

# DIGEST OF INSURANCE LAW

## NOVA SCOTIA

Not revised for this Edition

### CIVIL JUDICIAL SYSTEM

Inferior Courts. Inferior Courts of limited jurisdiction include Provincial and Small Claims Courts.

Provincial Courts. Provincial Courts are primarily Criminal Courts of limited jurisdiction. Small Claims Courts have limited civil jurisdiction over liquidated claims up to \$10,000 and up to \$100 for general damages (unliquidated claims). Appeal lies from Small Claims Court to Supreme Court on errors of law, natural justice, or jurisdiction.

Supreme Court of Nova Scotia. Supreme Court is Court of Common Law and Equity and is a superior court of record. Supreme Court is court of original jurisdiction for civil and criminal matters and has exclusive original jurisdiction over matters of divorce. Supreme Court is composed of a Chief Justice, an associate Chief Justice and at least 23 other judges. Court of Appeal is composed of Chief Justice and at least seven other judges. Court of Appeal is highest appellate court in Nova Scotia.

Civil actions are normally, but by no means exclusively, tried before single Judge without jury. In following cases Trial by Jury is required unless parties consent to Trial without Jury: (a) where action is for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution or false imprisonment; (b) where either party requires trial to be with Jury and serves Jury Notice accordingly, or (c) where Judge directs trial by Jury.

Appeal lies from Judgment to Nova Scotia Court of Appeal.

Appeals may be taken from Nova Scotia Court of Appeal to Supreme Court of Canada by leave of Court of Appeal or by special leave of Supreme Court of Canada.

Federal Court of Canada. Federal Court of Canada constituted under Statute of Parliament of Canada exercises original jurisdiction throughout Canada over claims by or on behalf of and against Crown in right of Dominion, as well as jurisdiction in cases of citizenship and immigration, customs, transportation, communications, parole and penitentiary proceedings, intellectual property, and admiralty. Trial Division has exclusive juris-

dition for judicial review of federal boards, commissions or other tribunals, except those specifically mentioned in the *Federal Court Act* as falling under authority of Court of Appeal. Appeal lies from decision of Trial Division to Federal Court of Appeal. Appeals from Federal Court of Appeal to Supreme Court of Canada may be taken by leave of Federal Court of Appeal or by Supreme Court of Canada.

### LAW

Abbreviations, Uniform Statutes and other Statutes

D.L.R. – Dominion Law Reports

N.S.R. – Nova Scotia Reports

N.S.Reg. – Nova Scotia Regulation

R.S.N.S. – Revised Statutes of Nova Scotia, 1989

R.S.O. – Revised Statutes of Ontario, 1990

S.C. – Statutes of Canada, sessional volume

S.C.R. – Supreme Court Reports

S.N.S. – Statutes of Nova Scotia, sessional volume  
*Insurance Act*, c. 231 of R.S.N.S. 1989, as

amended, is partial codification of law relating to insurance contracts within Province. Act has 12 Parts and is similar to insurance legislation in force in other Provinces of Canada. Act regulates form of insurance contracts and disclosure requirements; also regulates licensing of agents and adjusters. Other Parts of Act deal specifically with motor vehicle, accident and sickness, fire, life, marine insurance, and self-insurance plans.

### ACCIDENT AND SICKNESS INSURANCE

See “DISABILITY”

This is governed by Part V of Act. In Act “Accident Insurance” means insurance by which insurer undertakes, to pay insurance money in event of accident to person or persons insured, but does not include insurance by which insurer undertakes to pay insurance money both in event of death by accident and in event of death from any other cause. “Sickness Insurance” means insurance by which insurer undertakes to pay insurance



money in event of sickness of person or persons insured, but does not include disability insurance.

This Part does not apply to creditor's group insurance, disability insurance, accidental death insurance or uninsured accident coverage or no-fault disability benefits provided under Automobile Insurance Part VI, relating to insurance of passengers.

Any provision in an accidental insurance or sickness insurance policy issued on or after July 1<sup>st</sup>, 1976 is null and void if it provides that benefit is payable to insured on account of his disability and is conditional upon insured remaining confined. See *Insurance Act*, §69(1).

Disability and life insurance are governed by Part VIII of Act.

Only certain provisions of Act apply to group accident insurance or group sickness insurance.

Act fixes minimum disclosure requirements as to, *inter alia*, description of insured conditions under which insurance becomes payable, periods of grace, exceptions and term of policy.

Subject to certain exceptions, statutory conditions prescribed by Act are deemed to be part of every contract and must be printed in every policy with heading "Statutory Conditions."

### ACCIDENTAL MEANS

Insured died of asphyxiation having choked on food. Insured was alcoholic. Autopsy showed alcohol was a contributing factor in death. No proven nexus between blood alcohol level and aspiration. No evidence insured intended to cause himself harm. Asphyxia was "unforeseen, unexpected and without design and as such constituted an unusual result." Necessary to have knowledge of all circumstances before term "accident" can have determinative effect. Term should not be given narrow meaning. *Tracey-Gould v. Maritime Life*, (1992), 116 N.S.R. (2d) 62.

### ADJUSTERS, AGENTS AND BROKERS

Agents are governed by Part III of Act.

In case of life insurance, it is provided that no officer, agent or employee of insurer and no person soliciting insurance, whether or not he is agent of insurer shall, to prejudice of insured, beneficiary or claimant, be deemed to be agent of insured in respect of any question arising out of contract, and in case of accident and sickness insurance that no officer, agent, employee or servant of insurer or any person soliciting accident insurance or sickness insurance or both, whether agent of insurer, or not, shall, to prejudice of insured or of person

insured, be deemed to be for any purpose whatever agent of insured or of person insured in respect of any question arising out of contract.

Adjusters are governed by Part IV of Act.

Payment of premium to agent is deemed to be payment to insurer.

"Adjuster" means person who, on behalf of insurer or insured, for compensation, directly or indirectly solicits right to negotiate settlement of or investigate loss or claim, under contract or fidelity, surety or guarantee bond issued by insurer, or investigates, adjusts or settles any such loss or claim; or holds himself out as adjuster, investigator, consultant or adviser with respect to settlement of such loss or claim, excepting *inter alia*, barristers or solicitors acting professionally, trustee or agent of property insured, general agents or salaried employees of licensed insurer while acting on behalf of such insurer, experts employed solely for purpose of giving expert advice or evidence or persons who act as adjusters of marine losses only.

Adjusters must obtain licenses from Superintendent of Insurance.

No person, excepting barrister or solicitor acting in usual course of his profession, shall negotiate for compensation, settlement of claim for loss or damage arising out of motor vehicle accident resulting from bodily injury to or death of any person or damage to property on behalf of claimant; or hold himself out as adjuster on behalf of any person having claim against insured for which indemnity is provided by motor vehicle liability policy unless he holds adjusters license that is in force.

Member of fraternal society may, without license, solicit insurance contracts on behalf of society unless he devotes or intends to devote more than one-half his time to soliciting such contracts or has in previous license year solicited and procured life insurance contracts on behalf of society in amount in excess of twenty thousand dollars.

### AGE

See "AUTOMOBILES."

*Age of Majority Act*, c. 4 R.S.N.S. 1989, sets age of majority at 19 years.

### APPLICATION

See "REPRESENTATIONS AND WARRANTIES."

Application forms part of contract under automobile, fire and life insurance unless insurer sets out in writing any variation. Under automobile policies, no

statement by insured can be used in defense of claim unless same is set out in signed application and unless insurer proves applicant made statement attributed to him in purported application.

### ASSIGNMENT

See "FIRE INSURANCE."

### AUTOMOBILES

Person operating motor vehicle, other than owner, deemed servant and agent of owner acting within scope of authority unless contrary is established.

Age. Owner of motor vehicle causing or knowingly permitting person under age of 18 years to operate motor vehicle upon highway and any person who gives or furnishes motor vehicle to such person is jointly and severally liable for any injury, loss or damage caused by negligence of such person in operation of such motor vehicle and burden of proof that such motor vehicle was operated without his knowledge or consent, express or implied, is upon owner.

See "LIABILITY INSURANCE"

### BROKERS

See "ADJUSTERS, AGENTS AND BROKERS."

### BURGLARY INSURANCE

There are no statutory provisions in Nova Scotia relating to burglary insurance.

### CANCELLATION

Accident and Sickness Insurance. Statutory Conditions of Accident and Sickness Insurance part provide for termination of insurance in two ways. (1) By insured at any time by giving written notice of termination to insurer by registered mail to its head office or chief agency in Province or by delivery thereof to authorized agent of insurer in Province and insurer. Upon surrender of policy, must refund amount of premium paid in excess of short rate premium for expired time according to table in use by insurer at time of termination. (2) By insurer, at any time by giving written notice of termination to insured and by refunding concurrently, with giving of notice, amount of premium paid in excess of pro rata premium for expired time.

Notice of termination may be delivered to insured, or may be sent by registered mail to latest address of insured on records of insurer. Where notice of termination is delivered by insurer to insured, five days' notice of termination shall be given; where it is mailed to in-

sured, ten days' notice of termination shall be given. Ten days begins on day following date of mailing notice.

Automobile Insurance. Under statutory conditions; policy may be cancelled at any time at request of insured. Insurer shall, upon surrender of policy, refund excess of paid premium above customary short rate premium for time policy has been in force, "but, in no event shall pro rata premium for expired time be deemed to be less than any minimum retained premium specified." Policy may be cancelled by insurer giving insured 15 days' notice in writing of cancellation by registered post or 5 days' notice of cancellation personally delivered, and refunding excess of paid premium beyond pro rata premium for expired time, "but, in no event shall short rate premium for time expired be deemed to be less than any minimum retained premium specified." Repayment to accompany notice and 15 days' notice period to commence to run from day following receipt of registered letter at post office to which it is addressed. "Paid premium" means premium actually paid by insured to insurer or its agent, and does not include any premium or part thereof paid to insurer by agent unless actually paid to agent by insured.

Fire Insurance. May be terminated by insurer by giving to insured 15 days' notice by registered mail or 5 days' written notice personally delivered. The insurer shall refund excess of premium actually paid by insured over pro rata premium for expired time, but, in no event, shall pro rata premium for expired time be deemed to be less than any minimum retained premium specified.

Insurance may be terminated by insured at any time on request. In such case, insurer shall refund excess of premium actually paid by insured over short rate premium for expired time, but, in no event, shall short rate premium for expired time be deemed to be less than any minimum retained premium specified.

Where loss has, with consent of insurer, been made payable to some person other than insured, policy shall not be cancelled or altered by insurer to prejudice of such person without reasonable notice to him.

### CHATTEL MORTGAGE

See "FIRE INSURANCE."

### CONTRIBUTION

Fire Insurance. In event of loss covered by more than one policy each insurer is liable for its rateable portion unless insurers have otherwise agreed in writing. First loss coverage which converts to excess coverage in face of other coverage is prohibited.

Automobile Insurance. Where two or more insurers liable under concurrent policies, each shall share ratably in proportion to limits of respective policies. Contribution between tort-feasors is governed by *Tort-feasors Act*, c. 471 R.S.N.S. 1989 and *Contributory Negligence Act*, c. 95 R.S.N.S. 1989.

### DEATH

Presumption of. Presumed after seven years' unexplained absence.

Under *Presumption of Death Act*, c. 354 R.S.N.S. 1989 Court may upon application make order declaring that person shall be presumed dead for all purposes or for such purposes as are specified in order when (a) person has been absent and not heard of or from by applicant or to knowledge of applicant by any other person since day named; and (b) applicant has no reason to believe that person is living; and (c) reasonable grounds exist for supposing that person is dead. No order is binding upon insurer of life of person presumed dead until such time as Court declares order binding in insurer.

See "LIMITATION OF TIME FOR COMMENCEMENT OF ACTION."

### DISABILITY

This and life insurance are governed by Part VIII of Act.

"Disability Insurance" is defined as insurance undertaken by insurer as part of life insurance contract where terms of policy provide for payment of insurance money or granting of benefits if insured becomes disabled as result of bodily injury or disease.

### FATAL INJURIES

The *Fatal Injuries Act*, c. 163 R.S.N.S. 1989 allows executor of estate or family members to bring an action where death of a person has been caused by wrongful act, neglect or default of another which would have entitled deceased to maintain an action and recover damages.

### FINANCIAL RESPONSIBILITY LAW

Compulsory third party liability coverage in Province with minimum limits of \$200,000 exclusive of interest and costs, for automobile accidents involving injury or death. Claims against uninsured motorists arising before July 1, 1996 may be brought against uninsured motorist fund administered by Judgment Recovery (N.S.) Ltd.; those arising on or after July 1, 1996 may be brought against own insurer under Uninsured Automobile and Unidentified Automobile Coverage (Section D)

or Facility Association, if Section D coverage is unavailable.

Proof of financial responsibility may be requested before issuance or renewal of owner's permit or driver's license. Driver's license and owner's permit may be suspended under *Motor Vehicle Act*, c. 293 R.S.N.S. 1989, where accident causes property damage or bodily injury or death, unless at time of accident (a) vehicle was stolen; (b) damage resulting from accident was to the person or property of owner, driver, and passengers of vehicle; (c) or requisite insurance was in place.

Insurer which disputes its liability under policy may apply to be added as third party to litigation against insured whether latter enters appearance or not. Insurer may contest both issue of insured's liability to injured person and quantum of damages.

*Insurance Act* has been amended to support uniform Canadian motor vehicle liability card, whereby every motor vehicle liability policy issued or renewed in Province shall be conclusively deemed to provide that in case of any loss arising out of automobile accident in any province or territory in Canada insurer shall be liable up to minimum limits prescribed for that province or territory if those limits are higher than limits prescribed by policy.

See "UNSATISFIED JUDGEMENTS."

### FIRE INSURANCE

Governed by Part VII of Act.

Coverage. Fire Insurance Part applies to insurance against loss of or damage to property arising from peril of fire in any contract made in Province except, (a) insurance falling within classes of aircraft, automobile, boiler, and machinery, inland transportation, marine, plate glass, sprinkler leakage and theft insurance; (b) where subject-matter of insurance is rents, charges or loss of profits; (c) where peril of fire is incidental peril to coverage provided; or (d) where subject-matter of insurance is property that is insured primarily as nuclear risk under policy covering against loss of or damage to property resulting from nuclear reaction or nuclear radiation and from other perils.

Insurance against loss or damage by fire, lightning or explosion may also cover against loss or damage from falling aircraft, earthquake, windstorm, tornado, hail, sprinkler leakage, riot, malicious damage, weather, water damage, smoke damage, civil commotion and impact by vehicles and any one or more perils falling within such other classes of insurance as are prescribed by regulations.

Automobile may be insured against loss or damage under policy falling within scope of Part; but in case of purely mutual fire insurance corporation, incorporated or licensed in Nova Scotia, and carrying on business on premium note plan, automobile shall be specifically insured under policy separate from that insuring other property.

Subject to certain exceptions, in any contract to which this Part applies, contract shall be deemed to cover insured property against: (a) Fire (whether resulting from explosion or otherwise) not occasioned by or happening through, (i) in case of goods, their undergoing any process involving application of heat; (ii) riot, civil commotion, war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military power. (b) Lightning, but excluding destruction or loss to electrical devices or appliances caused by lightning or other electrical currents unless fire originates outside article itself and only for such destruction or damage as occurs from such fire. (c) Explosion (not occasioned by or happening through, any of perils specified in sub-clause (ii) of clause (a) of natural, coal or manufactured gas in building not forming part of gas works, whether fire ensues therefrom or not.

Unless otherwise specifically provided therein, in any contract to which Act applies, loss or damage caused by contamination by radioactive material, directly or indirectly, is not covered where it results from fire, lightning or explosion.

Nothing in foregoing precludes insurer giving more extended insurance against perils mentioned therein, but in that case Part does not apply to extended insurance.

**Deductible Clauses and Co-insurances.** Contract containing deductible clause or co-insurance, average or similar clause or clause limiting recovery by insured to specified percentage of value of any property insured at time of loss, whether or not that clause is conditional or unconditional, shall have printed or stamped upon its face in red ink words: "This policy contains clause which may limit amount payable," and unless these words are so printed or stamped clause shall not be binding upon insured.

**Property of Others.** Unless otherwise specifically stated in contract, insurer is not liable for loss or damage to property owned by any person other than insured, unless interest of insured therein is stated in contract.

**Change of Interest.** Insurer shall be liable for loss or damage occurring after authorized assignment under federal *Bankruptcy Act* or change of title by succession, by operation of law, or by death.

**Proof of Loss.** Upon occurrence of any loss or damage to insured property, insured must give notice in writing to insurer and deliver to insurer proof of loss verified by statutory declaration.

**Statutory Conditions.** This Part of *Insurance Act* provides that conditions set forth in Schedule shall be deemed to be part of every contract in force in Nova Scotia and shall be printed on every policy with heading "Statutory Conditions" and that no variation or omission of or addition to any statutory condition shall be binding on insured. Conditions deal with, *inter alia*, misrepresentations, change of interest, change of risk, termination, fraud, salvage and requirements after loss.

### GUEST CASES

Guest passenger status no longer applies to motor vehicle coverage. Claims by guest passenger as third party determined by test of simple negligence against driver and/or registered owner.

### INFANTS

See "AUTOMOBILES, Age."

### INLAND MARINE

Canadian Maritime Law is federal law, uniform throughout Canada, and applies to all activities which are, in modern context of commerce and shipping, "maritime" matters. *ITO-International Terminal Operators Ltd. v. Miida Electronics, Inc.*, [1986] 1 S.C.R. 752; *Monk Corp. v. Island Fertilizers Ltd.*, [1991] 1 S.C.R. 779. This body of federal law applies equally to recreational boating and maritime commerce, *Whitebread v. Whalley*, [1990] 3 S.C.R.1273, and to inland and tidal waters. *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437. The sources of Canadian Maritime Law include, but are not limited to, federal statutes, the principles of English Admiralty law, and, as a general statement, common law of tort, contract, agency and bailment.

Although marine insurance is likely a "maritime" matter subject to federal legislative jurisdiction under Canadian constitution, as a practical matter federal *Marine Insurance Act*, c. 22 S.C. 1993 and Part IX (Marine Insurance) of Nova Scotia *Insurance Act* are substantially identical, both having been based on the United Kingdom *Marine Insurance Act* of 1906. Thus, result of disputes under marine policies should be same regardless whether federal or Nova Scotia Law is applied.

Both Federal Court of Canada and Nova Scotia Supreme Court have concurrent original jurisdiction in marine insurance litigation, regardless whether *situs* of the insured property was in inland or tidal waters. Plaintiffs'

choice of forum is generally governed by such non-substantive considerations as whether national procedural and enforcement process is desired, relative merits of two courts' case management systems, and perceived differences in expense and delay associated with proceeding in one court or other.

### INSURABLE INTERESTS

Insurable Interests. Insurable interest in property is recognized where there is a substantial economic interest in the preservation of the insured property: *see Kosmopoulos v. Constitution Insurance*, [1987] 1 S.C.R. 1. More recently the Supreme Court of Canada has indicated that an insurable interest in property may arise upon the simple occupation, use and enjoyment of the insured property: *see Scott v. Wawanesa*, [1989] 1 S.C.R. 1445.

Life, Accident, and Sickness Insurance. *Insurance Act* defines interest to include the insured, his child, grandchild, spouse, employee, a person from whom he receives support or a person in whom he has a pecuniary interest.

### LIABILITY INSURANCE

See "FINANCIAL RESPONSIBILITY LAW."

Automobile Insurance. Insurance against liability for loss or damage to persons or property caused by any automobile or use or operation thereof and against loss of or damage to automobile is governed by Part VI of *Insurance Act*. Act provides for issuance of owner's policies and driver's policies. Provision is also made therein for insurance of passengers in automobiles. Standard Owner's Policy is in use in Province as mandated by Superintendent of Insurance.

Application. In contracts of automobile insurance, copy of application or such part thereof as is material to contract must be embodied in, endorsed upon or attached to policy when issued by insurer. Form of Application has been mandated by Superintendent of Insurance.

Statutory Conditions are set forth in Schedule to Part VI of *Insurance Act* which, subject to certain exceptions, are deemed to be part of every contract of automobile insurance and are required to be printed on every policy with heading "Statutory Conditions." No variation or omission of statutory condition is binding on insured, nor is anything contained in any addition to statutory condition or in description of subject matter of insurance effective insofar as it is inconsistent with, varies or avoids any such condition.

Every motor vehicle liability policy issued or renewed on or after first day of May, 1964, shall insure, in

respect of any one accident, to limit of at least \$200,000 exclusive of interest and costs, against liability resulting from bodily injury to or death of one or more persons and loss of or damage to property. Where in any one accident loss or damage results from bodily injury or death and loss or damage to property: (a) any claims arising out of bodily injury or death shall have priority over claims arising out of loss of or damage to property to amount of \$190,000 and (b) any claims arising out of loss of or damage to property shall have priority over claims arising out of bodily injury or death to amount of \$10,000.

Notice. No statutory provisions as to notice required in case of liability insurance except in respect of policies under Automobile Insurance Part of Act, where Statutory Conditions provide that insured shall promptly give to insurer written notice of any accident involving loss or damage to persons or property and of any claim made on account of accident. Also that upon occurrence of any loss of, or damage to, insured automobile insured shall, if such loss or damage is covered by policy, promptly give notice thereof in writing to insurer with fullest information at time. Notice of claim in this regard may be given by agent of insured named in policy in case of absence or inability of insured to give such notice. Under Act any written notice to insurer may be delivered at or sent by registered post to chief agency or head office of insurer in this Province. Written notice may be given to insured by letter personally delivered to him or by registered letter addressed to him at his last post office address notified to insurer or where no address is notified and address is not known addressed to him at office of agency, if any, from which application was received.

### LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

Accident and Sickness Insurance. Action or proceeding against insurer for recovery of claim under this contract shall not be commenced more than one year after date insurance money became payable or would become payable if it had been valid claim.

Automobile Insurance. Actions for recovery of damages on account of injury to persons or damage to property occasioned by or arising out of ownership, maintenance, operation or use of motor vehicle shall be commenced within two years after cause of action arose. Act allows direct claim by third party against insurer to have insurance money applied to judgment against insured, but action against insurer must be commenced within one year from final determination against insured.

Life Insurance. Subject to following exception, an action or proceeding must be commenced within one

year next after furnishing of sufficient proof of happening of event, age of insured, right of claimant to receive payment, and name and age of beneficiary; or more than six years after happening of event upon which insurance money becomes payable, whichever period first expires.

Where order has been made declaring that death is presumed from fact that insured has not been heard of for seven years, action must be commenced within one year from date of order.

Fire Insurance. Action for recovery of claim under policy is absolutely barred unless commenced within one year next after loss or damage occurs.

Limitations legislation give trial court discretion within four years following expiry to disallow limitation defense on basis of consideration of resulting prejudice to rights of litigants. See *Limitations of Actions Act*, c. 258 R.S.N.S. 1989. Typically, limitations defenses have been disallowed by trial court.

### MARINE

See "INLAND MARINE."

### NEGLIGENCE

Common law rules as to negligence are in force in this Province, except as modified by apportionment legislation.

### NO-FAULT INSURANCE

*Insurance Act* provides that every contract of automobile insurance policy shall provide medical, rehabilitation, loss of income, death and funeral expense benefits and other benefits set forth in Schedule B to Part VI of Act, which may be added to or increased from time to time by regulation. Schedule provides that insurer agrees to pay to or with respect to each injured person (as defined by relevant section of Act) who sustains bodily injury or death by accident arising out of use or operation of automobile: (a) all reasonable expenses incurred within four years from date of accident as result of such injury for necessary medical, surgical, dental, chiropractic, hospital, professional nursing and ambulance service or for any other service within meaning of insured services under *Health Services and Insurance Act* and for such other services and supplies which are, in opinion of physician of insured person's choice and that of insurer's medical adviser, essential for treatment, occupational retraining or rehabilitation of said person to limit of \$25,000 per person; and (b) funeral expenses incurred up to amount of \$1,000 in respect to death of any one person. Act provides for death benefits of \$10,000 in event of death of head of household or spouse of head of household and \$2,000 in event of death of dependent

within meaning of Act. Act provides that weekly payment for loss of income from employment for period during which injured person suffers substantial inability to perform essential duties of his occupation or employment. Weekly payment being lesser of \$140 per week or 80% of insured person's gross weekly income from employment less any payments for loss of income from employment received by or available to such person, provided however, that no payment shall be made for any period in excess of 104 weeks unless it can be established that injury continuously prevents person from engaging in any occupation or employment for which he is reasonably suited by education, training or experience. See Act regarding exclusions, i.e., suicide, or attempt thereat; where Workers Compensation applies; conviction for driving impaired, etc. Payment by insurer of no-fault benefits constitutes release by insured of claims against insurer or against other person liable to insured to extent of such payment. This release prevents double recovery by insured.

### PENALTY AND ATTORNEY FEES

Trial courts have discretion to award, in addition to proved damages, both pre-judgment interest and party-and-party costs to successful party at conclusion of litigation. Absent unusual circumstances, this discretion is usually exercised.

Statutory pre-judgment interest is generally awarded as additional damages, in both tort and contract claims, unless payment of interest is governed by a contract enforcement which is subject of the litigation, in which case, recovery of interest is governed by the terms of contract. Subject to court's discretion, award is usually simple interest from date of accrual of cause of action to date on which judgment is given, and generally at deposit, as opposed to borrowing, rates. Plaintiff's excessive delay in bringing litigation to judgment can operate to reduce, or even exclude, pre-judgment interest award.

Party-and-party costs are generally awarded to successful litigant (plaintiff or defendant) and ordered to be paid by unsuccessful litigant. Guidelines for exercise of judicial discretion in award of costs are provided by statute, which relate amount of award to amount involved in litigation and to Court's assessment of complexity of proceeding. Party-and-party costs are intended to be partial compensation only, and not a full indemnity, for legal expenses incurred by successful party in relation to litigation. Out-of-pocket expenses, including expert witness fees, are generally recoverable in full if shown to be reasonable in amount.

Pre-trial settlement offers, which can be disclosed to the Court following judgment, can influence success-

ful party's entitlement to an award of costs and amount of the award. If plaintiff recovers judgment on less favorable terms than defendant has previously offered, plaintiff will typically recover costs to date of the offer and defendant will recover costs thereafter (in practice, the two would be set off and resulting balance paid). Similarly, if plaintiff recovers judgment on terms more favorable than those of a settlement offer made to defendant, defendant pays double costs after date of offer.

Contingency fee agreements are permitted in Nova Scotia. Agreements are required to be in writing and filed with the Court on a confidential basis, and are subject to review by Court, at client's instance, following conclusion of litigation.

### REPRESENTATIONS AND WARRANTIES

In contracts of Life Insurance, except in cases of misstatement of age or disability insurance, where contract has been in place for two years during lifetime of insured, a failure to disclose or misrepresentation of required fact, does not, in absence of fraud, render contract voidable. Where contract has been in place for less than two years, failure to disclose or misrepresentation renders contract voidable by insurer.

In Accident and Sickness Insurance, applicant and each person to be insured have duty to disclose material facts within their knowledge. Where contract has been in effect continuously for two years with respect to person insured, failure to disclose such material fact does not render contract voidable, except in case of fraud. Exception arises when there is claim for loss or disability beginning before contract has been in force for two years. Statutory Conditions provide that no statement by insured on his application may be used in defense of claim under or to avoid contract unless it is contained in written application or other written statements furnished as evidence of insurability.

In contracts of Fire Insurance, if any person applying for insurance falsely describes property to prejudice of insurer or misrepresents or fraudulently omits to communicate any circumstance which is material to be made known to insurer in order to enable it to judge of risk to be undertaken, contract is voidable as to property in respect of which misrepresentation or omission is material. Warranties as to immaterial matters are by inference, unenforceable and on material matters may be waived by court if unjust or unreasonable.

In contracts of Automobile Insurance where applicant for contract falsely describes automobile to be insured to prejudice of insurer, or knowingly misrepresents or fails to disclose in the application any fact required to be stated therein, or where insured violates any term or

condition of policy or commits any fraud or makes any wilfully false statement with respect to claim under policy, any claim by insured is rendered invalid and right of insured to recover indemnity is forfeited. Where written application for contract is made, no statement of applicant shall be used in defense of claim under policy unless it is contained in written application or purported application. Third party claims are protected from the effects of any act or default by an insured, in contravention of the Act or policy, and the insurer is required to respond, to the statutory limits, subject to a right of reimbursement by the insured.

### SERVICE OF PROCESS

Documents which initiate litigation are generally required to be served personally. Subsequent documents are normally served by mail or courier delivery to the party's counsel, or to self-represented party's service address. Personal service may be made as of right anywhere in Canada.

Personal service upon corporations in Nova Scotia is effected in one of two ways. Under *Nova Scotia Civil Procedure Rules*, personal service may be made upon president, chairman, mayor, warden or other chief officer of corporation, or upon a manager, secretary of similar officer. Alternatively, under statute, the *Corporations Registration Act*, c. 101 R.S.N.S. 1989, corporations which carry on business in Nova Scotia are required to appoint a recognized agent in province, upon whom personal service of corporation may be made.

Where service is required to be made outside Canada in a state which is a party of the *Hague Convention on Service Abroad in Civil or Commercial Matters* (including particularly, in the United States), *Nova Scotia Civil Procedure Rules* require service in accordance with that Convention. In general terms, such service requires obtaining of judicial request for service abroad and transmission of documents through diplomatic channels.

In case of Self Insurance Plans, where office from which insurance contracts are issued is not in Nova Scotia, service upon Superintendent of Insurance shall be deemed service on insurer or members of insurer.

### SUBROGATION

Insurer's right to subrogate is governed primarily by rules of common law and equity subject to certain statutory modifications and intercompany agreements.

In contracts of Automobile Insurance and Fire Insurance, insurer, upon making any payment or assuming liability therefor under contract, is subrogated to all rights of recovery of insured against any person and may bring action in name of insured to enforce such rights.

Where the net amount recovered after deducting costs of recovery does not provide complete indemnity for loss suffered, remaining amount is divided between insured and insurer in proportion which loss has been borne by them. For damage to motor vehicle where interest of insured in recovery is limited to deductible amount insurer has control of action against tort-feasor. Otherwise, in absence of agreement between them, insurer and insured may apply to the Court for directions as to conduct and carriage of this action.

Subrogation rights under policies of personal insurance (i.e. disability and accident) will be recognized to extent that insurer's payments to its insured constitute indemnity against identifiable financial losses. *Maritime Life v. Mullenix* (1986), 76 N.S.R. (2d) 118.

We have no other statutory provisions or leading cases on question of insurer's right to subrogation. It is generally recognized that equitable rules as to subrogation prevail in this Jurisdiction.

### SUICIDE

Where life insurance contract contains an undertaking insurance money will be paid if a person whose life is insured commits suicide, undertaking is lawful and enforceable. Where contract provides that in case person whose life is insured commits suicide within certain period of time contract is void or amount payable under it is reduced, if contract lapses and is subsequently reinstated on one or more occasions, period of time commences to run from date of the latest reinstatement. See *Insurance Act*, s. 90.

### UNSATISFIED JUDGEMENTS

Claims against uninsured motorists arising before July 1, 1996 may be brought against uninsured motorists fund administered by Judgement Recovery (N.S.) Ltd. See *Motor Vehicle Act*, c. 293 R.S.N.S. 1989, s. 213.

For accidents involving uninsured motorists after July 1, 1996 victims have to look to own insurer under Section D of Standard Automobile Policy. Payment for damages as a result of bodily injury is subject to limit of \$200,000 for one or more persons from any one accident. Payment in respect of property damage is subject to a \$250.00 deductible. Insured must report accident to police within 24 hours, or as soon as practicable. Within 30 days, or as soon as practicable, insured must deliver to insurer notice of claim and within 90 days, as fully detailed a proof of claim as is reasonably possible in circumstances respecting events surrounding accident and damages resulting from it. See *Uninsured Automobile and Unidentified Automobile Coverage Regulations*, N.S. Reg. 94/96.

If Section D insurance is not available, and accident happened in Nova Scotia, victim may apply to Facility Association, created by the *Compulsory Insurance Act*, c. 25 R.S.O. 1990. Owner of uninsured vehicle cannot recover from Facility Association. Payment for damages as result of bodily injury is subject to limit of \$200,000 for one or more persons from any one accident, plus taxable costs. Payment in respect of property damage is subject to a \$250.00 deductible. See *Insurance Act*, s. 139A-139U.

### WAIVER AND ESTOPPEL

One of statutory conditions which are deemed to be part of every contract of accident and sickness insurance in force in this Province, provides that no statutory condition of Policy shall be deemed to have been waived by insurer either in whole or in part unless waiver is clearly expressed in writing signed by agent of insurer. With respect to Fire Insurance, no variation or omission of or addition to any Statutory Condition shall be binding on insured.

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

### WORKERS' COMPENSATION

Since 1917, there has been in force in this Province a *Workers' Compensation Act*, c. 10 S.N.S 1994-95 administered by Workers' Compensation Board. Act is divided into three parts. Part I contains substantive definitions and outlines entitlements of workers and requirements of employers. Part II creates Workers' Compensation Appeals Tribunal, which has authority to confirm, deny or vary decisions of the Board. Part III establishes Workers' Advisers Program to provide assistance, advice and representation to workers seeking compensation.

Funds to support Act's compensation scheme are collected through annual assessment of employers in an amount sufficient to cover cost of all claims payable during year, future claims and expenses incurred administering Act. Fund is known as Accident Fund and funds are administered by the Board. Act also provides authority to assess for additional amounts for purposes of replenishing reserve fund. Amount of assessment varies from industry to industry and also reflect claims record of the business itself. Assessments are adjusted annually to reflect employers' claim records and that of the particular industry in general.

Part I contains comprehensive definition of both employer and worker. Employers can include receivers,

liquidators, executors or administrators, or any other persons who have been given authority to administer a business. Definition also includes both provincial and federal employees who work within province. Generally definition of worker includes any individual under contract to another and also officers, directors or any other members of management, if they are actively engaged in day to day business; worker can also include students and volunteer firemen.

Act entitles worker to compensation for any injury arising "out of, or in the course of employment" and compensation is provided in lieu of claims against an employer, or the employer's servants or agents. Worker is not capable of filing a claim for compensation if injury was caused by the worker's willful and serious misconduct.

Worker must make an election (s. 27) to claim under Part I. Written notice of election must be filed with Board within six months of accident. If worker fails to file election, he cannot claim compensation from Board. Chief Commissioner of Appeals Tribunal has the authority (s. 29) to hear applications to determine if an action is banned for failure to make election. There is no right of appeal from decision of Chief Commissioner.

Board has a right of subrogation (s. 30) which vests Board with all rights to worker's action and gives Board authority to commence an action in the name of injured worker. Board has authority to settle action on behalf of worker. Worker must cooperate with Board, or Board

can suspend, reduce or terminate worker's compensation (s. 29 (8)). All funds recovered in an action by Board are payable to Board and worker is entitled to receive excess funds, less costs of action, as determined by Board.

If accident occurred in another jurisdiction, Board has authority (s. 32) to request that worker take action and assign worker's rights to damages to Board. Board has authority to withhold payment to worker until worker takes action, or makes assignment.

Act provides worker with a benefit equal to 75% of average net lost earnings. Where permanent impairment results, Board must pay worker a permanent impairment benefit and such benefit is expressed as a percentage according to permanent impairment rating schedule Board has established. Present schedule does not provide permanent medical impairment for chronic pain or other forms of myofascial pain.

Act also provides for death and survivor benefits payable when worker dies as result of work related accident. Surviving spouse payment is payable when spouse attains 65 or when worker would have attained 65, whichever is later. Dependents under age of eighteen are also entitled to dependant-child benefit which can be extended up to age of twenty-five years, if child is in full-time attendance at educational facility.

Act also sets forth duties of injured worker, specifically requiring that worker is to cooperate with all medical treatment recommended by Board and provide complete medical disclosure to Board.