *aff'd*, 43 A.D.2d 844, 352 N.Y.S.2d 1009 (2d Dep't 1974). Driver of insured vehicle covered under named insured's policy in injury suit by named insured passenger against his driver. *Aetna Cas. & Sur. Co. v. Gen. Cas. Co.*, 285 A.D. 767, 140 N.Y.S.2d 670 (1st Dep't 1955). Child can sue parent for negligent operation of a motor vehicle. *Holodook*, 36 N.Y.2d at 40, 324 N.E.2d at 340, *called into question, Nolechek*, 46 N.Y.2d 332 (1978). Intra-family immunity for unintentional torts abolished. Mother passenger sues 16 year old unemancipated son for negligent driving. *Gelbman v. Gelbman*, 23 N.Y.2d 434, 245 N.E.2d 192 (1969); *see also Warrens*, Vol. 1B, pg. 297.

Truck, wheels jacked up, operating buzz saw, slipped from supports. Insured thrown out. Company not liable under policy covering injuries sustained while riding in or being thrown from private automobile or truck. *Bommarito v. N. Am. Accident Ins. Co.*, 251 A.D. 123, 295 N.Y.S. 624 (4th Dep't 1937).

Public Liability policy gives separate obligations to each insured, and assault by one insured partner does not relieve insurer's obligation to other insured partner. *Morgan v. Greater N.Y. Taxpayers Mut. Ins. Ass'n*, 305 N.Y. 243, 112 N.E.2d 273 (1953); *see also Wenig*, 294 N.Y. at 201-02, 61 N.E.2d at 445. Assault at direction of manager and president of insured corporation excluded coverage. *De Luca v. Coal Merchs. Mut. Ins. Co.*, 203 Misc. 261, 59 N.Y.S.2d 664 (N.Y. App. Term 1945).

Employee of carpet company, who injured driver employee of trucking company, while loading truck owned by insured trucking company, is additional insured under trucking company policy and employee-

workers compensation exclusion not applicable. *Greaves v. Pub. Serv. Mut. Ins. Co.*, 5 N.Y.2d 120, 155 N.E.2d 390 (1959).

Go-cart powered by 1½ h.p. engine and built by named insured's son, age 15, which while on highway collides with infant on bike, is not covered under auto policy nor Commercial Property Liability policy. *Stevenson v. Merchs. Mut. Ins. Co.*, 37 Misc. 2d 996, 235 N.Y.S.2d 589 (N.Y. Sup. Ct. 1962). Mobile power crane not covered under automobile policy. *Liberty Mut. Ins. Co. v. Dooley Elec. Co.*, 133 N.Y.S.2d 785 (N.Y. Sup. Ct. 1954).

Motorized bicycle is "motor vehicle" within N.Y. Veh. & Traf. Law. *Lalomia v. Bankers & Shippers Ins. Co.*, 35 A.D.2d 114, 312 N.Y.S.2d 1018 (2d Dep't 1970), *aff'd*, 31 N.Y.2d 830, 291 N.E.2d 724 (1972), *holding limited by*, *Mount Vernon Fire Ins. Co.*, 88 N.Y.2d 347 (1996); *Geiger v. Ins. Co. of N. Am.*, 41 A.D.2d 796, 341 N.Y.S.2d 481 (3d Dep't 1973).

Homeowner's Policy Exclusion for Occurrences "arising out of the ownership, maintenance or use of... a motor vehicle" does not include alleged negligent entrustment of a three wheeled all terrain motor vehicle to insured's son. *Cone v. Nationwide Mut. Fire Ins. Co.*, 75 N.Y.2d 747, 551 N.E.2d 92 (1989), *holding limited by*, *Mount Vernon Fire Ins. Co.*, 88 N.Y.2d 347 (1996).

Motorized mini-cycle not covered under homeowner's policy because of exclusion, but must defend action for negligently entrusting dangerous instrument to young child. *Travelers Ins. Co. v. Beschel*, 71 Misc. 2d 420, 336 N.Y.S.2d 370 (N.Y. Sup. Ct. 1972). Three-wheeled motorized vehicle is a motor vehicle, as excluded in homeowner's policy. *Byer v. Cont'l Ins. Co.*, 155 A.D.2d 503, 547 N.Y.S.2d 363 (2d Dep't 1989), *rev'd on other grounds*, 161 A.D.2d 744, 558 N.Y.S.2d 847 (2d Dep't 1990).

Policy provided that replacement of insured vehicle would be covered if company notified of replacement within 30 days. Held, replacement covered for 30 day period though insurer not notified. *Melendez v. Gen. Accident, Fire & Life Assurance Corp.*, 189 Misc. 392, 70 N.Y.S.2d 404 (N.Y. Sup. Ct. 1947), *aff'd*, 273 A.D. 960, 79 N.Y.S.2d 307 (1st Dep't 1948), *appeal and reargument denied*, 274 A.D. 763, 80 N.Y.S.2d 725 (1st Dep't 1948).

Insured sold automobile, same day purchased another, sold that one 7 days later; 49 days later, purchased another; no coverage, insurer not having been notified within 30 days from first replacement. *Schaller v. Aetna Cas. & Sur. Co.*, 280 A.D. 988, 116 N.Y.S.2d 729 (2d Dep't 1952), *aff'd*, 306 N.Y. 725, 117 N.E.2d 908 (1954).

Omnibus clause was never intended to extend liability of insurer of registered owner to cover negligent driver to whom auto had been sold or otherwise transferred. *Mason v. Allstate Ins. Co.*, 12 A.D.2d 138, 209 N.Y.S.2d 104 (2d Dep't 1960).

Ways immediately adjoining premises includes accident at or near far curb of roadway separated from premises by sidewalk. *Pub. Serv. Mut. Ins. Co. v. Jacobs*, 161 N.Y.S.2d 791 (N.Y. Sup. Ct. 1952), *aff'd*, 282 A.D. 1041, 126 N.Y.S.2d 903 (1st Dep't 1953), *appeal denied*, 283 A.D. 696, 128 N.Y.S.2d 532 (1st Dep't 1954).

Accident, as used in liability policy, covers unintentional resulting damages, and therefore injuries accidental even though original acts may have been intentional. "Transaction as whole" test is to be applied by jury. Plaintiff's building gradually cracked and settled due to defendant's excavation and construction on adjacent property. *McGroarty*, 36 N.Y.2d at 365, 329 N.E.2d at 176.

Defense of Suit. Duty to defend arises whenever complaint alleges facts and circumstances, some of which would if proved, fall within risk coverage. *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 476 N.E.2d 272 (1984); *Spoor-Lasher Co. v. Aetna Cas. & Sur. Co.*, 39 N.Y.2d 875, 352 N.E.2d 139 (1976); *Sturges Mfg. Co. v. Utica Mut. Ins. Co.*, 37 N.Y.2d 69, 332 N.E.2d 319 (1975); *Baron v. Home Ins. Co.*, 112 A.D.2d 391, 492 N.Y.S.2d 50 (2d Dep't 1985).

Obligation to defend is broader than duty to pay. *Goldberg v. Lumber Mut. Cas. Ins. Co.*, 297 N.Y. 148, 77 N.E.2d 131 (1948). Duty to defend extends to any action, however groundless, false or fraudulent, in which facts alleged in complaint are within policy. *Prashker v. United States Guarantee Co.*, 1 N.Y.2d 584, 136 N.E.2d 871 (1956); *see also Int'l Paper Co. v. Cont'l Cas. Co.*, 35 N.Y.2d 322, 320 N.E.2d 619 (1974); *Lionel Freedman, Inc. v. Glens Falls Ins. Co.*, 27 N.Y.2d 364, 267 N.E.2d 93 (1971), *reargument denied*, 28 N.Y.2d 859, 271 N.E.2d 236 (1971).

If any of grounds alleged in complaint against insured are within coverage in policy, insurer owes defense. Insured entitled to expenses in defending declaratory action instituted by insurer. *Am. Home Assurance Co. v. Diamond Tours & Travel*, 78 A.D.2d 801, 433 N.Y.S.2d 116 (1st Dep't 1980), *appeal dismissed*, 52 N.Y.2d 1030, 420 N.E.2d 101 (1981). However, mere use of negligence allegation in complaint does not override obvious facts of assault and battery in a shooting. *U.S. Underwriters Ins. Co.*, 85 N.Y.2d at 823, 647 N.E.2d at 1344. Lack of intent to cause harm irrelevant in deciding intentional nature of the act. *Id.*

However, no duty to defend or indemnify insured defendant, under homeowner policy where allegations of sexual acts and abuse of young children. Such conduct could not possibly result in unintended injuries, as alleged in complaint. *Mugavero*, 79 N.Y.2d at 162-63, 589 N.E.2d at 370-71.

Insured may not be awarded attorney fees or other expenses in prosecution of declaratory suit against insurer to decide coverage. *Mighty Midgets, Inc. v. Centennial Ins. Co.*, 47 N.Y.2d 12, 389 N.E.2d 1080 (1979); *Grimsey v. Lawyers Title Ins. Co.*, 31 N.Y.2d 953, 293 N.E.2d 249 (1972); *Niagara County v. Utica Mut. Ins. Co.*, 103 Misc. 2d 814, 427 N.Y.S.2d 171 (N.Y. Sup. Ct. 1980), *aff'd*, 80 A.D.2d 415, 439 N.Y.S.2d 538 (4th Dep't 1981), *appeal dismissed*, 54 N.Y.2d 608, 427 N.E.2d 1191 (1981) But where insurer instituted action. *Johnson v. Gen. Mut. Ins. Co.*, 24 N.Y.2d 42, 246 N.E.2d 713 (1969); *Glens Falls Ins. Co. v. United States Fire Ins. Co.*, 41 A.D.2d 869, 342 N.Y.S.2d 624 (3d Dep't 1973), *motion denied*, 33 N.Y.2d 633, 301 N.E.2d 552 (1973), *aff'd*, 34 N.Y.2d 778, 315 N.E.2d 813 (1974).

Insurer refused to defend action, claiming injuries not within policy coverage. Policy required defense even if action groundless. Held, required to reimburse insured for cost of defense. *Grand Union Stores, Inc. v. Gen. Accident, Fire & Life Assurance Corp.*, 163 Misc. 451, 295 N.Y.S. 654 (N.Y. Sup. Ct. 1937), *aff'd*, 251 A.D. 810, 298 N.Y.S. 187 (1st Dep't 1937), *aff'd*, 279 N.Y. 638, 18 N.E.2d 38 (1938); *Chinn v. Butchers' Mut. Cas. Co.*, 190 Misc. 117, 71 N.Y.S.2d 70 (N.Y. City Ct. 1947).

Excess liability insurer, failing to respond to insured's request for defense while insured litigated coverage between employer's liability carrier and workmen's compensation carrier, was estopped to deny its obligation to defend. *Servidone Constr. Corp. v. Sec. Ins. Co.*, 64 N.Y.2d 419, 477 N.E.2d 441 (1985).

Where conflict of interest exists between carrier and insured because some causes of action are outside coverage and/or conflict from "character of act" by insured, insured should be permitted to choose counsel and insurer pay such defense attorney. *Prashker*, 1 N.Y.2d at 593, 136 N.E.2d at 876; *Utica Mut. Ins. Co. v. Cherry*, 45 A.D.2d 350, 358 N.Y.S.2d 519 (2d Dep't 1974), *motion denied*, 35 N.Y.2d 791, 320 N.E.2d 871 (1974), *aff'd*, 38 N.Y.2d 735, 343 N.E.2d 758 (1975).

Insurer's refusal to appeal from adverse judgment entitled insured to recover expenses of successful appeal although in excess of policy limits. *Gen. Cas. Co. v. Whipple*, 328 F.2d 353 (7th Cir. 1964); *Brassil v. Md. Cas. Co.*, 210 N.Y. 235, 104 N.E. 622 (1914); *Kaste v.*

Hartford Accident & Indem. Co., 5 A.D.2d 203, 170 N.Y.S.2d 614 (1st Dep't 1958); *see also Grand Union Co. v. Gen. Accident & Life Assur. Corp.*, 279 N.Y. 638, 18 N.E.2d 38 (1938). Duty to appeal if there are reasonable grounds. *Fidelity Gen. Ins. Co. v. Aetna Ins. Co.*, 27 A.D.2d 932, 278 N.Y.S.2d 787 (2d Dep't 1967).

Policy covering claims against insured for damages for injuries suffered by person other than employee, resulting from ownership, care, maintenance, occupation or use of premises, or from business operations of insured, requires company to defend action for assault by insured's employee, such injuries having been "accidentally suffered." *Floralbell Amusement Corp. v. Standard Sur. & Cas. Co.*, 256 A.D. 221, 9 N.Y.S.2d 524 (1st Dep't 1939).

Insurer required to continue defense of actions against insured or new actions instituted though coverage limit is exhausted depending on policy wording. *Am. Employers Ins. Co. v. Goble Aircraft Specialties*, 205 Misc. 1066, 131 N.Y.S.2d 393 (N.Y. Sup. Ct. 1954).

Disclaimer. Must be prompt. Ins. Law §3420 (g). *See also Allstate Ins. Co. v. Gross*, 27 N.Y.2d 263, 265 N.E.2d 736 (1970). Four and one-half month delay by insurer unreasonable. *Zook v. Hartford Accident & Indem. Co.*, 64 A.D.2d 701, 407 N.Y.S.2d 570 (2d Dep't 1978). Nine month delay unreasonable. *Long Island Ins. Co. v. Graziano*, 64 A.D.2d 944, 408 N.Y.S.2d 145 (2d Dep't 1978). Defending may estop disclaimer. *DiMartile v. Country-Wide Ins. Co.*, 86 Misc. 2d 36, 381 N.Y.S.2d 579 (N.Y. Sup. Ct. 1975), *aff'd*, 51 A.D.2d 869, 379 N.Y.S.2d 684 (4th Dep't 1976); *Newman v. Ketani*, 54 A.D.2d 926, 388 N.Y.S.2d 128 (2d Dep't 1976).

Excess insurer, where insured did not timely file claim against primary insurer, had no duty to serve notice of disclaimer. *Allcity Ins. Co. v. Sioukas*, 51 A.D.2d 525, 378 N.Y.S.2d 711 (1st Dep't 1976), *aff'd*, 41 N.Y.2d 872, 362 N.E.2d 623 (1977); *State Farm Mut. Auto. Ins. Co. v. Elgot*, 48 A.D.2d 362, 369 N.Y.S.2d 719 (1st Dep't 1975). Duty of primary carrier to excess carrier is same duty primary owes to its insured. Violation of this fiduciary duty exposes primary to liability beyond its policy. *Hartford Acc. & Indem. Co. v. Michigan Mut. Ins. Co.*, 93 A.D.2d 337, 462 N.Y.S.2d 175 (1st Dep't 1983), *aff'd*, 61 N.Y.2d 569, 463 N.E.2d 608 (1984).

Insolvency of Insurer. State Insurance Department Liquidation Bureau, on filing of proper proof of claim undertakes claims and defense of suits as to insurers admitted to do business in New York State. Statute fixes maximum amount of coverage and the limitations. (123 William St., New York, N.Y. 10038). Ins. Law. Art. 74.

Personal injury judgment of wife and loss of services judgment of husband aggregated more than policy limit for single accident. Insurer liable only for policy limit. *Rankin v. Travelers Ins. Co.*, 254 A.D. 687, 3 N.Y.S.2d 444 (2d Dep't 1938); *Thoren v. Hartford Accident & Indem. Co.*, 165 Misc. 790, 300 N.Y.S. 865 (N.Y. Sup. Ct. 1937). For bodily injuries to and loss of wife's services, and bodily injuries to husband, see *Boyce v. Utica Mut. Ins. Co.*, 279 N.Y. 758, 18 N.E.2d 696 (1939).

See also "LIABILITY INSURANCE, Defense of Actions."

Loading and Unloading. "Complete Operation" doctrine followed. *Wagman v. Am. Fid. & Cas. Co.*, 304 N.Y. 490, 109 N.E.2d 592 (1952); see also *Lowry v. R.H. Macy & Co.*, 119 N.Y.S.2d 5 (N.Y. Sup. Ct. 1952).

Doctrine of Mysterious Disappearance and its presumptions discussed. *Casey v. London & Lancashire Indem. Co.*, 204 Misc. 1106, 126 N.Y.S.2d 726 (Albany City Ct. 1953), *aff'd*, 5 A.D.2d 724, 168 N.Y.S.2d 692 (3d Dep't 1957).

Non-Waiver Agreements. Insurer conducting defense of action against insured under non-waiver agreement, does not waive breach of policy condition. *Frank Knauss, Inc. v. Indem. Ins. Co.*, 270 N.Y. 211, 200 N.E. 791 (1936); *Weatherwax v. Royal Indem. Co.*, 250 N.Y. 281, 165 N.E. 293 (1929). See "WAIVER AND ESTOPPEL, Liability Insurance."

Notice. Where policy required immediate notice of accident, failure of insured to give reasonable explanation of twenty-two day delay barred recovery under policy. *Rushing v. Commercial Cas. Ins. Co.*, 251 N.Y. 302, 167 N.E. 450 (1929).

Where policy required notice "as soon as practicable," insured's notice two months after accident for property damage claim where there was substantial automobile damage, not excused but insurer required to defend personal injury action where reasonable for insured to believe there were no injuries. *Am. Sur. Co. v. Rosenthal*, 206 Misc. 485, 133 N.Y.S.2d 870 (N.Y. Sup. Ct. 1954).

Where no excuse for delay is offered issue of timely notice is one of law for Court. *Greenwich Bank v. Hartford Fire Ins. Co.*, 250 N.Y. 116, 164 N.E. 876 (1928), *reargument denied*, 250 N.Y. 587, 166 N.E. 334 (1929). Late notice violating policy was found in following: fifty-one days. *Deso v. London & Lancashire Indem. Co.*, 3 N.Y.2d 127, 143 N.E.2d 889 (1957); twenty-seven days. *Reina v. United States Cas. Co.*, 228 A.D. 108, 239 N.Y.S. 196 (1st Dep't 1930), *aff'd*, 256 N.Y. 537, 177 N.E. 130 (1931); twenty-two days. *Rushing*,

251 N.Y. at 304, 167 N.E. at 451; thirty days. *Mason v. Allstate Ins. Co.*, 12 A.D.2d 138, 209 N.Y.S.2d 104 (2d Dep't 1960); and forty-nine days. *Abitante v. Home Indem. Co.*, 240 A.D. 553, 270 N.Y.S. 641 (1st Dep't 1934). Proof of delay prejudice to the insurer is not required. *Hovdestad v. Interboro Mut. Indem. Ins. Co.*, 135 A.D.2d 783, 522 N.Y.S.2d 895 (2d Dep't 1987); *Jenkins v. Burgos*, 99 A.D.2d 217, 472 N.Y.S.2d 373 (1st Dep't 1984).

Sixteen month delay in giving notice, without any credible explanation by insured contractor, is not notice "as soon as practical after accident or notice of claim." *Empire City Sub. Co. v. Greater N.Y. Mut. Ins. Co.*, 35 N.Y.2d 8, 315 N.E.2d 755 (1974).

Delay of 58 days before giving notice was untimely without reasonable explanation for delay. *Cortes v. Hartford Accident & Indem. Co.*, 14 Misc. 2d 1062, 180 N.Y.S.2d 102 (N.Y. App. Term 1958); see also *Vanderbilt v. Indem. Ins. Co.*, 265 A.D. 495, 39 N.Y.S.2d 808 (2d Dep't 1943) (finding delay of 28 days in giving notice fatal).

Under Ins. Law §3420, third party has right to put insurance company on notice. Under particular circumstances of case, notice by injured party 13 months after accident held timely. *Lauritano v. Am. Fid. Fire Ins. Co.*, 4 N.Y.2d 1028, 152 N.E.2d 546 (1958).

Reasonable notice to carrier required by injured party is necessarily measured by standards different than those applied to insured. *Price v. Allstate Ins. Co.*, 12 A.D.2d 911, 210 N.Y.S.2d 945 (1st Dep't 1961); see also *Matthews v. Glens Falls Ins. Co.*, 21 Misc. 2d 1079, 192 N.Y.S.2d 811 (N.Y. Sup. Ct. 1959) (holding 4 month delay reasonable under the circumstances).

In absence of suitable explanation, 68-day delay in giving notice on behalf of injured person held unreasonable as matter of law. *Allstate Ins. Co. v. Manger*, 30 Misc. 2d 326, 213 N.Y.S.2d 901 (N.Y. Sup. Ct. 1961).

Under no-fault coverage, notice within 90 days of accident is sufficient. *Subia v. Cosmopolitan Mut. Ins. Co.*, 80 Misc. 2d 1090, 364 N.Y.S.2d 118 (N.Y. Sup. Ct. 1975). See also "NO-FAULT."

Druggist's failure to notify insurer of claim known to him, that his improper compounding of prescription had caused death of infant, until action commenced seven months later, voided liability policy. *Dworkin v. Aetna Cas. & Sur. Co.*, 194 Misc. 501, 87 N.Y.S.2d 77 (N.Y. City Ct. 1949).

Failure to notify insurer of psychiatric "treatment of sexual relations" until service of suit 6 months after treatment ended was not timely notice. *Hartogs v. Employers Mut. Liab. Ins. Co.*, 89 Misc. 2d 468, 391

N.Y.S.2d 962 (N.Y. Sup. Ct. 1977); *Roy v. Hartogs*, 85 Misc. 2d 891, 381 N.Y.S.2d 587 (N.Y. App. Term 1976) (containing underlying liability action).

Hold Harmless. See Coverage under Comprehensive General Liability Policy and not Worker's Compensation Insurer. *Ciffa v. Jewish Fed'n Hous. Dev. Fund Co.*, 126 Misc. 2d 892, 484 N.Y.S.2d 459 (N.Y. Sup. Ct. 1985), *vacated sub nom Lumberman's Mut. Cas. Co. v. Aetna Cas. & Sur. Co.*, 119 A.D.2d 987, 500 N.Y.S.2d 883 (4th Dep't 1986).

Punitive Damages. Awarded as punishment, it would defeat public policy to find coverage. *Am. Sur. Co. v. Gold*, 375 F.2d 523 (10th Cir. 1966); *Hartford Accident & Indem. Co. v. Village of Hempstead*, 48 N.Y.2d 218, 397 N.E.2d 737 (1979); *Padavan v. Clemente*, 43 A.D.2d 729, 350 N.Y.S.2d 694 (2d Dep't 1973); *Teska v. Atl. Nat'l Ins. Co.*, 59 Misc. 2d 615, 300 N.Y.S.2d 375 (N.Y. Dist. Ct. 1969). Intoxication alone is insufficient. *Sweeney v. McCormick*, 159 A.D.2d 832, 552 N.Y.S.2d 707 (3d Dep't 1990). See also "DAMAGES."

Reimbursement. Conflicting decisions re: insurer's right of reimbursement for moneys paid to injured third party where insured violated policy restrictions re: persons who would operate insured vehicle. Held entitled, *Standard Accident Ins. Co. v. Solomon*, 195 Misc. 48, 88 N.Y.S.2d 667 (N.Y. Sup. Ct. 1949). Held not entitled, *Travelers Ins. Co. v. Russo*, 155 Misc. 589, 280 N.Y.S. 99 (N.Y. App. Term 1935).

Reformation. Injured third party may sue to reform liability policy of person causing injury to state period of coverage correctly. *Tuzinska v. Ocean Accident & Guarantee Corp.*, 241 A.D. 598, 272 N.Y.S. 593 (4th Dep't 1934). Wife, without knowledge, was included as "named assured," was injured in auto driven by son and owned by husband. Sought reformation to strike her name from policy to enable action against company on judgment against son, denied. *Kerr v. New Amsterdam Cas. Co.*, 276 N.Y. 648, 12 N.E.2d 803 (1938), *reargument denied*, 278 N.Y. 566, 16 N.E.2d 105 (1938).

Violation of policy provisions by additional insured, held no defense in action against insurance company on unpaid judgment against named insured. *Wenig*, 294 N.Y. at 201, 61 N.E.2d at 444.

Although seller estopped from denying ownership and liability where he permitted buyer to use his license plates in violation of N.Y. Veh. & Traf. Law §388, insurance company not estopped and not obligated to defend and indemnify either buyer or seller. *Phoenix Ins. Co. v. Guthiel*, 2 N.Y.2d 584, 141 N.E.2d 909 (1957).

Where automobile dealer loaned his plates to purchaser and dealer failed to comply with statute and unlawfully permitted their use by purchaser, dealer cannot rebut presumption of ownership. *Switzer v. Aldrich*, 307 N.Y. 56, 120 N.E.2d 159 (1954); *see also Switzer v. Merchants Mut. Cas. Co.*, 2 N.Y.2d 575, 141 N.E.2d 904 (1957) (holding automobile dealer's insurer covered risk when only 4 days had elapsed from date of sale to date of accident).

Generally injured employee cannot sue employer but defendant can implead employer as a third party defendant. Most general liability policies exclude coverage as to direct or indirect suits by plaintiff employees against employer, as a third party defendant. However, employer's workers compensation policy (coverage B) usually covers the employer, as a third party defendant. In 1996 (L1996, Ch. 635) Omnibus Workers' Compensation Act limited impleading plaintiff's employer as third party defendant, unless injuries are "grave." *Majewski*, 91 N.Y.2d at 582, 696 N.E.2d at 979 (statute is not retroactive).

Where same carrier wrote coverage for owner and driver, then no cross-claim by owner against driver, unless amount in complaint exceeds coverage. *Schwartz v. S. Lipkin & Son, Inc.*, 76 A.D.2d 141, 430 N.Y.S.2d 356 (2d Dep't 1980); *Winnick v. Kupperman Constr. Co.*, 29 A.D.2d 261, 287 N.Y.S.2d 329 (2d Dep't 1968); *Beck v. Renahan*, 46 Misc. 2d 252, 259 N.Y.S.2d 768 (N.Y. Sup. Ct. 1965), *aff'd*, 26 A.D.2d 990, 275 N.Y.S.2d 1010 (2d Dep't 1966), *appeal denied*, 19 N.Y.2d 580, 225 N.E.2d 221 (1967). Carrier would pay and then receive its own payment, but watch amount of coverage.

LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

Arbitration. Generally, the same period of time that would be applied by the court on the claim being arbitrated. CPLR §7502. However, under §7501 a claim may be arbitrable even though it could not have been asserted in a court.

Within one year to commence suit: assault; battery; libel; slander; for violation of right of privacy; malicious prosecution; false imprisonment and on arbitration award. CPLR §215.

Medical-Dental. Within two years and six months to commence medical, dental or podiatric malpractice suit from act, omission or failure complained of, or last treatment where there is continuous treatment for same illness, injury or condition which gave rise to said act, omission or failure; however continuous treatment shall not include examination at patients request for sole purpose of determining state of patient's condition. Where

suit is based upon discovery of foreign object in body of patient, action must be commenced within one year of date of discovery or of date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. For this statute "foreign object" shall not include chemical compound, fixation device or prosthetic device. CPLR §214-a (Effective July 1, 1975). In medical malpractice, infant has maximum of 10 years. CPLR §208. Continuous treatment. *See Wehle v. Giovanniello*, 137 A.D.2d 680, 524 N.Y.S.2d 772 (2d Dep't 1988); *Delaney v. Muscillo*, 138 A.D.2d 258, 525 N.Y.S.2d 221 (1st Dep't 1988), *appeal dismissed*, 73 N.Y.2d 852, 534 N.E.2d 336 (1988). A medical malpractice cause of action accrues from the time of the act, not when injury occurred. *Wancewicz v. Hickey*, 148 A.D.2d 773, 538 N.Y.S.2d 354 (3d Dep't 1989).

Three years to commence suit for personal injury; property damage; and, malpractice other than medical malpractice whether or not action is for contract or tort (accountants, lawyers, architects). CPLR §214.

Wrongful death - two years. E.P.T.L. §5-4.1. Where surviving child of decedent is infant, but other next-of-kin could qualify, two years applied. *Ratka v. St. Francis Hosp.*, 44 N.Y.2d 604, 378 N.E.2d 1027 (1978), *superseded by statute as stated in Adelman v. Adelman*, 191 Misc. 2d 281, 741 N.Y.S.2d 841 (N.Y. Sup. Ct. 2002); E.P.T.L. §5-4.1, *et seq.*. Infancy of decedent held not to bar running of two year statute. *Mossip v. F.H. Clement & Co.*, 256 A.D. 469, 10 N.Y.S.2d 592 (4th Dep't 1939), *aff'd*, 283 N.Y. 554, 27 N.E.2d 279 (1940).

Indemnity. Action for indemnity does not accrue at time of tort, but from time of payment of judgment. *Musco v. Conte*, 22 A.D.2d 121, 254 N.Y.S.2d 589 (2d Dep't 1964); *Satta v. City of New York*, 272 A.D. 782, 69 N.Y.S.2d 653 (2d Dep't 1947). Indemnity may be sought in separate suit subsequent to judgment. *McDermott v. City of New York*, 50 N.Y.2d 211, 406 N.E.2d 460 (1980); *City of Rochester v. Montgomery*, 72 N.Y. 65 (1878). However, as practical matter in most suits party is impleaded as third party defendant. See "IMPLEADER."

Defense of Statute of Limitations not available to indemnify third-party defendant. Cause of indemnity accrues when judgment obtained against defendant third-party plaintiff. *Clements v. Rockefeller*, 189 Misc. 889, 76 N.Y.S.2d 493 (N.Y. Sup. Ct. 1947). Service over 6 years after injury and 5 years after primary suit started allowed in discretion of Court. *Musco v. Conte*, 34 A.D.2d 796, 313 N.Y.S.2d 328 (2d Dep't 1970); *Musco*, 22 A.D.2d at 126, 254 N.Y.S.2d at 595. Plaintiff may amend complaint to include third party defendant as primary defendant after statute of limitations has expired, if impleader was within time for statute of limita-

tions. Timeliness and any prejudice are issues for court. *Duffy v. Horton Mem'l Hosp.*, 66 N.Y.2d 473, 488 N.E.2d 820 (1985).

Court of Appeals held that on suits of strict products liability, cause sounds in tort rather than in contract and statute of limitations starts to run from time of injury, which is when action accrues to plaintiff who was remote user of apartment house laundry machine. *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 335 N.E.2d 275 (1975), *superseded by statute as stated in Calabria v. St. Regis Corp.*, 124 A.D.2d 514, 508 N.Y.S.2d 186 (1st Dep't 1986) (commenting on four years from sale warranty limitation under U.C.C.).

Generally, three-year statute in strict tort liability runs from date of accident, and four years in breach of warranty runs from date of sale. *Martin v. Julius Dierck Equip. Co.*, 43 N.Y.2d 583, 374 N.E.2d 97 (1978); *McCarthy v. Bristol Labs.*, 61 A.D.2d 196, 401 N.Y.S.2d 509 (2d Dep't 1978). As to manufacturer's warranties, time runs from sale by manufacturer. *Heller v. U.S. Suzuki Motor Corp.*, 64 N.Y.2d 407, 477 N.E.2d 434 (1985).

In drug injection cases, cause of action accrues at date of discovery of the injury or from the date when through the exercise of reasonable diligence such injury should have been discovered by plaintiff. *See* CPLR §214-c (2)*. *See also Matter of New York County DES Litig.*, 89 N.Y.2d 506, 678 N.E.2d 474 (1997). Injury occurs when compound is injected or introduced, date of exposure, not when resulting physical injury manifests itself. *Aranoff v. Winthrop Labs.*, 102 A.D.2d 736, 476 N.Y.S.2d 571 (1st Dep't 1984), *aff'd*, 113 A.D.2d 1038, 493 N.Y.S.2d 71 (1st Dep't 1985), *but see* CPLR §214-c *et seq.** Where implanted device, statute of limitations runs from date of injury resulting from malfunction. *Martin v. Edwards Labs.*, 60 N.Y.2d 417, 457 N.E.2d 1150 (1983), *superseded by statute as stated. Matter of New York County DES Litig.*, 89 N.Y.2d at 513, 678 N.E.2d at 478; CPLR §214-c(2).

As to contract for sales four year statute of limitations may be reduced to one year by original agreement but may not be extended. U.C.C. §2-725.

Toxic Exposure Bill. Effective July 30, 1986. CPLR §214-c,* which provides in subdivision (2) that three-year period for action to recover damages for personal injury or injury to property caused by latent effects of exposure to any substance... toxic shall be computed from date of discovery of injury by plaintiff or from date when through exercise of reasonable diligence such injury should have been discovered... whichever is earlier. *See generally* CPLR §214-c *et seq.**

Subdivision (4) of CPLR §214-c,* with its resolution compromise. If plaintiff at discovery time is not aware of cause, his remaining chance depends on his discovering cause within five years afterwards. If he does discover cause within five years after discovering injury, he gets, as alternative measure, one year from discovery of cause. In this connection plaintiff must show that “technical, scientific or medical knowledge and information sufficient to ascertain cause of his injury had not been discovered, identified or determined” in time to inform him earlier. Absent discovery of cause within five years after discovery of injury, CPLR §214-c* apparently doesn’t help plaintiff and claim is barred. This new statute is very complex and comprehensive and entire Act should be read before making any decisions.

*CPLR §214-c(4) preempted by *Ruffing v. Union Carbide Corp.*, 193 Misc. 2d 350, 746 N.Y.S.2d 798 (N.Y. Sup. Ct. 2002) - proposed legislation deferred to judiciary 1/30/09.

Revivor Statute. Any prior exposure case not brought before July 30, 1986 (effective date of Chapter 682), because barred by statute of limitations, or brought and dismissed prior to that date solely because of time bar, is hereby revived and action thereon may be commenced provided such action is commenced within one year from effective date of this act. Revival occurs only for claims traceable to one of five substances. They are: 1) diethylstilbestrol (DES), 2) tungsten carbide, 3) asbestos, 4) chlordane, or 5) polyvinyl chloride (PVC). This statute is very complex and this is only brief outline of some parts.

Fidelity Insurance. Action commenced more than 15 months after filing proof of loss, held, barred by policy provision precluding suits after expiration of 15 months from discovery of fraudulent or dishonest act. *Paul Kaskel & Sons, Inc. v. Fid. & Deposit Co.*, 277 A.D. 366, 100 N.Y.S.2d 273 (1st Dep’t 1950), *aff’d*, 302 N.Y. 762, 98 N.E.2d 887 (1951).

Fire Insurance. Standard policy provides no action sustainable unless all requirements of policy have been complied with, nor unless commenced within twelve months after fire.

“After inception of loss” means after fire and not after filing proof of loss. *Margulies v. Quaker City Fire & Marine Ins. Co.*, 276 A.D. 695, 97 N.Y.S.2d 100 (1st Dep’t 1950).

Action on compromise negotiated between insured and insurer not bound by one year provision of fire policy. *Tindall v. Cont’l Ins. Co.*, 252 A.D. 47, 297 N.Y.S. 780 (4th Dep’t 1937).

Non-Resident Motorists. Absence from state, does not stop running of statute of limitation where long-arm jurisdiction may be obtained. *See* CPLR §207. *See also* N.Y. Veh. & Traf. Law §253.

Accident in Pennsylvania; plaintiff and defendant residents of and action brought in New York. Held, N.Y. statute 2 years applied, not Pennsylvania 1 year. *Panzironi v. Heath*, 197 Misc. 847, 95 N.Y.S.2d 660 (N.Y. Sup. Ct. 1950).

LOAN RECEIPT

See “SUBROGATION.”

Confusion respecting “real party in interest” has been eliminated by amendment to CPLR §1004 permitting action to be brought in name of insured. Where insured executed loan receipt to insurer, insurer could maintain action in name of insured. *Point Tennis Co. v. Irvin Indus. Corp.*, 63 A.D.2d 967, 405 N.Y.S.2d 506 (2d Dep’t 1978).

MEDICAL MALPRACTICE

See also “LIMITATION OF TIME”; “HOSPITAL.”

Generally, failure to use or perform medical services of standard generally followed in profession practicing in that area. *Kinsley v. Carravetta*, 244 A.D. 213, 279 N.Y.S. 29 (1st Dep’t 1935), *aff’d*, 273 N.Y. 559, 7 N.E.2d 691 (1937). Physician will not be held liable for errors in judgment so long as he follows recognized procedures for diagnosis and treatment. *Fisher v. Bartley*, 275 N.Y. 469, 11 N.E.2d 301 (1937), *reargument denied*, 275 N.Y. 544, 11 N.E.2d 744 (1937). Malpractice and failure to cure distinguished. *Robins v. Finestone*, 308 N.Y. 543, 127 N.E.2d 330 (1955), *citing*, *Safian v. Aetna*, 260 A.D. 765, 24 N.Y.S.2d 92 (1st Dep’t 1940), *aff’d*, 286 N.Y. 649, 36 N.E.2d 692 (1941).

Informed Consent suits Limited - Accruing after 7/1/75 - Public Health Law §2805-d and CPLR §4401 - a. Public Health Law §2805-d defines, limits and gives four defenses. CPLR §4401-a requires plaintiff to produce expert medical testimony in support of alleged qualitative insufficiency of consent.

All cases submitted to panel (Judge, doctor, lawyer) for review, and if unanimous on issue of liability written recommendation shall be admissible in evidence. Also any party may call member of panel as witness. *Curtis v. Brookdale*, 62 A.D.2d 749, 406 N.Y.S.2d 494 (2d Dep’t 1978). Proximate cause. *Kletnieks v. Brookhaven Memorial Ass’n*, 53 A.D.2d 169, 385 N.Y.S.2d 575 (2d Dep’t 1976). Amendment of B/P allowed after panel hearing. *Ostrick v. Mt. Sinai Hosp.*, 56 A.D.2d 646, 391 N.Y.S.2d



895 (2d Dep't 1977); *Donnadelle v. Lakeside Hosp.*, 56 A.D.2d 834, 391 N.Y.S.2d 1020 (2d Dep't 1977).

When very nature of acts bespeak clear improper treatment then malpractice expert testimony is not required. *Hammer v. Rosen*, 7 N.Y.2d 376, 165 N.E.2d 756, (1960); see also *Benson v. Dean*, 232 N.Y. 52, 133 N.E. 125 (1921); *Simon v. Freidrich*, 163 Misc. 112, 296 N.Y.S. 367 (N.Y. City Ct. 1937). Res ipsa loquitur doctrine. *Acosta v. City of New York*, 67 Misc. 2d 756, 324 N.Y.S.2d 137 (N.Y. City Civ. Ct. 1971); *Matter of Acosta v. New York City Hous. Auth.*, 236 A.D.2d 337, 655 N.Y.S.2d 333 (1st Dep't 1997).

Damages. Collateral sources of plaintiff reduce damages in medical malpractice actions. CPLR §4545. Evidence that plaintiff recovered special damages from insurance, Workers' Compensation, Social Security, etc. is admissible.

CPLR §3012-a, requires "certificates of merit" accompanying the complaint in new malpractice actions, to effect that attorney has conferred with physician and that action has reasonable basis. CPLR §3045 allows for arbitration of damages in cases where defendant concedes liability. Effect of new statute is to require that awards for lost earnings reflect impact that income taxes would have had on such earnings. See CPLR §4546.

All medical and dental malpractice suits instituted on or after July 1, 1985, come under new statutes containing twenty-five sections which amend Public Health Law, Civil Practice Law, Education Law, Judicians Law, and Insurance Law. Space limitations allows for only setting forth summary of some major changes: Payment of future damages up to \$250,000 will be in lump sums, but payment of future damages in excess of \$250,000 and attorney fees derived from that amount, shall be reduced and judgment entered as to "present value" of annuity necessary to pay this sum in periodic payments. Duration of payments is for jury, except future pain and suffering, period is limited not to exceed 10 years. Four percent interest shall be added to prior year's sum to determine next year's amount. As to periodic payments for future damages, terminate at death of plaintiff. However, payments for loss of future earnings continue to dependents. Law allows "equitable adjustment of periodic payments. Court can assess reasonable attorney fees, not to exceed \$10,000 for continuing action "found... to be frivolous by the court." CPLR §8303-a (a). There is also reduced formula for plaintiff contingency fees; full discovery of expert witnesses; special items for jury awards and expedited time for cases to come to trial. CPLR §4111 allows for itemized verdicts. CPLR §§5031-5039 requires periodic payment of judgments. Collateral sources allowed to reduce verdict. CPLR §4545(c). Plaintiff attorney fee maximum 30% of first \$250,000

and next \$250,000, 25% etc. Chapters 294 and 760 of the Laws of 1985.

Defendant liable for accident may recover from physician whose alleged malpractice aggravated injuries. *Clark v. Halstead*, 193 Misc. 739, 85 N.Y.S.2d 349 (N.Y. Sup. Ct. 1948), *aff'd*, 276 A.D. 17, 93 N.Y.S.2d 49 (3d Dep't 1949); *Primes v. Ross*, 123 N.Y.S.2d 702 (N.Y. Sup. Ct. 1953); *Rezza v. Isaacson*, 13 Misc. 2d 794, 178 N.Y.S.2d 481 (N.Y. Sup. Ct. 1958). See "CONTRIBUTION."

Hospital. Charitable organization, *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3 (1957), applying doctrines of respondent superior. Hospital is liable for negligence of nurse and its servants dependent upon nature of act or omission. *Dillon v. Rockaway Beach Hosp.*, 284 N.Y. 176, 30 N.E.2d 373 (1940).

Hospital staff doctor may, in circumstances of particular case, be ad hoc employee of patient's doctor. *O'Rourke v. Halcyon*, 281 A.D. 838, 118 N.Y.S.2d 693 (2d Dep't 1953), *aff'd*, 306 N.Y. 692, 117 N.E.2d 639 (1954). Hospital employee must pass out of direction and control of hospital and into that of doctor. *Cannon v. Fargo*, 222 N.Y. 321, 118 N.E. 796 (1918). Concurrent control, see *Matlick v. Long Is. Jewish Hosp.*, 25 A.D.2d 538, 267 N.Y.S.2d 631 (2d Dep't 1966); P.J.I. §2:238. For hospital to be vicariously liable for negligence of doctor, usually must show employment, not just affiliation. *Raschel v. Rish*, 69 N.Y.2d 694, 504 N.E.2d 389 (1986), *declined to extend by*, *Brown v. Sagamore Hotel*, 184 A.D.2d 47, 590 N.Y.S.2d 934 (3d Dep't 1992).

Hospital not liable for lack of informed consent where risks of operation to be performed given by independently engaged surgeon, despite conflicting opinion as to desirability of operation. *Fiorentino v. Wenger*, 19 N.Y.2d 407, 227 N.E.2d 296 (1967).

Hospital owed duty to exercise "reasonable care and diligence, not only in treating but in safeguarding, patient, measured by capacity of patient to provide for his own safety." *Robertson v. Towns Hosp.*, 178 A.D. 285, 165 N.Y.S. 17 (2d Dep't 1917); see also *Hendrickson v. Hodkin*, 276 N.Y. 252, 11 N.E.2d 899 (1937); *Zophy v. State*, 27 A.D.2d 414, 279 N.Y.S.2d 918 (4th Dep't 1967), *aff'd*, 22 N.Y.2d 921, 242 N.E.2d 86 (1968).

Prima facie negligence against hospital where patient fell first day walking with crutches on theory that nurse employee failed to properly supervise and take proper and customary precaution against falls. *Butler v. Lutheran Medical Center*, 36 A.D.2d 640, 319 N.Y.S.2d 291 (2d Dep't 1971).



Plaintiff allowed recovery for a phobic fear that she would get cancer as further consequence of burns she suffered from x-ray therapy due to defendant's malpractice. *Ferrara v. Galluchio*, 5 N.Y.2d 16, 152 N.E.2d 249 (1958), *possible negative treatment*, *Ordway v. County of Suffolk*, 154 Misc. 2d 269, 583 N.Y.S.2d 1014 (N.Y. Sup. Ct. 1992).

Letting catheter slip into bloodstream was violation of duty of reasonable care to patient and "catheterphobia," phobic mental fear that catheter will lodge somewhere in his circulatory system is compensable. *Giles v. West*, 178 F.3d 1313 (Fed. Cir. 1999) (unpublished opinion).

Prenatal. There is no wrongful death claim on behalf of stillborn. *Endresz v. Friedberg*, 24 N.Y.2d 478, 248 N.E.2d 901 (1969) (Some disagreement in other states. Recent case is *Kaniecki v. Yost*, 166 Misc. 2d 408, 631 N.Y.S.2d 500 (N.Y. Sup. 1995)). Viable fetus would have claim were he injured in utero but born alive. *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951). No liability on obstetrician as to alleged negligence in three amniocentesis injections alleged to cause death of 16 week fetus.

Stillborn. Even in the absence of an independent injury, Medical malpractice resulting in miscarriage or stillbirth should be construed as a violation of the duty of care to the expectant mother entitling her to damages for emotional distress. *Broadnax v. Gonzalez*, 2 N.Y.3d 148, 809 N.E.2d 645 (2004), *limitation of holding*, *Sheppard-Mobley v. King*, 4 N.Y.3d 627, 830 N.E.2d 301 (2005). See lower court attempt to reconcile as physical injury. *Johnson v. Verrilli*, 134 Misc. 2d 582, 511 N.Y.S.2d 1008 (N.Y. Sup. Ct. 1987), *aff'd*, 139 A.D.2d 497, 526 N.Y.S.2d 600 (2d Dep't 1988).

MOTOR VEHICLE

See "AUTOMOBILES"; "NO-FAULT."

NEGLIGENCE

See also "AUTOMOBILE"; "DEATH"; "MALPRACTICE"; "HOSPITAL"; "INFANTS." Indemnification see "DAMAGES" and "INDEMNITY."

See Law Digest Tables.

Age. (See also "INFANTS") In automobile accident with insurance coverage, parent may sue unemancipated infant for negligence. *Gelbman v. Gelbman*, 23 N.Y.2d 434, 245 N.E.2d 192 (1969). Drinking: Sale, distribution or dispensation of alcoholic beverages to persons under 21 years is illegal. See NY Alcoholic Beverage Control Law §65.

Animals. One who keeps animal with knowledge of vicious propensities has absolute or strict liability for injuries inflicted by animal. *Strunk v. Zoltanski*, 62 N.Y.2d 572, 468 N.E.2d 13 (1984); *Arbegast v. Board of Educ.*, 65 N.Y.2d 161, 480 N.E.2d 365 (1985); *Petrella v. O'Connor*, 65 N.Y.2d 849, 482 N.E.2d 1207 (1985).

Assumption of Risk. Sports. Defendant has duty to plead and prove. It can be complete bar to recovery. *Maddox v. City of New York*, 66 N.Y.2d 270, 487 N.E.2d 553 (1985); *Arbegast v. Board of Educ.*, 65 N.Y.2d 161, 480 N.E.2d 365 (1985). In sports, horseback riding, doctrine applies to all inherent risks and all open and obvious conditions. *Diderou v. Pinecrest*, 34 A.D.2d 672, 310 N.Y.S.2d 572 (2d Dep't 1970). Softball, included light pole in "fair" territory on field. *Pascucci v. Town of Oyster Bay*, 186 A.D.2d 725, 588 N.Y.S.2d 663 (2d Dep't 1992). Pleading culpable conduct defense includes contributory negligence and assumption of risk. *Caiati v. Kimel*, 154 A.D.2d 639, 546 N.Y.S.2d 877 (2d Dep't 1989). Two distinct doctrines of Assumption of Risk; "culpable conduct" and "primary assumption of risk." CPLR Article 14A; *Lamey v. Foley*, 188 A.D.2d 157, 594 N.Y.S.2d 490 (4th Dep't 1993).

Attractive Nuisance. With respect to private property, doctrine generally not applicable in New York. *Morse v. Buffalo Tank Co.*, 280 N.Y. 110, 19 N.E.2d 981 (1939); *Lefler v. Pennsylvania*, 203 Misc. 887, 118 N.Y.S.2d 389 (N.Y. Sup. Ct. 1952). Doctrine, when applied, is generally limited to dangerous attractions on highway. *Tierney v. Dugan*, 288 N.Y. 16, 41 N.E.2d 161 (1942); *Eason v. State*, 280 A.D. 358, 113 N.Y.S.2d 479 (3d Dep't 1952). Even if child is trespasser, where owner of land leaves it open and accessible to children; and he knows children use it for play; and he leaves accessible to them highly volatile substance, prima facie case is made. *Patterson v. Proctor Paint & Varnish*, 21 N.Y.2d 447, 235 N.E.2d 765 (1968). Defendant possessor's negligence is for jury where infant trespasser was killed when tripping over construction equipment at defendant's site. *Londa v. Douglass Estates*, 40 N.Y.2d 1001, 359 N.E.2d 980 (1976). Infant trespassers who drowned in defendant's swimming pool. *Naughton v. Sheehan*, 56 A.D.2d 839, 392 N.Y.S.2d 75 (2d Dep't 1977). See also "Premises" *infra*.

Bicyclists must observe same rules as drivers. N.Y. Veh. & Traf. Law §1231. Whether rider properly signaled is a question of fact. *Secor v. Kohl*, 67 A.D.2d 358, 415 N.Y.S.2d 434 (2d Dep't 1979).

Blasting. Landowner was not strictly liable to contractor's employee and did not have a non-delegable duty, even though blasting was "inherently dangerous." *Whitaker v. Norman*, 75 N.Y.2d 779, 551 N.E.2d 579 (1989). Labor Law §§402 and 435, (McKinney 2007).



Co-Defendant. Defendant can implead third party defendants who are, or may be, wholly or partially negligent. Jury decides percentage of negligence for each defendant. *Dole v. Dow Chemical*, 30 N.Y.2d 143, 282 N.E.2d 288 (1972), superseded by statute Gen. Oblig. Law §15-108 for other grounds. Defendants can cross-claim and ask indemnity and/or contribution against co-defendant. CPLR §3019, (McKinney Supp. 2004). See also "IMPLEADER." Omnibus Workers Act (L. 1996, Ch. 635) limits impleading injured plaintiff's employer unless grave injuries, i.e. loss of arm, leg, death, etc. It is not retroactive. See Workers' Compensation Law §11, (McKinney Supp. 2004); see also, *Majewski v. Broadalbin*, 91 N.Y.2d 577, 696 N.E.2d 978 (1998).

Conflict of Laws. Where both driver and guest are New York residents and guest was injured in car accident occurring in Ontario, Canada, Court did not apply usual rule that tort law of place of accident controlled, but rather guest was permitted to sue despite Ontario guest statute barring liability. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279 (1963), limitation on holding, *Roach v. McGuire & Bennett*, 146 A.D.2d 89, 539 N.Y.S.2d 138 (3d Dep't 1989).

Comparative Negligence. Plaintiff's damages diminished in proportion to amount of negligence attributable to plaintiff. CPLR §1411, (McKinney 2007). Doctrine is applied to degrees of negligence of each defendant and jury decides percentage of fault for each defendant. *Dole*, 30 N.Y.2d at 143, 282 N.E.2d at 288, superseded by statute Gen. Oblig. Law §15-108 for other grounds. Burden to prove plaintiff's culpable conduct is on defendant. CPLR §1412; P.J.I. §2:36.

Damages. See this heading.

Dram Shop. See Gen. Oblig. Law §11-101. Does not allow suit for injuries to intoxicated person, by reason of voluntary intoxication. *Marsico v. Southland Corp.*, 148 A.D.2d 503, 539 N.Y.S.2d 378 (2d Dep't 1989). No suit against retailer who sold imitation drivers license to 15 year old. *Etu v. Cumberland*, 148 A.D.2d 821, 538 N.Y.S.2d 657 (3d Dep't 1989). Statute discussion of application, See *Terrigino v. Zaleski*, 144 Misc.2d 474, 544 N.Y.S.2d 283 (N.Y. Sup. Ct. 1989).

Statute creates for injured persons right against all who "caused or contributed to intoxication" or "illegal sale or procuring of alcohol" and such person has been injured by intoxicated person. Gen. Oblig. Law §11-101. Alcoholic Beverage Control Law §65. In 1986, require showing of sale to "any visibly intoxicated person." *Kelly v. Fleet Bank*, 271 A.D.2d 654, 706 N.Y.S.2d 190 (2d Dep't 2000). Effective 12/1/85, age for purchase of alcohol is 21 years.

Statutory dram shop liability imposed on vendor of alcohol for injuries and damages caused by intoxicated person is set forth in Gen. Oblig. Law §11-101. Drunk 15 year old guest killed another at church function-dram shop violation involved. *Bartkowiak v. St. Adalbert's R.C. Church*, 40 A.D.2d 306, 340 N.Y.S.2d 137 (4th Dep't 1973). Seller may seek contribution from drunk. *Zona v. Oatka Rest.*, 68 N.Y.2d 824, 499 N.E.2d 869 (1986).

Alcohol furnished to persons under twenty-one years imposes liability. Gen. Oblig. Law §11-100, also Alcoholic Beverage Control. §65. Dram Shop Act requires a commercial sale to persons under 21 years. *D'Amico v. Christie*, 71 N.Y.2d 76, 518 N.E.2d 896 (1987).

Emergency Defense Doctrine. Applied in New York where defendant confronted with sudden and unexpected situation which defendant did not create. *Caristo v. Sanzone*, 96 N.Y.2d 172, 750 N.E.2d 36 (N.Y. 2001).

Contracts exempting owners or lessors from liability for negligence - void and unenforceable. Gen. Oblig. Law §5-321. Also same for building service or maintenance. Gen. Oblig. Law §5-323. Also, contracts exempting gymnasiums, pools, places of public recreation or amusements void. Gen. Oblig. Law §5-326. Burglar alarm company contract liability only for gross negligence - unenforceable. *Federal Ins. Co. v. Automatic Burglar Alarm*, 208 A.D.2d 495, 617 N.Y.S.2d 53 (2d Dep't 1994).

Foreseeability. Risk reasonably to be perceived defines duty to be obeyed, and risk imports relation. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928); *Havas v. Victory Paper Stock*, 49 N.Y.2d 381, 402 N.E.2d 1136 (1980). Generally this issue is for jury without requiring expert testimony. See *Havas, supra*. (loading ramp and truck).

Negligence may not be based on inference. *Ruppert v. Brooklyn Heights R. Co.*, 154 N.Y. 90, 47 N.E. 971 (1897); *Leonard v. Ashley Welding*, 11 A.D.2d 1073, 206 N.Y.S.2d 875 (2d Dep't 1960), *aff'd*, 10 N.Y.2d 993, 180 N.E.2d 259 (1961); *Olsen v. St. Margaret*, 21 A.D.2d 827, 251 N.Y.S.2d 512 (2d Dep't 1964).

Infants. See also "AGE," Sui Juris. Boy eleven years old held contributorily negligent. *Busby v. Levy*, 101 N.Y.S.2d 946 (N.Y. Sup. Ct. 1951). Ordinarily, question of fact for jury. *Stone v. Dry Dock*, 115 N.Y. 104, 21 N.E. 712 (1889); *Gunsburger v. Kristeller*, 189 A.D. 821, 179 N.Y.S. 506 (2d Dep't 1919). In determining whether act of infant defendant is negligent his age, intelligence and experience and circumstances under which act was committed must be taken into consideration, *Eagle v. Janoff*, 12 A.D.2d 638, 208 N.Y.S.2d 579



(2d Dep't 1960), *but see Williams v. Hayes*, 143 N.Y. 442, 38 N.E. 449 (1894) (stating dicta to contrary). Infant defendant, age six, held liable for assault and battery. *Baldinger v. Banks*, 26 Misc. 2d 1086, 201 N.Y.S.2d 629 (N.Y. Sup. Ct. 1960). Three-year-old child is conclusively presumed to be incapable of negligence. *Verni v. Johnson*, 295 N.Y. 436, 68 N.E.2d 431 (1946).

Investigation. Plaintiff entitled to inspection of his statement given to insurance company representative when alleged to have been obtained by coercion. *Bearor v. Kapple*, 24 N.Y.S.2d 655 (N.Y. Sup. Ct. 1940); while plaintiff in poor physical condition. *Meehan v. McCloy*, 266 A.D. 706, 40 N.Y.S.2d 207 (3d Dep't 1943); by misrepresentations, *Johnson v. Valentino*, 277 A.D. 1133, 101 N.Y.S.2d 622 (2d Dep't 1950); *but see Sack v. All-States*, 268 A.D. 793, 49 N.Y.S.2d 148 (2d Dep't 1944); *Bernal v. Baptist*, 275 A.D. 88, 87 N.Y.S.2d 458 (1st Dep't 1949), *aff'd*, 300 N.Y. 486, 88 N.E.2d 720 (1949) (noting that does not apply to parent's action for loss of services and medical expense).

Last Clear Chance. Doctrine is applied. *Hernandez v. B.&Q.*, 284 N.Y. 535, 32 N.E.2d 542 (1940). See "AUTOMOBILES."

Municipal. When city official action involves expert judgment or exercise of discretion, and is not exclusively ministerial, a municipal defendant generally has no liability. *Tango v. Tulevech*, 61 N.Y.2d 34, 459 N.E.2d 182 (1983); *Haddock v. City of New York*, 75 N.Y.2d 478, 553 N.E.2d 987 (1990); *Rodriguez v. City of New York*, 189 A.D.2d 166, 595 N.Y.S.2d 421 (1st Dep't 1993) (A police officer firing at criminal in a crowd and hitting plaintiff, bystander, where there are specific police rules, is not within the "judgmental error rule").

Premises. Application of single standard of reasonable care under circumstances whereby "foreseeability" shall be measure of liability. *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868 (1976), *disagreed with by, Wight v. State of New York*, 93 Misc. 2d 560, 403 N.Y.S.2d 450 (N.Y. Ct. Cl. 1978); *see also Quinlan v. Cechini*, 41 N.Y.2d 686, 363 N.E.2d 578 (1977) (where seventeen year old visiting friends home fell in small dark vestibule, plaintiff's expert testified "architecturally unsound," thus foreseeability and proximate cause for jury); *Scurti v. City of New York*, 40 N.Y.2d 433, 354 N.E.2d 794 (1976), *disagreed with by, Wight*, 93 Misc. 2d 560, 403 N.Y.S.2d 450 (where fourteen year old trespasser electrocuted created issues fact for jury); *Barker v. Parnossa*, 39 N.Y.2d 926, 352 N.E.2d 880 (1976) (where infant trespasser is factor for jury to consider and duty owed is that of reasonable care for safety of all persons reasonably to be expected upon owner possessor's land); *Farkas v. Cedarhurst Natural Food*

Shoppe, 41 N.Y.2d 1041, 364 N.E.2d 829 (1977). No prior accidents under same conditions within reasonable time prior to date of accident is admissible. *Wozniak v. 110 S. Main St. Land*, 61 A.D.2d 848, 402 N.Y.S.2d 69 (3d Dep't 1978); *Miller v. Food Fair*, 63 A.D.2d 766, 404 N.Y.S.2d 740 (3d Dep't 1978); *Fleischer v. Mel-markets*, 174 A.D.2d 647, 571 N.Y.S.2d 509 (2d Dep't 1991) (where display falls on customer and no *res ipsa loquitur*, duty of reasonably safe condition). Rape. Owner no liability. *Jacqueline S. v. NYC Housing*, 81 N.Y.2d 288, 614 N.E.2d 723 (1993).

Notice of Defect. Plaintiff failed to show either actual or constructive notice of 1/8 to 1/16 inch raised crack in tennis court. *Katcher v. Ideal Tennis*, 65 A.D.2d 751, 409 N.Y.S.2d 756 (2d Dep't 1978). Proof of notice of foreign substance on floor of supermarket is essential. *Cameron v. Bohack*, 27 A.D.2d 362, 280 N.Y.S.2d 483 (2d Dep't 1967); *Bender v. Dan's Supreme Supermarket*, 71 A.D.2d 636, 418 N.Y.S.2d 476 (2d Dep't 1979). Jury could infer from photo taken one month after accident that condition was long existent. *Taylor v. New York City Transit*, 63 A.D.2d 630, 405 N.Y.S.2d 95 (1st Dep't 1978), *aff'd*, 48 N.Y.2d 903, 400 N.E.2d 1340 (1979). Landowner not responsible when tree branch falls and injures plaintiff on adjacent property unless he had notice of defective condition of his tree. *Ivancic v. Olmstead*, 66 N.Y.2d 349, 488 N.E.2d 72 (1985), *cert. denied*, 476 U.S. 1117 (1986). Trip due to one-inch irregularity, not actionable. *Morales v. Riverbay*, 226 A.D.2d 271, 641 N.Y.S.2d 276 (1st Dep't 1996).

Owner who completely parted with possession and control is not liable for building's defective condition. *Worth v. Latham*, 59 N.Y.2d 231, 451 N.E.2d 193 (1983). Owner/landlord with a right to enter to inspect and repair is sufficient to charge owner with constructive notice of defect and liability for the defect. *Guzman v. Haven Plaza*, 69 N.Y.2d 559, 509 N.E.2d 51 (1987); *Tkach v. Montefiore Hosp.*, 289 N.Y. 387, 46 N.E.2d 333 (1943).

Construction. Labor Law. Owner, other than one and two family residence, and contractors on construction and demolition jobs absolutely liable to other contractors employees for violations of Labor Law §240 and §241. *Allen v. Cloutier Construction*, 44 N.Y.2d 290, 376 N.E.2d 1276 (1978), *reargument denied*, 45 N.Y.2d 776, 380 N.E.2d 350 (1978), *called into doubt, Monroe v. City of New York*, 67 A.D.2d 89, 414 N.Y.S.2d 718 (1st Dep't 1979). Owner and general contractor, neither of whom supervised or directed, absolute liability to employee of sub-contractor for violation of §241. No exemption to one-family house used purely for commercial purposes. *Demartino v. CBS Auto Body*, 208 A.D.2d 886, 618 N.Y.S.2d 92 (2d Dep't 1994). Owners common



law duty to provide a safe work place. *Duclos v. Bisordi*, 209 A.D.2d 376, 618 N.Y.S.2d 424 (2d Dep't 1994); *McAdam v. Sadler*, 170 A.D.2d 960, 566 N.Y.S.2d 130 (4th Dep't 1991), *appeal denied*, 77 N.Y.2d 810, 575 N.E.2d 399 (1991). Defendants vicariously liable (owner and/or contractor) can obtain common law indemnification from active tortfeasor. *Kelly v. Diesel*, 35 N.Y.2d 1, 315 N.E.2d 751 (1974). (See "IMPLEADER".) Scaffolding supplier not contractor within above statutes. *Waters v. Patent Scaffold Co.*, 75 A.D.2d 744, 427 N.Y.S.2d 436 (1st Dep't 1980), *appeal dismissed*, 53 N.Y.2d 704 (1981); *Wood v. Nourse*, 124 A.D.2d 1020, 509 N.Y.S.2d 223 (4th Dep't 1986). Plaintiff must prove that the violation was the proximate cause of the accident. *Zimmer v. Chemung Co.*, 65 N.Y.2d 513, 482 N.E.2d 898 (1985); *see also Amedure v. Standard Furniture*, 125 A.D.2d 170, 512 N.Y.S.2d 912 (3d Dep't 1987). Professional Engineer. Liability under labor law if there exists in contract authority to supervise and control the activity that caused accident. *Carter v. Vollmer*, 196 A.D.2d 754, 602 N.Y.S.2d 48 (1st Dep't 1993). Inspection authority without authority to direct not sufficient. Owners have nondelegable duty by §240 (1) and includes owner in fee even though leased to another. *Gordon v. Eastern Ry.*, 82 N.Y.2d 555, 626 N.E.2d 912 (1993), *called into doubt*, *Sarigul v. New York Telephone Co.*, 4 A.D.3d 168, 772 N.Y.S.2d 653 (1st Dep't 2004). See also under "DAMAGES"; "CONSTRUCTION."

Labor Law §240 (1) does not apply if injured was changing bulbs as this is maintenance, not repair. *Santagate v. Yorktown*, 226 A.D.2d 519, 641 N.Y.S.2d 339 (2d Dep't 1996). Labor Law applicable if replacing the lighting fixture. *Clemente v. GrowTunneling*, 235 A.D.2d 331, 653 N.Y.S.2d 922 (1st Dep't 1997).

Owner vicariously liable under Labor Law can, in recovery against party at fault, include attorney fees, costs and disbursements in defending the primary injury suit. *Chapel v. Mitchell*, 84 N.Y.2d 345, 642 N.E.2d 1082 (1994).

Intoxication admissible only as proof of sole proximate cause of fall from ladder. *Hodge v. Crouse*, 207 A.D.2d 1007, 616 N.Y.S.2d 822 (4th Dep't 1994), *declined to follow by*, *Beesimer v. Albany Avenue/Route 9 Realty, Inc.*, 216 A.D.2d 853, 629 N.Y.S.2d 816 (3d Dep't 1995).

Employer breached its nondelegable duty of providing employee with safe place to work. *Medici v. Dalton Schools*, 43 A.D.2d 677, 349 N.Y.S.2d 726 (1st Dep't 1973). Employer can be impleaded as a third party defendant in a suit by injured employee. See "IMPLEADER." "Grave injury" to plaintiff employee required as defined in Omnibus Workers' Compensation

Act: "... death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability." N.Y. Workers' Comp. Law §11 (McKinney 2007).

Broad general allegations of alleged permanent injuries are not sufficient for "grave injury." *Johnson v. Space Saver*, 172 Misc. 2d 147, 656 N.Y.S.2d 715 (N.Y. Sup. Ct. 1997).

Indemnity. In *North Star Reins. v. Continental*, 82 N.Y.2d 281, 624 N.E.2d 647 (1993) the Court of Appeals declined to adopt the "preindemnification doctrine" which bars common law claims for indemnification by a vicariously liable party to the extent that the wrongdoer has obtained insurance for that party against a loss. However, it reaffirmed, the "anti-subrogation rule" which provides that no insurer has a right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered. Thus, where, for example, owners, contractors and/or subcontractors are named as insured's or additional insured's in the same policy or even in separate policies issued by the same insurer, actions between those parties requires careful review of wording in policy or endorsements. *Pennsylvania Gen. v. Austin Powder*, 68 N.Y.2d 465, 502 N.E.2d 982 (1986); (barred suits to limits of the policy); *Kinney v. Lisk*, 76 N.Y.2d 215, 556 N.E.2d 1090 (1990); *See also* 16 COUCH, Ins.2d §61:37; *Keeton & Widiss*, Ins. Law, §3.10 (a).

Landlord aware of assaults in building has duty to maintain locks. *Sherman v. Concourse Realty*, 47 A.D.2d 134, 365 N.Y.S.2d 239 (2d Dep't 1975); *Garzilli v. Howard Johnson's*, 419 F. Supp. 1210 (E.D.N.Y. 1976) (verdict \$2.5 million); *See also Montag v. YMCA*, 105 A.D.2d 1131, 482 N.Y.S.2d 613 (4th Dep't 1984) (where assault in YWCA locker room while attendant absent, owner has duty to maintain in reasonable condition under all of circumstances present). Landlord's knowledge of crimes in the immediate vicinity raises fact jury issue of liability to raped tenant. *Jacqueline S. v. City of New York*, 81 N.Y.2d 288, 614 N.E.2d 723 (1993). Tenant who sustains personal injuries must show landlord's inadequate security measures were proximate cause of injury, and that assailant was an intruder to the building. Plaintiff's case does not fail for lack of identification of intruder. *Burgos v. Aqueduct Realty Corp.*, 92 N.Y.2d 544, 706 N.E.2d 1163 (1998).

Snow shoveling must actually make existing mass of snow more dangerous than prior to create liability.

Mandel v. City of New York, 44 N.Y.2d 1004, 380 N.E.2d 173 (1978). Reasonable opportunity to remove must be present. *Roark v. Hunting*, 24 N.Y.2d 470, 248 N.E.2d 896 (1969). Failure to remedy condition by sand or salt over dangerous area is question for jury. *Cohen v. New York City Hous. Auth.*, 44 A.D.2d 817, 355 N.Y.S.2d 771 (1st Dep't 1974); see also *Goslin v. Nine Platt*, 39 A.D.2d 986, 333 N.Y.S.2d 352 (3d Dep't 1972), appeal denied, 31 N.Y.2d 643, 290 N.E.2d 827 (1972).

Parents liability to their child, see "INFANTS." A child has no cause of action against a parent for negligent supervision. *Holodook v. Spencer*, 36 N.Y.2d 35, 324 N.E.2d 338 (1974). But leaving infant accessible to pool, duty separate from family relationship. *Semmens v. Hopper*, 128 A.D.2d 767, 513 N.Y.S.2d 472 (2d Dep't 1987).

"Infants." Trespass doctrine is not bar to recovery by children injured by dangerous condition on land, and owner knows children use it for play, and he leaves it open and accessible with highly volatile substance. *Patterson v. Proctor Paint*, 21 N.Y.2d 447, 235 N.E.2d 765 (1968).

Regardless of status of infant on property, since fire escape was potentially lethal trap overhanging sidewalk where children frequently played issue of "foreseeability" is for jury. *Martinez v. Kaufman*, 34 N.Y.2d 819, 316 N.E.2d 336 (1974); see also *Mayer v. Temple Properties.*, 307 N.Y. 559, 122 N.E.2d 909 (1954); *Beauchamp v. New York City Hous. Auth.*, 12 N.Y.2d 400, 190 N.E.2d 412 (1963).

Owner of building that is open to public is required to reasonably light exterior means of egress and ingress. *Gallagher v. St. Raymond's*, 21 N.Y.2d 554, 236 N.E.2d 632 (1968).

Police Injuries. Santangelo Rule (also known as "Firemen's Rule") bars police from recovering for injuries as a result of "special risks" inherent in duties, including fellow officer negligence in rushing to scene of emergency. See *Desmond v. City of New York*, 88 N.Y.2d 455, 669 N.E.2d 472 (1996), reargument denied, 89 N.Y.2d 861, 675 N.E.2d 1236 (1996); N.Y. Gen. Mun. Law §§205-a and 205-e (McKinney 2007).

Proximate Cause. What constitutes legal or proximate cause is always dependent upon facts of particular case. *O'Neill v. Port Jervis*, 253 N.Y. 423, 171 N.E. 694 (1930). If act is in clear sequence with result and it reasonably could have been anticipated that consequences complained of would follow, alleged wrongful act is proximate cause. *Cole v. Vincent*, 229 A.D. 520, 242 N.Y.S. 644 (4th Dep't 1930). No prior accidents for reasonable time admissible where plaintiff fell in hotel

parking lot. *Wozniak v. 110 South Main St. Land & Dev.*, 61 A.D.2d 848, 402 N.Y.S.2d 69 (3d Dep't 1978); see also *Miller v. Food Fair Stores*, 63 A.D.2d 766, 404 N.Y.S.2d 740 (3d Dep't 1978). Concept is elusive and cannot be precisely defined. Question is whether the intervening act is normal or foreseeable consequence of the negligence. *Thomas v. U.S. Soccer Fed. Inc.*, 236 A.D.2d 600, 653 N.Y.S.2d 958 (2d Dep't 1997).

Settlement. Duty of defendant to pay plaintiff within 21 days of receipt of proper closing papers, or plaintiff enter judgment, without notice, including costs, disbursements and interest. CPLR §5003.

Snowmobile hit gate on private road owned by defendant and defendant had cleared path, complaint dismissed. See Gen. Oblig. Law §9-103 (McKinney 2007); *Rock v. Concrete Materials*, 46 A.D.2d 300, 362 N.Y.S.2d 258 (3d Dep't 1974), appeal dismissed, 36 N.Y.2d 772, 329 N.E.2d 672 (1975).

Sudden Emergency. Doctrine discussed and held not to apply in *La Plante v. State*, 200 Misc. 396, 107 N.Y.S.2d 615 (N.Y. Ct. Cl. 1950), *aff'd*, 278 A.D. 739, 103 N.Y.S.2d 669 (4th Dep't 1951). Where emergency is not created by defendant's own act, error of judgment may not be equated with fault. *Ward v. F.R.A.*, 265 N.Y. 303, 192 N.E. 585 (1934); *Rowlands v. Parks*, 2 N.Y.2d 64, 138 N.E.2d 217 (1956). See also "AUTOMOBILES."

Impleader. Defendant's right to bring in other defendants. Court of Appeals in 1972, in passing on motion to dismiss third party complaint against employer of plaintiff by manufacturer of chemical allegedly improperly labeled, held for first time that defendant should be able to bring in as additional third-party defendant any other party who was negligent in any manner, active or passive, and jury should decide percentage of negligence of each defendant. *Dole v. Dow Chemical*, 30 N.Y.2d 143, 282 N.E.2d 288 (1972), superseded by statute, Gen. Obl. Law §15-108 (a tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person). Plaintiff in enforcing judgment not limited to percentage of fault jury attributed to each defendant. Plaintiff has full right recovery against any one or more joint or concurrent tortfeasors found negligent. *Kelly v. Long Is. Light. Co.*, 31 N.Y.2d 25, 286 N.E.2d 241 (1972). (See "IMPLEADER.") General rule, if defendant found 50% or less liability then such defendant liable only for his equitable share. Applies only to non-economic damages, *i.e.* pain and suffering, loss of consortium, etc. Many exceptions, *i.e.* not in motor vehicle cases. See CPLR §§1601-1602.

Impleader of plaintiff's employer requires "grave injury" as set forth in Omnibus Workers' Compensation Act. N.Y. Workers' Comp. Law §11 (McKinney 2007).

Defense of Personal Injury. Statute of Limitations not available to third-party defendant impleaded for indemnity. Cause of action accrues when judgment obtained against primary defendant third-party plaintiff. *Clements v. Rockefeller*, 189 Misc. 889, 76 N.Y.S.2d 493 (N.Y. Sup. Ct. 1947). See "LIMITATION OF TIME FOR COMMENCEMENT OF ACTION."

Unavoidable accident when not result in any degree, directly or indirectly, by want of such care or skill as law holds every man bound to exercise. *Carvel v. Underwood*, 51 Misc. 2d 863, 273 N.Y.S.2d 918 (N.Y. Sup. Ct. 1966) (Infant darted into street.); *Dorn v. Butts*, 46 Misc. 2d 953, 260 N.Y.S.2d 468 (N.Y. App. Term 1965) (relating to a mechanical defect in vehicle.)

Voluntary assumption of duty to care for individual requires performance with reasonable care. *Florence v. Goldberg*, 44 N.Y.2d 189, 375 N.E.2d 763 (1978). Also obligation not to abandon. *Id.* N.Y.P.J.I. 2:24.

NO-FAULT

New injury threshold and arbitration limitations for accidents on and after December 1, 1977. Definition of threshold includes eight items such as fracture; significant disfigurement; death; dismemberment; significant limitation of use of body function or system; etc. Medical fees and attorney fees limited by regulations of insurance department.

Comprehensive Automobile Insurance Reparations Act. Ins. Law §5102 (d). No Dollar Threshold: Law restricts tort suit liability in this way: Accident victim covered by no-fault cannot sue for general damages from driver covered by no-fault unless victim's injury results in 1) his being unable to perform substantially all of material acts that constitute his usual daily activities for at least 90 days during 180 days following accident, 2) dismemberment, 3) significant disfigurement, 4) fracture, 5) permanent loss of use of body organ, member, function, or system, 6) permanent consequential limitation of use of body organ or member, 7) significant limitation of use of body function or system, or 8) death.

Law requires motorists to carry first-party economic loss coverage with aggregate limit of \$50,000 per person. Medical benefits are paid without time limit if, within one year of accident, it is ascertainable that further expenses may be incurred. Wage loss coverage is limited to 80 per cent of actual loss up to \$2,000 per month for maximum of three years. Substitute service benefits are limited to \$25 per day for up to one year. In

addition to \$50,000 economic loss package, estates of accident victims who die are paid \$2,000 by insurer.

If injured person is entitled to receive his salary from his employer while unable to work because of his injuries, he will not receive loss-of-income benefits from his auto insurer except in cases where employee's future benefits for illness or injury would be reduced.

Amounts recovered or recoverable under Federal or State laws providing social security disability or worker's compensation benefits or Medicare benefits (other than lifetime reserve days and provided that the Medicare benefits do not result in a reduction of such person's Medicare benefits for subsequent illness or injury) are deductible from first party benefits paid to reimburse persons for their basic economic loss. Ins. Law §5102 (McKinney 2007).

Employee is entitled to first-party No-Fault benefits when injured in auto during employment, workmen's compensation benefits are not bar. *Ryder Truck v. Maiorano*, 44 N.Y.2d 364, 376 N.E.2d 1311 (1978). Interplay of two coverages, N.Y. Workers' Comp. Law §29 (1)(a) (McKinney 2007).

Doctors, hospitals, and other providers of health services cannot charge more for treatment of traffic accident victims than amount permitted in schedule of charges established by chairman of worker's compensation board for industrial accidents.

Property damage is left under tort system, but member carriers use arbitration for subrogation up to agreed amount.

When non-resident motorists drive in this state, their policies must provide these "first party benefits."

Notice given to insurer within 90 days of accident is given "as soon as reasonably practicable" and if not given within 90 days, trial or arbitration should determine if delay was reasonable under circumstances. *Subia v. Cosmopolitan Mut.*, 80 Misc. 2d 1090, 364 N.Y.S.2d 118 (N.Y. Sup. Ct. 1975).

Objective of this statute was to remove from courts and place before arbitrators threshold issues (relating to a cancellation of coverage). *Allcity Ins. Co. v. Robinson*, 87 Misc. 2d 634, 386 N.Y.S.2d 515 (N.Y. Sup. Ct. 1976). Courts starting some control. If award has no rational basis, it will be modified. *Hartford v. Mendez*, 93 Misc. 2d 957, 404 N.Y.S.2d 519 (N.Y. Sup. Ct. 1978). Motion to stay arbitration must be made timely, but only when 20 day notice and proper service is part of demand for arbitration. *Government Emp. Ins. Co. v. Kozlowski*, 62 A.D.2d 1056, 404 N.Y.S.2d 150 (2d Dep't 1978). Stay on coverage issue. *Nassau Ins. v. Davis*, 60 A.D.2d



882, 401 N.Y.S.2d 284 (2d Dep't 1978). Effective 12/1/77, can appeal for preview by master arbitrator.

Arbitration award may be set aside by Court, if award has no rational basis. *Garcia v. Federal Ins.*, 46 N.Y.2d 1040, 389 N.E.2d 1066 (1979); *Government Emp. Ins. Co. v. Sparrow*, 66 A.D.2d 782, 410 N.Y.S.2d 657 (2d Dep't 1978).

Pedestrian. Driver of disabled car hit in highway while warning oncoming traffic is entitled to no-fault from car that struck him. *Colon v. Aetna*, 64 A.D.2d 498, 410 N.Y.S.2d 634 (2d Dep't 1978), *aff'd*, 48 N.Y.2d 570, 399 N.E.2d 938 (1980).

First insurer to whom claim is presented shall be responsible for payment. Mere notice of accident does not automatically constitute claim. *Melito v. Interboro-Mutual*, 73 A.D.2d 819, 423 N.Y.S.2d 742 (4th Dep't 1979).

Carrier may deduct Worker's Compensation available even though applicant elected not to take Workers' Compensation. *Carlo Service Corp. v. Rachmani*, 64 A.D.2d 579, 407 N.Y.S.2d 700 (1st Dep't 1978).

Serious Injury. Threshold issue of whether plaintiff sustained serious injury is usually a fact question for jury. *Sanders v. Rickard*, 51 A.D.2d 260, 380 N.Y.S.2d 811 (3d Dep't 1976); *Hernandez v. Levine*, 90 A.D.2d 481, 454 N.Y.S.2d 473 (2d Dep't 1982); *Licari v. Elliott*, 57 N.Y.2d 230, 441 N.E.2d 1088 (1982). However, defendant's motion for summary judgment is proper to determine whether plaintiff can prove serious injury under no-fault law. *Zoldas v. Louise Cab*, 108 A.D.2d 378, 489 N.Y.S.2d 468 (1st Dep't 1985); *Locatelli v. Blanchard*, 108 A.D.2d 1032, 485 N.Y.S.2d 603 (3d Dep't 1985); *Cangemi v. Cole*, 107 A.D.2d 1027, 486 N.Y.S.2d 511 (4th Dep't 1985). Vague, self-serving, and conclusive assertions by plaintiff are insufficient to establish "serious injury." *Zelenak v. Clark*, 170 A.D.2d 677, 567 N.Y.S.2d 92 (2d Dep't 1991); *Lopez v. Senatore*, 65 N.Y.2d 1017, 484 N.E.2d 130 (1985); *Gaddy v. Eyles*, 79 N.Y.2d 955, 591 N.E.2d 1176 (1992). Chiropractor and orthopedist not sufficient. *Delfino v. Davey*, 159 A.D.2d 604, 552 N.Y.S.2d 658 (2d Dep't 1990).

PRIVILEGE COMMUNICATIONS

Insured, upon trial, by calling doctor to establish present condition, waived privilege; insurer permitted to call other doctors to show condition prior to application. *Steinberg v. New York Life*, 263 N.Y. 45, 188 N.E. 152 (1933). Claimed monoxide poisoning, physician statement heart trouble. *Poses v. Travelers*, 245 A.D. 304, 281 N.Y.S. 126 (1st Dep't 1935). Order directing examination of physician before trial reversed. *Woernley v. Electromatic*, 271 N.Y. 228, 2 N.E.2d 638 (1936).

Privilege once waived is "waived for all time." *Strader v. Collins*, 280 A.D. 582, 116 N.Y.S.2d 318 (1st Dep't 1952).

PRODUCTS LIABILITY

Defect causation can be proved by circumstantial evidence and plaintiff need not prove specific causal mechanism. *Schneider v. Kings Hwy. Hosp. Ctr., Inc.*, 67 N.Y.2d 743, 490 N.E.2d 1221 (1986); *Hunter v. Ford Motor Co.*, 37 A.D.2d 335, 325 N.Y.S.2d 469 (3d Dep't 1971); *Markel v. Spencer*, 5 A.D.2d 400, 171 N.Y.S.2d 770 (4th Dep't 1958), *aff'd*, 5 N.Y.2d 958, 157 N.E.2d 713 (1959).

Design negligence as to construction of spring mechanism in seat, evidence clearly sufficient for jury questions on negligence, foreseeability and proximate cause. *MacDowall v. Koehring Basic Constr. Equip.*, 49 N.Y.2d 824, 404 N.E.2d 738 (1980).

Doctrine of strict products liability against manufacturer of defective product set forth provided being used for purpose and in manner normally intended, and defect was substantial factor in bringing about injury, and comparative negligence is now to be considered. *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622 (1973). Manufacturer in his plan or design should avoid any unreasonable risk that user will not be exposed to danger when product is used as intended. Obviousness of danger or defect is issue as to reasonable care in use and is not absolute defense. *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571 (1976). Jury charge shall include that to find for plaintiff they must find that by exercise of reasonable care plaintiff would not have discovered defective condition and perceived its danger. *Velez v. Craine & Clark Lumber Corp.*, 33 N.Y.2d 117, 305 N.E.2d 750 (1973). No cause of action where product, although not itself unduly dangerous, does not function properly, resulting in economic loss other than physical damage to persons or property. *Denny v. Ford Motor*, 87 N.Y.2d 248, 662 N.E.2d 730 (1995); *Schiavone Constr. Co. v. Elgood Mayo Corp.*, 56 N.Y.2d 667, 436 N.E.2d 1322 (1982).

Strict liability rule in products liability litigation was in substitution for, not in addition to, cause of action grounded on implied warranty by remote user. U.C.C. §2-318; *Dickey v. Lockport Prestress*, 52 A.D.2d 1075, 384 N.Y.S.2d 609 (4th Dep't 1976); *see also Victorson v. Bock*, 37 N.Y.2d 395, 335 N.E.2d 275 (1975) *superceded by statute as stated in Calabria v. St. Regis Corp.*, 124 A.D.2d 514, 508 N.Y.S.2d 186 (1st Dep't 1986); *Goldberg v. Kollsman Inst.*, 12 N.Y.2d 432, 191 N.E.2d 81 (1963). However, see causes of action for strict liability and breach of implied warranty are not identical.



Denny v. Ford Motor, 87 N.Y.2d 248, 662 N.E.2d 730 (1995).

Altered Product. Subsequent modification which substantially alters product and is proximate cause of plaintiffs injuries relieves manufacturer of liability. Purchaser "cut hole" in product and plaintiff injured his hand in hole. *Robinson v. Reed-Prentice*, 49 N.Y.2d 471, 403 N.E.2d 440 (1980). *But see, Lopez v. Precision Papers*, 67 N.Y.2d 871, 492 N.E.2d 1214 (1986). Did post-manufacture modification render a safe machine defective. *See Id.*, *see also Wade v. Landegger*, 193 A.D.2d 1056, 598 N.Y.S.2d 874 (4th Dep't 1993). Employer cut bolts which held safety guard fixed over meat grinder. *Garcia v. Biro*, 101 A.D.2d 779, 475 N.Y.S.2d 863 (1st Dep't 1984), *rev. other grounds*, 63 N.Y.2d 751, 469 N.E.2d 834 (1984). Forcibly bending safety pin out of shape. *Kinter v. Emhart*, 99 A.D.2d 689, 471 N.Y.S.2d 724 (4th Dep't 1984), *appeal denied*, 63 N.Y.2d 602, 469 N.E.2d 102 (1984); *Powles v. Wean*, 126 A.D.2d 624, 511 N.Y.S.2d 61 (2d Dep't 1987), *appeal dismissed*, 69 N.Y.2d 1016, 511 N.E.2d 80 (1987); *McLaughlin v. Mine Safety Appliances*, 11 N.Y.2d 62, 181 N.E.2d 430 (1962). Removal of guard with 17 bolts, no liability. *Zuniga v. Schmidt*, 208 A.D.2d 719, 617 N.Y.S.2d 502 (2d Dep't 1994). It is for jury to decide whether manufacturer breached its duty by placing "not reasonably safe" fork lift vehicle with easily removable over head safety bars (guard) on market. *Lopez v. Precision Paper*, 107 A.D.2d 667, 484 N.Y.S.2d 585 (2d Dep't 1985), *aff'd*, 67 N.Y.2d 871, 492 N.E.2d 1214 (1986). Alteration as disputed fact does not exculpate manufacturer. *Jiminez v. Dreis & Krump Mfg.*, 736 F.2d 51 (2d Cir. 1984). Manufacturer can have replacement part liability where user replaced with a part of same design, (not altered) and it was manufacturer's original defective design that caused the injury. *Sage v. Fairchild*, 70 N.Y.2d 579, 517 N.E.2d 1304 (1987). Post-accident modification not admissible in negligence case, but is admissible in alleged defective design case, unless manufacturer admits feasibility of plaintiffs alternate design. *Cover v. Cohen*, 61 N.Y.2d 261, 461 N.E.2d 864 (1984); *Bolm v. Triumph*, 71 A.D.2d 429, 422 N.Y.S.2d 969 (4th Dep't 1979).

Manufacturer may not limit warranty of merchandise on basis that retailer (dealer) has gone out of business. N.Y. Gen. Bus. Law §369-b (McKinney 2007).

Post accident design change allowed in evidence where it is "supportive of manufacturing and assembly defect" on which this case went to jury. Not applicable in negligence or strict liability cases. *Caprara v. Chrysler Corp.*, 52 N.Y.2d 114, 417 N.E.2d 545 (1981); *Rainbow v. Albert Elia Building Co.*, 79 A.D.2d 287, 436 N.Y.S.2d 480 (4th Dep't 1981), *aff'd*, 56 N.Y.2d 550,

434 N.E.2d 1345 (1982). Also changes in design admissible to demonstrate feasibility of alternatives. *Cover v. Cohen*, 61 N.Y.2d 261, 461 N.E.2d 864 (1984). Also availability of modification as of date of manufacture. *Majchrzak v. Heil Co.*, 99 A.D.2d 649, 471 N.Y.S.2d 722 (4th Dep't 1984).

Test is whether risks reasonably to be foreseen would arise from misuse reasonably to be foreseen by manufacturer. Drano and infant plaintiff. *Tucci v. Bossert*, 53 A.D.2d 291, 385 N.Y.S.2d 328 (2d Dep't 1976).

Proof by circumstantial evidence is sufficient and need not prove specific mechanical defect. *Hunter v. Ford Motor Co.*, 37 A.D.2d 335, 325 N.Y.S.2d 469 (3d Dep't 1971); *Markel v. Spencer*, 5 A.D.2d 400, 171 N.Y.S.2d 770 (4th Dep't 1958), *aff'd*, 5 N.Y.2d 958, 157 N.E.2d 713 (1959).

Manufacturer is liable for unreasonably dangerous latent design defects which enhance or aggravate injuries suffered in motorcycle accident. *Bolm v. Triumph*, 33 N.Y.2d 151, 305 N.E.2d 769 (1973). More than one proximate cause (second collision trend), *See Vinogradov v. Clicquot Club*, 55 A.D.2d 489, 391 N.Y.S.2d 18 (3d Dep't 1977). In a strict product liability case based on design defect, *See Cover v. Cohen*, 61 N.Y.2d 261, 461 N.E.2d 864 (1984). Industry-wide "standards" are not binding on jury. *Alfieri v. Cabot*, 17 A.D.2d 455, 235 N.Y.S.2d 753 (1st Dep't 1962), *aff'd*, 13 N.Y.2d 1027, 195 N.E.2d 310 (1963); *Monaco v. Hall-Ehlert GMC*, 3 A.D.2d 90, 158 N.Y.S.2d 444 (3d Dep't 1956). Expert testimony is not required to present issue of defective machine to jury. *McDermott v. New York*, 50 N.Y.2d 211, 406 N.E.2d 460 (1980). If plaintiff shows no direct proof defect, plaintiff is required to exclude all causes not attributable to defendant, manufacturer. *Halloran v. Virginia Chem.*, 41 N.Y.2d 386, 361 N.E.2d 991 (1977); *Shelden v. Hample Equipment*, 89 A.D.2d 766, 453 N.Y.S.2d 934 (3d Dep't 1982), *aff'd*, 59 N.Y.2d 618, 449 N.E.2d 1272 (1983).

Strict products liability not applicable to furnishing of services such as hospital supplying blood and hospital cannot be held on breach of warranty as it is not sale. *Simone v. Long Island Jewish Hillside Medical Center*, 81 Misc. 2d 163, 364 N.Y.S.2d 714 (N.Y. Sup. Ct. 1975); *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 123 N.E.2d 792 (1954); *Iannucci v. Yonkers Gen. Hosp.*, 59 A.D.2d 887, 399 N.Y.S.2d 39 (2d Dep't 1977); *Mondello v. New York Blood Ctr.*, 80 N.Y.2d 219, 604 N.E.2d 81 (1992) (Citing N.Y. Public Health Law §580 [4] (McKinney 1993)).

Compliance with Federal Product standard is some evidence of due care. *Feiner v. Calvin Klein*, 157 A.D.2d 501, 549 N.Y.S.2d 692 (1st Dep't 1990).



Corporation that sold used machine as surplus property was not liable to remote purchasers either in strict product liability or in negligence, for injuries allegedly resulting from defect in machine. *Sukljian v. Charles Ross & Son Co.*, 69 N.Y.2d 89, 503 N.E.2d 1358 (1986). Casual seller who sold printer in liquidation sale had duty to warn buyer of known defects only, which not obvious and readily noticeable. *Marte v. W.O. Hickok Mfg.*, 159 A.D.2d 316, 552 N.Y.S.2d 300 (1st Dep't 1990). *But see, Goldman v. Packaging Industries*, 144 A.D.2d 533, 534 N.Y.S.2d 388 (2d Dep't 1988) (where used vendor could be held liable for negligently failing to warn of known defects).

Second hand vehicles must be inspected and condition warranted by seller. N.Y. Veh. & Traf. Law §417 (McKinney 2007); *Pierce v. International Harvester*, 61 A.D.2d 255, 402 N.Y.S.2d 674 (4th Dep't 1978).

Duty to Warn. Plaintiff claim upheld, in failure to warn of flammable cosmetic puffs, used on an infant costume which caught fire from electric stove. Also, not an unforeseeable misuse of the product. *Trivino v. Jamesway*, 148 A.D.2d 851, 539 N.Y.S.2d 123 (3d Dep't 1989). "Warning- Operate backhoe from operator's seat only" not adequate warning. *Bickram v. Case I.H.*, 712 F. Supp. 18 (E.D.N.Y. 1989). Used vendor could be liable for negligent failure to warn of known defects. *Goldman v. Packaging Industries*, 144 A.D.2d 533, 534 N.Y.S.2d 388 (2d Dep't 1988).

Toy manufacturer has liability for unintended but reasonably foreseeable use, for example, part of doll detachable and thrown, as on TV in *Lugo v. L.J.N. Toys*, 75 N.Y.2d 850, 552 N.E.2d 162 (1990); *see also Singer v. Jefferies*, 160 A.D.2d 216, 553 N.Y.S.2d 346 (1st Dep't 1990).

Punitive damages allowed in strict products liability case where theory of liability was failure to warn and where there was evidence it was wanton, or in conscious disregard of others. *Home Ins. v. Am. Home Products*, 75 N.Y.2d 196, 550 N.E.2d 930 (1990). In New York no insurance coverage allowed for punitive. See "DAMAGES."

RELEASE

See Law Digest Tables.

Effective 7/1/92, if defendant does not deliver payment to plaintiff attorney within 21 days from date closing papers were mailed to defendant attorney, plaintiff can enter judgment, without further notice for the amount in the release and additional costs and disbursements. CPLR §5003.

Accord and Satisfaction. Liquidated claim. In absence of honest dispute, payment of lesser amount, not accord and satisfaction. *Rosenbaum v. National Acc. Soc'y*, 167 N.Y.S. 325 (N.Y. App. Term 1917); *Armbruster v. Draker*, 194 Misc. 1002, 88 N.Y.S.2d 557 (N.Y. Mun. Ct. 1949). Acceptance of limited disability benefits through acquiescence in company's erroneous construction of policy not accord and satisfaction. *Ginsburg v. Equitable Life Assur. Soc'y of U.S.*, 254 A.D. 445, 5 N.Y.S.2d 16 (1st Dep't 1938), *appeal denied*, 279 N.Y. 810, 18 N.E.2d 46 (1938).

General release, unlimited in scope, discharges all plaintiff's causes of action, known or unknown at time for that defendant. *Knapp Engraving Co. v. John Post Constr.*, 107 N.Y.S.2d 328 (N.Y. Sup. Ct. 1951), *aff'd*, 280 A.D. 763, 113 N.Y.S.2d 647 (1st Dep't 1952). Plaintiff general release bars co-defendant joint tortfeasor cross-complaint for contribution, but not for indemnification. Gen. Oblig. Law §15-108 (McKinney 2007).

Joint Tortfeasors. Release or covenant not to sue one tortfeasor does not discharge other tortfeasors unless its terms expressly so provide, but reduces claim against them to extent of greatest of (a) amount stated in release, (b) amount of consideration paid, or (c) amount of released party's share under Dole rule as codified in Article 14 of CPLR (Gen. Oblig. Law §15-108).

Major purposes of General Obligations Law §15-108 are 1) motivate settlements and 2) ensuring that nonsettling tortfeasor not be burdened with more than his equitable share of liability. Good detailed explanation, status of settling defendant and if co-defendant cross complaints assert only contribution settling tortfeasor (defendant) appears to have no place as party in suit. *Mielcarek v. Knights*, 50 A.D.2d 122, 375 N.Y.S.2d 922 (4th Dep't 1975).

Release given by injured party to one tortfeasor releases such tortfeasor from liability to any other person for contribution under Article 14 of CPLR. (Gen. Oblig. Law §15-108(b)). Joint tortfeasor who obtains release is not entitled to contribution from any other person. Gen. Oblig. Law §15-108(c).

Accident Insurance. Company claimed policy void for breach of warranty. Sent check for premiums paid which insured kept but did not use. Policy not void, and retention of premiums did not constitute accord and satisfaction. *Dineen v. General Acc. Ins. Co.*, 126 A.D. 167, 110 N.Y.S. 344 (4th Dep't 1908).

As Affecting Insurer's Right of Subrogation. Where insurer paid insured and became subrogated to insured's claim against railroad, insurer not precluded from recovering against latter, by insured executing release to railroad which paid insured less than total claim, obtaining

release with knowledge that insurer had paid insured. *Hamilton v. Greger*, 246 N.Y. 162, 158 N.E. 60 (1927).

Covenant Not to Sue. Reservation in release of rights against third parties constitutes covenant not to sue. *Bossong v. Muhleman*, 254 A.D. 738, 3 N.Y.S.2d 992 (2d Dep't 1938).

Fraud and Misrepresentation. Where injured party has executed release under impression that injuries are minor when in fact, they are serious, release not void, but voidable only. *Gilbert v. Rothschild*, 280 N.Y. 66, 19 N.E.2d 785 (1939). Procured by false representation, not binding. *Moses v. Carver*, 164 Misc. 204, 298 N.Y.S. 378 (N.Y. Sup. Ct. 1937), *aff'd*, 254 A.D. 402, 5 N.Y.S.2d 783 (3d Dep't 1938), *leave to appeal denied*, 279 N.Y. 812, 17 N.E.2d 684 (1938); *Stephens v. Nolan*, 257 A.D. 856, 12 N.Y.S.2d 512 (2d Dep't 1939); *Inman v. Merchants Mutual*, 190 Misc. 720, 74 N.Y.S.2d 87 (N.Y. Sup. Ct. 1947), *aff'd*, 274 A.D. 320, 82 N.Y.S.2d 801 (3d Dep't 1948).

Misrepresentation of Adjuster. *Inman v. Merchants Mutual*, 190 Misc. 720, 74 N.Y.S.2d 87 (N.Y. Sup. Ct. 1947), *aff'd*, 274 A.D. 320, 83 N.Y.S.2d 801 (3d Dep't 1948).

In General. Medical examiner and claim agent knew insured permanently injured and settled on basis of temporary injury. Release may be set aside. *Jones v. Commercial Travelers Mut. Acc. Ass'n of Am.*, 114 N.Y.S. 589 (N.Y. Sup. Ct. 1908), *aff'd*, 201 N.Y. 576, 95 N.E. 1130 (1911). Release executed by insured's widow was ineffective as to minor children named as beneficiaries in policy. *Killian v. Metropolitan*, 251 N.Y. 44, 166 N.E. 798 (1929). Validity of release *Farrington v. Harlem*, 280 N.Y. 1, 19 N.E.2d 657 (1939).

Verdict or claim of plaintiff against nonsettling tortfeasors is reduced by amount of settlement or in amount of released tortfeasors equitable share of damages. (CPLR §4533-b). Rule followed even when jury found no fault on part of defendant who settled during trial. *Purcell v. Doherty*, 55 N.Y.2d 985, 434 N.E.2d 255 (1982).

Separate judgments recovered against owner and operator of automobile. Satisfaction of one judgment satisfies other. *Sarine v. Maher*, 187 Misc. 199, 63 N.Y.S.2d 241 (N.Y. Sup. Ct. 1946).

For a defendant joint tortfeasor to obtain benefits of a partial settlement prior to verdict, must amend answer and plead Gen. Oblig. Law §15-108; CPLR §3018 (b) as affirmative defense, even during trial. *Manginaro v. Nassau Medical*, 123 A.D.2d 842, 507 N.Y.S.2d 455 (2d Dep't 1986).

Liability Insurance. Release of liability insurer executed by bankrupt insured does not affect injured party's right of action against insurer. Insured failed to give proper notice. Company agreed to defend if insured released it from liability. (Non-waiver agreement.) *Rushing v. Commercial Cas. Ins. Co.*, 251 N.Y. 302, 167 N.E. 450 (1929).

Procured in Hospital. Unlawful to enter hospital to settle, obtain release or statement respecting personal injuries within 15 days after injury sustained unless 5 days prior thereto injured party has consented in writing. Does not apply to injured person's attorney. N.Y. Jud. Law §480 (McKinney 2007). Violation of Judiciary Law §480, release not void. *Thorne v. Columbia*, 167 Misc. 72, 3 N.Y.S.2d 537 (N.Y. City. Ct. 1938), *rev'd on other grounds*, 168 Misc. 255, 5 N.Y.S.2d 775 (N.Y. App. Term 1938); *Moses v. Carver*, 164 Misc. 204, 298 N.Y.S. 378 (N.Y. Sup. Ct. 1937), *aff'd*, 254 A.D. 402, 5 N.Y.S.2d 783 (3d Dep't 1938), *leave to appeal denied*, 279 N.Y. 812, 17 N.E.2d 684 (1938).

Unknown injuries. *See Le Francois v. Hobart*, 31 N.Y.S.2d 200 (N.Y. Sup. Ct. 1941), *aff'd*, 287 N.Y. 638, 39 N.E.2d 271 (1941); *Tropp v. Safeguard*, 263 A.D. 306, 32 N.Y.S.2d 581 (1st Dep't 1942).

REPRESENTATIONS AND WARRANTIES

Proof of material misrepresentation makes prima facie case for rescission. *Travelers v. Pomerantz*, 246 N.Y. 63, 158 N.E. 21 (1927). Though innocent, if material, entitled insurer to rescind disability and double indemnity provisions. *Equitable v. Kaplan*, 168 Misc. 24, 5 N.Y.S.2d 154 (N.Y. Sup. Ct. 1938), *aff'd*, 258 A.D. 1038, 17 N.Y.S.2d 1005 (1st Dep't 1940); *Equitable v. Schusterman*, 255 A.D. 54, 5 N.Y.S.2d 368 (1st Dep't 1938). False representation not warranty unless fraudulently made. If fraudulently made warranty and policy is void. *Charlton v. Metropolitan*, 202 A.D. 814, 195 N.Y.S. 64 (2d Dep't 1922). Re Fire Insurance, *see American v. Patriotic*, 242 N.Y. 54, 150 N.E. 599 (1926). Misrepresentation by insured of part of loss, though withdrawn later, voids entire policy. *Happy v. American*, 286 A.D. 505, 145 N.Y.S.2d 206 (1st Dep't 1955), *aff'd in part, modified in part*, 1 N.Y.2d 534, 136 N.E.2d 842 (1956).

N.Y. Veh. & Traf. Law §313 provides sole and exclusive method by which automobile insurance coverage for which certificate of insurance has been issued under §312 can be terminated. Insurer, therefore, is foreclosed from rescinding policy *ab initio* for fraud.

Even though at time of issuance of burglary policy company knew of facts rendering it void, it may, where insured is cautioned to read policy, in absence of fraud

on its part, avoid policy. *Satz v. Massachusetts*, 243 N.Y. 385, 153 N.E. 844 (1926).

Concealment, to constitute breach of warranty, need not relate to fact of such nature as to increase risk or hazard but is material if insurer, with knowledge thereof, would have rejected risk. *Sebring v. Fidelity*, 255 N.Y. 382, 174 N.E. 761 (1931).

Concealment of conviction, in absence of inquiry by insurer, held not to have avoided salesman's floater policy. Good discussion of "concealment." *Stecker v. American*, 299 N.Y. 1, 84 N.E.2d 797 (1949).

Description of property in fire binder is warranty. *American v. Patriotic*, 242 N.Y. 54, 150 N.E. 599 (1926). Sole and unconditional ownership clause breached though attorney requested agent to include wife co-owner as named insured; no evidence of assent by company. *Palma v. National*, 240 A.D. 454, 270 N.Y.S. 503 (4th Dep't 1934).

Insured having sustained burglary loss but not having received indemnity therefor, held to have breached warranty by answering in negative clause reading "The assured has not sustained nor received any indemnity for any loss or damage by Burglary, Theft, or Robbery..." *Sirvint v. Fidelity & Deposit Co.*, 242 A.D. 187, 272 N.Y.S. 555 (1st Dep't 1934), *aff'd*, 266 N.Y. 482, 195 N.E. 164 (1934).

SERVICE OF PROCESS

See also "AUTOMOBILES."

Attorney is responsible for improper service by independent process server. *Kleeman v. Rheingold*, 81 N.Y.2d 270, 614 N.E.2d 712 (1993).

Service of suit without filing an index number, is a nullity. CPLR §306(a).

"The commencement (of suit) by filing act," effective 7/1/92 to start new civil suits in Supreme and County Courts. An action is started by filing a summons and complaint or summons with notice. Then proof of service must be filed within 120 days after filing. CPLR §§306-a and 306-b.

From 1/1/90 to 1/1/92, CPLR §312-a. Process may be served by first class mail, and request defendant sign and return acknowledgement. If acknowledgement not returned, server must use any other method of service and request reasonable costs for service.

Upon Agent. Of insurer, sufficiency of. *National Grange Mut. Ins. Co. v. Diaz*, 111 A.D.2d 700, 490 N.Y.S.2d 516 (1st Dep't 1985). Of non-resident motor carrier, valid. *Esperti v. Cardinale*, 263 A.D. 46, 31 N.Y.S.2d 253 (2d Dep't 1941).

Designation of Superintendent of Insurance by foreign corporation as agent for process, effective so long as any liability is outstanding. See Ins. Law §1212 (McKinney 2007). However, *Arkwright Mut. v. Scottsdale Ins.*, 874 F. Supp 601 (S.D.N.Y. 1995), it is not consent to jurisdiction in New York District Court unless insurer is doing business in New York State.

Upon Non-Resident Motorists. See "AUTOMOBILES."

Substituted service. Before use of "nail and mail," CPLR §308(4), "due diligence" must be attempted in trying for personal service. *Markoff v. S. Nassau Comm. Hosp.*, 91 A.D.2d 1064, 458 N.Y.S.2d 672 (2d Dep't 1983), *aff'd*, 61 N.Y.2d 283, 461 N.E.2d 1253 (1984), *superseded by Maldonado v. Maryland Rail*, 91 N.Y.2d 467, 695 N.E.2d 700 (1998). See *O'Connor v. O'Connor*, 52 Misc. 2d 950, 277 N.Y.S.2d 424 (N.Y. Sup. Ct. 1967).

SETTLEMENT

Where settlement is \$5,000 or more and claimant is an individual (not corporation or company), the carrier shall mail notice of sending check to claimant attorney or representative, also direct to claimant. 11 N.Y.C.R.R. 216.9.

Insurance carrier or defendant shall within 21 days from receipt of closing papers, on judgment, pay the amount, or plaintiff or claimant's attorney or representative can enter judgment, plus interest, costs and disbursements without giving notice. CPLR §5003.

Usual plaintiff attorney or claimant's representative prepared general release.

SUBROGATION

Member insurance companies have agreement for property damage arbitration up to maximum amount in arbitration agreement.

To extent of payment made by it, insurance company by right of subrogation (which right insured may not destroy) succeeds to all rights of insured against third party causing loss or damage. No formal assignment necessary. Right of subrogation accrues at time payment is made. If person causing damage pays insured, without knowledge of insurer's rights, he is relieved of liability to insurance company. If insured receive payment from wrongdoer for damage already paid for by insurance company, he will be deemed to hold proceeds for benefit of insurance company. If third party pay insured, with knowledge of rights of insurer, and procure release, such release not bar to insurer's right of action against him. *Hamilton v. Greger*, 246 N.Y. 162, 158 N.E. 60 (1927); *Ocean Accident v. Hooker*, 240

N.Y. 37, 147 N.E. 351 (1925); *Wanamaker v. Otis*, 228 N.Y. 192, 126 N.E. 718 (1920); *Pacific v. L.A.D. Motors*, 136 Misc. 594, 240 N.Y.S. 372 (N.Y. City Ct. 1930); *Commercial v. Capital*, 224 A.D. 553, 231 N.Y.S. 494 (1st Dep't 1928); *Fort v. Globe*, 186 A.D. 185, 173 N.Y.S. 595 (3d Dep't 1919), *appeal dismissed*, 227 N.Y. 581, 125 N.E. 918 (1919); *Potomac v. MacNaughton*, 191 Misc. 362, 77 N.Y.S.2d 110 (N.Y. Sup. Ct. 1948); *Camden v. Bleem*, 132 Misc. 22, 227 N.Y.S. 746 (N.Y. City Ct. 1928). Insurer which has paid judgment against insured and others, subrogated to rights of insured against joint tortfeasors. (Practice discussed). *Hadcock v. Wiggins*, 147 Misc. 252, 263 N.Y.S. 583 (N.Y. Sup. Ct. 1933).

Collision Insurance. As to validity of loan agreements in settlement of losses, see "LOAN AGREEMENT." Insurer having paid, entitled to recover from insured where rights destroyed. *Home v. Bernstein*, 172 Misc. 763, 16 N.Y.S.2d 45 (N.Y. Mun. Ct. 1939).

Counterclaim. Insurer paid loss, subrogated and commenced action against third party, who counterclaimed against insurer, alleging insured responsible for accident. Counterclaim dismissed. *Occidental v. Herman*, 179 Misc. 499, 38 N.Y.S.2d 278 (N.Y. Sup. Ct. 1942) *superseded by statute as stated in Allstate v. Trans Hudson Express*, 4 Misc. 3d 1029A, 798 N.Y.S.2d 342 (N.Y. Sup. Ct. 2004).

Fire Insurance. Insured purchased truck, made monthly payments; third party endorsed notes. Fire insurance company cancelled truck policy; neglected to give mortgagee (vendor) notice of cancellation; truck damaged. Insurer paid and took assignment from mortgagee; sued endorser of notes. Court of Appeals, divided 4 to 3, rejected claim. *Fields v. Western*, 290 N.Y. 209, 48 N.E.2d 489 (1943).

Parties to Action. Insurer may join as party plaintiff, to extent of interest, in action against wrongdoer to have division of damages determined. *United v. Metropolitan*, 169 Misc. 1049, 9 N.Y.S.2d 497 (N.Y. App. Term 1938).

Insurer not entitled to subrogation until insured made whole. *American v. Gerold et al.*, 255 A.D. 285, 7 N.Y.S.2d 447 (1st Dep't 1938), *reargument denied*, 255 A.D. 950, 8 N.Y.S.2d 662 (1st Dep't 1938).

Insurer can maintain suit in name of insured, where insured executed loan receipt in favor of his insurer. *Point Tennis v. Irvin Industries*, 63 A.D.2d 967, 405 N.Y.S.2d 506 (2d Dep't 1978); CPLR §1004.

Insured sued fire insurer which had denied liability claiming that damage caused by third party not within coverage. Insurer not having paid or received assignment

of loss, permitted to implead third party. *Madison v. Royal*, 281 A.D. 641, 120 N.Y.S.2d 626 (1st Dep't 1953), *appeal denied*, 281 A.D. 1030, 122 N.Y.S.2d 631 (1st Dep't 1953).

SUICIDE

Burden of establishing defense of suicide is upon insurer. *Ostrander v. Travelers*, 265 N.Y. 467, 193 N.E. 274 (1934); *see also Bass v. Equitable Life Assur. Soc'y of U.S.*, 19 N.Y.S.2d 736 (N.Y. City Ct. 1940). Presumption against rebuttable. *Jahn v. Commercial Travelers Mut. Acc. Ass'n of Am.*, 259 A.D. 722, 18 N.Y.S.2d 72 (2d Dep't 1940). On second trial, judgment for plaintiff affirmed under *Jahn v. Commercial Travelers Mut. Acc. Ass'n of Am.*, 260 A.D. 1044, 25 N.Y.S.2d 416 (2d Dep't 1940). Of mentally deranged patient, not accident within coverage of liability policy. *Liberty v. New Amsterdam*, 265 A.D. 883, 38 N.Y.S.2d 275 (2d Dep't 1942), *leave to appeal denied*, 265 A.D. 954, 39 N.Y.S.2d 606 (2d Dep't 1942).

THEFT

Of automobile defined. *Merl v. Standard*, 173 Misc. 230, 17 N.Y.S.2d 709 (N.Y. Sup. Ct. 1940). Collision damages sustained while stolen automobile being driven by officer to police station, not within exclusion of direct loss by theft. *Bolling v. Northern Ins. Co. of N.Y.*, 280 N.Y. 510, 19 N.E.2d 920 (1939).

Larceny. What constitutes. Notwithstanding Penal Law §165.05 declaring use of automobile without owner's consent to be larceny, unauthorized use by garage-man does not entitle insured to recover under theft policy for damages caused to automobile while thus unlawfully operated. *Van Vechten v. American*, 239 N.Y. 303, 146 N.E. 432 (1925). Theft from salesman's unattended auto not covered. *Kinscherf v. St. Paul*, 234 A.D. 385, 254 N.Y.S. 382 (2d Dep't 1931).

"In custody of messenger" and "In transit" discussed. *Starlight v. Glens Falls*, 297 N.Y. 426, 79 N.E.2d 812 (1948).

Mysterious Disappearance. Discussed. *Levine v. Accident & Casualty*, 203 Misc. 135, 112 N.Y.S.2d 397 (N.Y. Mun. Ct. 1952).

TRIALS

Trial Motions see Article 44, CPLR.

Post trial motions. CPLR §4404. Adequacy or excessive jury verdicts. Expert can testify to "customary" practice but may not invade jury province by giving conclusion that basketball drill was dangerous and improper for plaintiff's age. *Strauch v. Hirschman*, 40



A.D.2d 711, 336 N.Y.S.2d 678 (2d Dep't 1972). In Federal Court it is in judge's discretion. Expert not to testify meaning and applicability of statute or regulations. *Rodriguez v. New York City Hous. Auth.*, 209 A.D.2d 260, 618 N.Y.S.2d 352 (1st Dep't 1994).

Bifurcate. Cases in the Second Department Counties (Brooklyn, Queens, Nassau, Putnam, Suffolk, Dutchess, and Orange), in discretion of judge. First trial on liability issues, then if liability same jury hears injuries - damages.

Appellate Division reduced trial verdict of \$350,000 to \$71,600, or plaintiff can have new trial. *Barcliff v. Brooklyn Hospital*, 212 A.D.2d 562, 622 N.Y.S.2d 746 (2d Dep't 1995).

Jury verdict not fair interpretation of the evidence, new trial ordered. *Johnson v. Hallam*, 208 A.D.2d 1110, 617 N.Y.S.2d 405 (3d Dep't 1994).

WAIVER AND ESTOPPEL

See also "LIABILITY INSURANCE"- Coverage.

Waiver is voluntary abandonment or relinquishment of some right or advantage. No consideration required nor is prejudice or injury to other party essential. *Fisher v. U.S. Casualty*, 138 Misc. 307, 245 N.Y.S. 406 (N.Y. Sup. Ct. 1930). Estoppel is admission or determination under such circumstances as to preclude subsequent contradiction or withdrawal between same parties. *Matter of Mesa's Estate*, 172 A.D. 467, 159 N.Y.S. 59 (1st Dep't 1916), *aff'd*, *Matter of Hernandez*, 219 N.Y. 566, 114 N.E. 1069 (1916).

Accident Insurance. Insurer by accepting renewal premiums, after interposing defense of fraud in pending action, waived such defense. *Oglesby v. Massachusetts*, 230 A.D. 361, 244 N.Y.S. 576 (2d Dep't 1930). Extension of credit on prior premium payments held waiver of requirement of accident policy that renewal premiums be paid in advance. *Kadelburg v. Hartford*, 223 A.D. 169, 227 N.Y.S. 619 (1st Dep't 1928), *aff'd*, 248 N.Y. 654, 162 N.E. 563 (1928). Failure to furnish forms. *Simson v. Commercial Travelers Mut. Acc. Ass'n of Am.*, 263 A.D. 297, 32 N.Y.S.2d 615 (1st Dep't 1942), *aff'd*, 289 N.Y. 700, 45 N.E.2d 457 (1942).

Disability. Payments erroneously made and premiums erroneously waived, not recoverable. *Standard v. Equitable Life Assur. Soc'y of U.S.*, 274 N.Y. 519, 10 N.E.2d 529 (1937). Waiver of Premiums after Disability. *Luftig v. Travelers*, 253 A.D. 538, 2 N.Y.S.2d 904 (1st Dep't 1938), *aff'd*, 279 N.Y. 725, 18 N.E.2d 680 (1939). Payments of benefits for 6 years with knowledge of insured's physical condition constitutes estoppel. *Lieber-*

man v. Equitable Life Assur. Soc'y of U.S., 168 Misc. 259, 5 N.Y.S.2d 777 (N.Y. App. Term 1938).

Fire Insurance. Retaining proofs of loss without objection estopped company from asserting they were insufficient. *Titus v. Glens Falls*, 81 N.Y. 410 (1880). But does not constitute waiver of breach of condition invalidating policy, unknown to insurer. *Englander v. Springfield*, 232 A.D. 463, 251 N.Y.S. 298 (3d Dep't 1931). By agent, *Bennett v. Commercial Union Assur. Co.*, 251 A.D. 776, 295 N.Y.S. 658 (3d Dep't 1937).

Liability Insurance. Insurer undertaking and/or continuing defense of action, with full knowledge of violation of policy condition will be held to have waived breach. (Driver of wagon under age.) *Gerka v. Fidelity & Cas. Co.*, 251 N.Y. 51, 167 N.E. 169 (1929). Insurer abandoned defense immediately upon learning of violation. (Chauffeur under age.) Held not to have waived breach. *S. & E. Motor Hire v. New York Indem.*, 255 N.Y. 69, 174 N.E. 65 (1930). Insurer by failing to act promptly in asserting defense of failure of co-operation by insolvent insured may waive right to assert that defense in action by injured party against insurer. *Ohrbach v. Preferred*, 227 A.D. 311, 237 N.Y.S. 494 (1st Dep't 1929). Insurer's disclaimer of liability waived requirement for immediate written notice of claim. *Shapiro v. Employers Liab. Assur. Corp.*, 139 Misc. 454, 248 N.Y.S. 587 (N.Y. Sup. Ct. 1931).

Doctrine of waiver is to relieve against forfeitures, but not available to extend coverage to include losses outside terms of policy. *Draper v. Oswego*, 190 N.Y. 12, 82 N.E. 755 (1907). *But see S. & E. Motor Line v. New York Indem.*, 255 N.Y. 69, 174 N.E. 65 (1930), where court indicated clause of policy excluding certain accidents could be waived; and *Shichman v. Commercial Travelers Mut. Acc. Ass'n of Am.*, 267 A.D. 389, 46 N.Y.S.2d 32 (2d Dep't 1944), *appeal denied*, 267 A.D. 906, 47 N.Y.S.2d 486 (2d Dep't 1944), insurer may waive right to insist on particular defense including lack of coverage.

Insurer's waiver of insured's refusal to cooperate in preparing defense, held not waiver of refusal to appear at trial. *Briskman v. Glens Falls*, 251 A.D. 319, 296 N.Y.S. 519 (1st Dep't 1937), *appeal denied*, 13 N.E.2d 478 (1938).

Insurer estopped to assert non-coverage where delay in disclaimer prejudiced insured. *Ashland v. Metropolitan*, 269 A.D. 31, 53 N.Y.S.2d 677 (1st Dep't 1945).

Estoppel does not create insurance coverage where none existed. *Drew Chemical v. Fidelity & Casualty*, 60 A.D.2d 552, 400 N.Y.S.2d 334 (1st Dep't 1977), *aff'd*, 46 N.Y.2d 851, 387 N.E.2d 226 (1979); *Zappone v. Home Ins.*, 55 N.Y.2d 131, 432 N.E.2d 783 (1982);

Schiff Assoc. v. Flack, 51 N.Y.2d 692, 417 N.E.2d 84 (1980).

Proof of Loss. Right to forfeiture waived by receipt and retention of insured's reports, known to be false, under floater policy. *Atlantic v. Hamilton*, 251 N.Y. 98, 167 N.E. 184 (1929). Insurer, knowing of breach of warranty, required insured to furnish proof of loss and incur expense of examination. Held to have waived breach and elected to treat policy as valid. *Posnick v. U.S. Fidelity*, 222 A.D. 36, 225 N.Y.S. 341 (1st Dep't 1927).

WARRANTIES

See "REPRESENTATIONS AND WARRANTIES."

WORKERS' COMPENSATION

Worker's compensation is exclusive remedy directly against employer and co-employees as to plaintiff employee injured in scope of employment. N.Y. Workers' Comp. Law §29(6) (McKinney 2007); *Moakler v. Blanco*, 47 A.D.2d 614, 364 N.Y.S.2d 526 (1st Dep't 1975). Section 11 amended 1996, limits rights of third parties to implead injured plaintiff's employer, unless serious injuries, for indemnification or contribution. This statute is not retroactive. *Small v. Yonkers Contracting*, 242 A.D.2d 378, 662 N.Y.S.2d 67 (2d Dep't 1997); *Morales v. Gross*, 230 A.D.2d 7, 657 N.Y.S.2d 711 (2d Dep't 1997).

Exception is that where employer commits or directs wilful assault on employee, employee can sue employer directly. *Wojcik v. Aluminum Co. of America*, 18 Misc. 2d 740, 183 N.Y.S.2d 351 (N.Y. Sup. Ct. 1959). Intentional torts by employer, see *Estupinan v. Cleanorama Drive-In*, 38 A.D.2d 353, 329 N.Y.S.2d 448 (2d Dep't 1972). See *Werner v. State of New York*, 79 A.D.2d 873, 434 N.Y.S.2d 548 (4th Dep't 1980), *aff'd*, 53 N.Y.2d 346, 424 N.E.2d 541 (1981); and *Ralph v. Oliver*, 186 A.D.2d 977, 588 N.Y.S.2d 444 (4th Dep't 1992).

Illegal activity by employee does not preclude benefits, when activity is "common practice in industry," and others were not fired. *Richardson v. Fiedler Roofing*, 112 A.D.2d 551, 491 N.Y.S.2d 489 (3d Dep't 1985), *aff'd*, 67 N.Y.2d 246, 493 N.E.2d 228 (1986).

Presumption that general employer continues as sole employer even when doing work for another. *Bar-tolomeo v. Bennett Contracting*, 245 N.Y. 66, 156 N.E. 98 (1927) and *Bird v. New York State Thruway*, 8 A.D.2d 495, 188 N.Y.S.2d 788 (4th Dep't 1959). Control is primary test to determine employee status. *Braxton v. Mendelson*, 233 N.Y. 122, 135 N.E. 198 (1922) and *McNamara v. Leipzig*, 227 N.Y. 291, 125 N.E. 244 (1919).

Whether one is an employee or an independent contractor depends on various factors, most important is right of control; and right to hire assistants; supervision; how paid; supply tools and materials. Contract that sets forth "independent" is considered with the operating facts. *Szabados v. Quinn & Coca Cola*, 156 A.D.2d 186, 548 N.Y.S.2d 442 (1st Dep't 1989); *Commissioner v. Lindenhurst*, 101 A.D.2d 730, 475 N.Y.S.2d 42 (1st Dep't 1984). Usually a fact jury issue, *Matter of Charles*, 66 N.Y.2d 516, 488 N.E.2d 1223 (1985); *Sorrenti v. The Go*, 156 A.D.2d 243, 548 N.Y.S.2d 503 (1st Dep't 1989).

Lien. N.Y. Workers' Comp. Law §29(1) creates lien for compensation carrier as to benefits paid against separate third-party recoveries by employee as plaintiff. No lien for Workers Compensation insurer because these benefits were in lieu of No-Fault Auto, first party benefits.

Plaintiff attorney fees on recovery of lien amount. N.Y. Workers' Comp. Law §29(1). Lien for workers' compensation benefits in settlement is to be reduced by present value of future payments and injured employee plaintiffs expenses of litigation and trial judge has discretion to decide equitable sharing of the settlement. *Kelly v. State Ins. Fund*, 60 N.Y.2d 131, 456 N.E.2d 791 (1983).

