

# DIGEST OF INSURANCE LAW

## RHODE ISLAND

Courtesy of  
**Partridge Snow & Hahn LLP**  
Providence, Rhode Island

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### CIVIL JUDICIAL SYSTEM

#### Supreme Court

The Rhode Island Supreme Court is comprised of a Chief Justice and four Associate Justices. R.I. Gen. Laws §8-1-1. The Supreme Court is Rhode Island's only appellate court and has general supervisory authority over all courts of inferior jurisdiction. The Supreme Court also has jurisdiction to correct and prevent errors and abuses and may issue all extraordinary and prerogative writs. R.I. Gen. Laws §8-1-2. The court also has jurisdiction to review some interlocutory decrees pursuant to R.I. Gen. Laws §9-24-7 as well as interlocutory decrees that "ha[ve] such an element of finality" that immediate review is required "in order to prevent possible injurious consequences." *In re Joseph J.*, 465 A.2d 150 (1983).

#### Superior Court

The Rhode Island Superior Court is comprised of a presiding justice and twenty-one associate justices. R.I. Gen. Laws §8-2-1. The Superior Court is Rhode Island's court of general jurisdiction and has exclusive jurisdiction for all actions sounding in equity. R.I. Gen. Laws §8-2-13. Except for actions for possession of tenements let or held at will or by sufferance, the Superior Court has original jurisdiction for all actions at law in which more than \$10,000 is in controversy. R.I. Gen. Laws §8-2-15. The Superior Court has concurrent jurisdiction with the probate court to fill, remove and replace any trustee of a trust established under a will and may exercise general probate jurisdiction in all cases brought to it on appeal from the probate courts. R.I. Gen. Laws §§8-2-13; 8-2-17. Additionally, the Superior Court has concurrent jurisdiction with the district courts for actions at law in which more than \$5,000 but less than \$10,000 is in controversy. The Superior Court also has original, but not exclusive jurisdiction of all crimes, offenses and misdemeanors. In addition, the Superior Court has authority, concurrent with the Supreme Court, to issue writs of habeas corpus, mandamus, quo warranto and information in the nature of quo warranto. All jury trials are had in Superior Court.

Pursuant to R.I. General Laws §8-6-5, the Superior Court has promulgated Rules Governing Arbitration of Civil Actions. Super. Ct. Civ. Arb. Rule 1-8, inc. With some exceptions, all civil actions filed in Superior Court with up to \$100,000 in controversy are subject to court-annexed arbitration. Super. Ct. Civ. Arb. Rule 1. The right to jury trial is preserved. Super. Ct. Civ. Arb. Rule 5.

Cases may be appealed from District Court to Superior Court for de novo review. Superior Court sits continuously in Providence County and for no less than thirty-six (36) weeks during the court year in Newport, Kent and Washington counties. R.I. Gen. Laws §8-7-2.

#### Family Court

Family Court is comprised of a chief judge and eleven (11) associate justices. R.I. Gen. Laws §8-10-3. Family Court has jurisdiction over all domestic relations matters including divorce, alimony, child custody, child support, matters concerning delinquent, wayward dependent, neglected or disabled children, adoption of children under eighteen (18), paternity and abandonment or failure to pay support for children under sixteen (16). In addition, the family court has jurisdiction to hear any matter necessary for the resolution of domestic relations matters including division of property, accountings, receiverships, trusts and other equitable matters arising out of the family relationship. R.I. Gen. Laws §8-10-3. In addition, the Family Court has established a number of specialized courts to facilitate the efficient handling of certain types of cases. These courts include: Domestic Violence Court, Juvenile Reentry Court, Family Treatment Drug Court, Juvenile Drug Court and Truancy Court. 2003 Rhode Island Judiciary Annual Report, at 11-12, available at [www.courts.state.ri.us/pdf/2003\\_Annual\\_Report.pdf](http://www.courts.state.ri.us/pdf/2003_Annual_Report.pdf).

#### District Courts

There are six (6) judicial divisions which are presided over by a chief judge and twelve (12) associate judges. R.I. Gen. Laws §8-8-1. The district courts have exclusive jurisdiction over all civil actions at law in which the amount in controversy does not exceed



\$5,000, landlord and tenant actions and actions for possession of premises, except where title is at issue, all actions for replevin in which the goods and chattels to be replevied are valued at \$5,000 or less, all violations of minimum housing standards, all complaints for offenses against the bylaws, ordinances and regulations of the cities and towns. R.I. Gen. Laws §8-8-3. District courts generally do not have jurisdiction over actions sounding in equity, except for limited equitable remedies available for the resolution of landlord tenant disputes. R.I. Gen. Laws §8-8-3.1.

The district court has concurrent jurisdiction with the superior court for all civil actions at law in which more than \$5,000 but not more than \$10,000 is in controversy. However, in such cases, any one or more of the defendants in their answer may demand removal of the action to the superior court. R.I. Gen. Laws §8-8-3(c). District court also has jurisdiction for all crimes punishable by a fine not exceeding \$500 or imprisonment of not more than one year. R.I. Gen. Laws §8-8-5. District court sits in continuous session.

### Probate Court

Each city or town may establish a probate court. Probate courts may be comprised of the town council, probate judges or both. R.I. Gen. Laws §8-9-2.3. Probate courts have jurisdiction over the probate of wills, administration of trusts and estates and power to do and transact all matters and things incidental to matters under the jurisdiction of the Probate courts. R.I. Gen. Laws §8-9-9.

### Workers' Compensation Court

Rhode Island's Workers' Compensation Court is comprised of a chief judge and nine (9) associate judges. R.I. Gen. Laws §28-30-1. The court's authority extends as far as necessary to adjudicate issues arising under the Workers' Compensation Act, except for violations of the act that amount to crimes, offenses or misdemeanors. Jurisdiction over such crimes, offenses and misdemeanors remains in the district and superior courts. R.I. Gen. Laws §28-30-1. The Workers' Compensation Court also has authority to interpret and apply the Rhode Island Insurers' Insolvency Fund Act to the extent necessary to determine the fund's obligations under the Workers' Compensation Act. *Callaghan v. Rhode Island Occupational Info. Coordinating Committee/Industry Educ. Council of Labor*, 704 A.2d 740 (R.I. 1997).

### Municipal Courts

Many cities and towns have municipal courts with jurisdiction to hear matters related to the promotion of the health and safety of town residents, including but not limited to housing, motor vehicle offenses and violations

of town or city ordinances. R.I. Gen. Laws §§8-18-1 to 8-18-10.

## LAW

### Abbreviations

- A. – Atlantic Reporter.
- A.2d – Atlantic Reporter, Second Series.
- F. Supp. – Federal Supplement.
- P.L. – Public Laws.
- R.C.P. – Rules of Civil Procedure. (Patterned on Federal Rules).
- R.I. – Rhode Island Reports.
- R.I. Gen. Laws – Rhode Island General Laws. (1956).
- R.E. – Rules of Evidence-Adopted 1988.

## ACCIDENT AND HEALTH INSURANCE

Disability. Question of fact and burden of proof is upon insured. *Davis v. Equitable Life Assur. Soc'y*, 61 R.I. 414, 1 A.2d 105 (1938). "Totally and permanently disabled" is not to be construed literally. *Seabra v. Puritan Life Ins. Co.*, 117 R.I. 488, 369 A.2d 652 (1977); *Pannone v. John Hancock Ins. Co.*, 52 R.I. 95, 157 A. 876 (1931). "Person unable to perform substantial and necessary acts involved in work or business is entitled to benefits of policy unless such person is able to engage in some other gainful activity." *Cole v. Metropolitan Life Ins. Co.*, 54 R.I. 88, 170 A. 74 (1934); *Millerick v. Fascio*, 120 R.I. 9, 384 A.2d 601 (R.I. 1973).

Disease Induced by Accident. Accident must govern result; i.e. unexpected cause which produces result. *Kimball v. Massachusetts Acc. Co.*, 44 R.I. 264, 117 A. 228 (1922); *Renault v. John Hancock Mut. Life Ins. Co.*, 98 R.I. 213, 200 A.2d 588 (1964).

Excepted Risks. Homicide. *Black v. Massachusetts Acc. Co.*, 57 R.I. 257, 189 A. 3 (1937).

Minor beneficiary of medical services covered by contract entered into by parent is bound by provision entitling insurer to subrogation against responsible third party. *Hamrick v. Hospital Service Corp.*, 110 R.I. 634, 296 A.2d 15 (1972).

Major medical insurance policy excluding reimbursement for expenses incurred during period of treatment commencing prior to effective date of policy held to cover expenses incurred after effective date despite occurrence of illness and rendition of certain treatment prior to such effective date. *Cassidy v. Springfield Life Ins. Co.*, 106 R.I. 615, 262 A.2d 378 (1970).



Compensation provided by State for persons injured by virtue of criminal acts, except for those who place themselves in harms way. *Belfi v. State of Rhode Island*, Superior Court of R.I. (1992); R.I. Gen. Laws §§12-25-16 to 12-25-31, incl. (§§12-25-1 to 12-25-14 repealed); *Brown v. State of Rhode Island*, 512 A.2d 875 (R.I. 1986); *Lake v. State of Rhode Island*, 504 A.2d 1349 (R.I. 1986).

Insurance providing coverage of elective inpatient surgery must provide benefits to pay for second medical opinions. R.I. Gen. Laws §§27-39-1 to 27-39-5.

Spouses may remain eligible for family coverage benefits of group health insurance after they have been divorced. §§27-20.4-1 & 27-20.4-2.; *Thompson v. Thompson*, 642 A.2d 1160 (R.I. 1994).

All health insurance group contracts must provide continuing coverage to persons who were covered under a replaced contract for whatever reason including change of employment. In a succeeding contract an insurer may not request evidence of insurability from the insured, nor may it decline enrollment on the basis of evidence of insurability. The insurer may not exclude a person because of a preexisting condition, nor can the insurer create a "waiting period". Intent is to prohibit insurer from preventing an insured from changing employment due to a chronic illness of an insured, §27-20.4-4.

### ACCIDENTAL MEANS

Definition. Cause or means governed the result and not the result the cause; here must be something unexpected in the cause or means which produced the result. *Kimball v. Massachusetts Accident Co.*, 44 R.I. 264, 117 A.2d 228 (1922). Distinguished from "accidental bodily injury." *West v. Commercial Ins. Co.*, 528 A.2d 339 (1987). Whether death of injured under accidental death policy excluding coverage for death resulting from disease resulted by accidental means was for jury. *D'Arrezo v. John Hancock*, 102 R.I. 56, 228 A.2d 114 (1967); *West v. Commercial Ins. Co. of Newark*, 528 A.2d 339 (R.I. 1987). Recovery not allowed. Plaintiff failed to sustain burden that death caused exclusively by motor vehicle accident where deceased also had kidney disease. *Renault v. John Hancock*, 98 R.I. 213, 200 A.2d 588 (1964).

### ADJUSTERS

License required of insurance claim adjuster except where such adjuster is: 1) attorney at law acting in usual course of profession; 2) agent, broker or solicitor of insurance company when adjusting claim under policy negotiated or effected by him or by agent or broker for whom he acts; 3) insurance company employee- licensed

by commissioner who acts in settlement of claims of \$2500.00 or less. R.I. Gen. Laws §§27-10-1 to 27-10-14.

Automobile damage appraisers licensed and regulated. R.I. Gen. Laws §§27-10.1-1 to 27-10.1-10.

### AGE

Eighteen (18) is the age of majority in Rhode Island. R.I. Gen. Laws §15-12-1.

See "AUTOMOBILES"; "NEGLIGENCE " and "INFANTS".

### AGENTS AND BROKERS

Authority of Agent. Question of fact in each case. *Ferla v. Commercial Cas. Co.*, 74 R.I. 190, 59 A.2d 714 (1948).

For whom. Person drawing application is agent of applicant. *daSilva v. Equitable Fire & Marine*, 106 R.I. 729, 263 A.2d 100 (1970). Person empowered merely to accept applications is agent of applicants. *Ferla v. Commercial Cas. Co.*, 74 R.I. 190, 59 A.2d 714 (1948). Agent may act for insurer and insured. *Fliger v. Penn Fire Ins. Co. et al.*, 48 R.I. 274, 137 A. 470 (1927).

Insurer is held to have knowledge of facts already in its possession and cannot rely solely on statements in application. *O'Rourke v. John Hancock Ins. Co.*, 23 R.I. 457, 50 A. 834 (1902). An oral contract of life insurance is enforceable and evidence of insured's statements indicating its existence is admissible. *Overton v. Washington Nat'l Ins. Co.*, 260 A.2d 444 (R.I. 1970).

Insurer is not affected by acts or knowledge of broker not its agent. *Monast v. Manhattan Ins. Co.*, 35 R.I. 294, 86 A. 728 (1913). See also, *Pieri v. John Hancock*, 168 A.2d 277.

Insurer not bound by knowledge of soliciting agent. *Salvate v. Firemen's Ins. Co.*, 42 R.I. 433, 108 A. 579 (1920). Knowledge of insurer's agent that property insured stood on leased ground imputed to insurer. *Mancini v. Yorkshire Ins. Co.*, 54 R.I. 79, 170 A. 82 (1934). But agent who fails to effect policy amendment requested by insured is not liable to insured if he is acting for disclosed insurer and had authority to do what he had agreed to amend. *Belanger v. Silva*, 114 R.I. 266, 331 A.2d 403 (1975). Agent protected from liability when coverage has been placed in good faith with company admitted to do business in Rhode Island or a non-admitted carrier provided the insured executes an affidavit §27-14.4-23.

Agent who fails to make policy changes is not liable where he acts for insurer whose identity is dis-

closed. *Kenney Mfg. Co. v. Starkweather & Shepley, Inc.*, 643 A.2d 203 (R.I. 1994).

Notice given to broker authorized to procure insurance is to be considered notice to insured as to any matters preceding completion of contract, but authority of broker to represent insured ordinarily ends with completion of contract, and any notice thereafter given to broker will not affect rights of insured. *Capuano v. Kemper Ins. Co.*, 433 A.2d 949 (R.I. 1981).

Licensing. See §§27-3-36 to 27-3-51; license not issued to agent or broker whose principal purpose is to solicit or place insurance on property owned by him or by relative, employer, employee, etc. Insurance company broker or agent may retain for unpaid premiums sum certain, received in settlement of insureds claim, §27-3-48.5.

Surplus line broker's license may be obtained by locally licensed agent, authorizing such license to procure policies of insurance, except life and health and accident, from insurers not authorized to do business in state, R.I. Gen. Laws §§27-3-38 to 27-3-42. Independent agent entitled to notice and hearing of proposed revocation of agency, R.I. Gen. Laws §27-3-45.

Punitive damages will not be allowed where principal is sued for tortious act of its servant, unless there is proof in cause to implicate principal and make it particeps criminis of its agent's act. *AAA Pool Service & Supply, Inc. v. Aetna Cas. & Surety Co.*, 479 A.2d 112 (R.I. 1984). There are mandatory continuing education programs for all licensed insurance agents and brokers. §§27-3.2-1 to 27-3.2-10.

### ARBITRATION

There is a court-annexed arbitration program in Rhode Island. R.I. Gen. Laws §8-6-5. Matters are heard by single arbitrators chosen by agreement of the parties, or if the parties can't agree, by appointment of the court. Either party may reject the arbitrator's award and demand a trial, subject to a \$200 filing fee, which is refunded if the verdict at trial is more favorable than the arbitrator's award. No reference to the arbitration may be made at trial.

Arbitration procedure under the Government Tort Liability Act must comply with procedures for court annexed arbitrations set out in R.I. Gen. Laws §8-5-6, except that the state is not required to pay the filing fee. R.I. Gen. Laws §9-31-13.

Additionally, every contract of motor vehicle liability insurance, issued in the state by an insurance carrier authorized to do business in Rhode Island must include an arbitration provision. R.I. Gen. Laws §27-10.3-1 (a).

At the plaintiff's election, any claim of \$25,000 or less may be submitted to arbitration. R.I. Gen. Laws §27-10.3-1(a)(1). The right to jury trial is preserved and may be claimed by either party within 60 days of an arbitrator's award. R.I. Gen. Laws §27-10.3-1(a)(3)(i-ii).

### ASSIGNMENT

See "FIRE INSURANCE."

### ATTORNEYS

Appointment and Authority. An attorney has no authority to settle a case on behalf of client unless client has authorized attorney to do so. *Parrillo v. Chalk*, 681 A.2d 1916 (1996).

Conflict of Interest. Trial courts may assume either that multiple representation entails no conflict or the lawyer and his client knowingly accept such risk of conflict as may exist unless trial court knows or reasonably should know that a particular conflict exists. *State v. Feng*, 421 A.2d 1258, 1272 (1990). An attorney may represent conflicting interests after full disclosure of pertinent facts has been made to parties involved and they have expressly consented. *Employers' Fire Ins. Co. v. Beals*, 103 R.I. 623, 240 A.2d 397 (1968).

Legal Malpractice. An action for legal malpractice shall be commenced within three (3) years of occurrence of incident which gave rise to action, but one under a disability by reason of age, mental incompetence, or otherwise shall bring said action within three (3) years from removal of said disability and as to acts of legal malpractice that could not be discoverable at time of occurrence, suit shall be commenced within three (3) years of time act or acts of legal malpractice should, in the exercise of reasonable diligence, have been discovered. R.I. Gen. Laws §9-1-14.3; *Rocchio v. Morretti*, 694 A.2d 704 (R.I. 1997).

Fees. Attorney fees are governed generally by Rule 1.5 of the Rules of Professional Conduct. Rule 1.5 (a) requires that a lawyer's fee be reasonable, and includes among other factors the following tests of reasonableness: The time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal services properly; the likelihood, if apparent to the client, that the acceptance of particular employment will preclude other employment by the lawyer; the fee customarily charged in the locality for similar legal services; and the amount involved and results obtained. The Rule prohibits contingent fee arrangements in all criminal cases. *Colonial Plumbing & Heating v. Contemporary Constr.*, 464 A.2d 741 (R.I. 1983). The comment to Rule 1.5 states that when the lawyer has regularly represented a client there ordinarily will have



evolved an understanding concerning the basis or rate of the fee. In new relationships, an understanding as to the fee should be promptly established.

### AUTOMOBILES

See Law Digest Tables.

See "NEGLIGENCE."

Compulsory Insurance/Financial Security. Financial security, in form of liability insurance, financial security bond or deposit, or approved self insurance must be maintained for all motor vehicles which are registered or have registration renewed on or after November 1, 1993. Liability insurance must have minimums of coverage of \$25,000 per person, \$50,000 per accident for bodily injury or death, \$25,000 for property damage, or \$75,000 combined single limit. Financial security bond or deposit is minimum of \$75,000. Violations result in fines and suspension of operating and/or registration privileges, §31-47-1, *et seq.*

Age. License to operate issued to qualified applicant who has attained age of sixteen and has successfully completed driver training course.

Liability of Owner. Owner, lessee or bailee held liable when car is operated with his consent. R.I. Gen. Laws §31-33-6 & 7. Owner of a vehicle is responsible under the statute for the acts of its agent even when agent's act is intentional. *Dias v. Cinquegrana*, 727 A.2d 198 (R.I. 1999). Unless operator is bailee or lessee of owner, he will be deemed to be his agent, even though not on owner's business, if owner gave initial consent. *Baker v. Rhode Island Ice Co.*, 72 R.I. 262, 50 A.2d 618 (1946). Where child has parent's consent to use motor vehicle, and permits another to operate said vehicle, negligence of such operator is imputable to parent. *McKendall Lumber Co. v. Ramieri*, 85 R.I. 92, 126 A.2d 560 (1956). In statutory action against automobile insurer, injured party must establish owner's consent, express or implied, to use of automobile by operator as condition precedent to imposition of liability on owner. *Harding v. Carr*, 79 R.I. 32, 83 A.2d 79 (1951); *Mitchell v. Repucci*, 514 A.2d 1028 (R.I. 1986). Owner's express or implied "consent" held synonymous with "permission" as used in automobile liability policy. *Id.*

"Motor Vehicle" exception to compulsory counterclaim rule of Super R. Civ. P. 13 (a) construed and explained. *Lemieux v. American Univ. Ins. Co.*, 116 R.I. 685, 360 A.2d 540 (1976).

Family Purpose Doctrine. Not adopted by statute or decision. *Landry v. Richmond*, 45 R.I. 504, 124 A. 263 (1924).

Joint Enterprises. Doctrine is recognized. *Najjar v. Horovitz*, 54 R.I. 324, 172 A. 255 (1934).

Service of Process Upon Non-resident Motorists. See "SERVICE OF PROCESS."

Periodical safety inspection of motor vehicles required. R.I. Gen. Laws §§31-38-1 to 31-38-20.

Automobile body repair establishments licensed and regulated. R.I. Gen. Laws §§5-38-1 to 5-38-29.

Liability insurance coverage of \$100,000/\$300,000/\$20,000 provided for all state-owned motor vehicles. R.I. Gen. Laws §37-4-6.

Certificate of title required. R.I. Gen. Laws §31-3-2.

Statutory requirement for availability of uninsured motorist coverage to all insureds is properly subject to exclusion denying its applicability to other vehicles owned by insured but not covered by policy. *Carlton v. Worcester Ins. Co.*, 923 F.2d 1 (1st Cir. 1991); *Delagrotta v. Liberty Mut. Ins.*, 639 A.2d 980 (R.I. 1994).

Copy of out-of-state conviction of driving while intoxicated was admissible in administrative proceeding and was sufficient to suspend driver's Rhode Island license. *DePasquale v. Harrington*, 599 A.2d 314 (R.I. 1991).

Policy stipulation which excludes uninsured motorist coverage if insured settles without insurer's consent is valid. *Stanko v. Hartford Acc. & Indem. Co.*, 121 R.I. 331, 397 A.2d 1325 (1979).

Insured entitled to recover full amount of each uninsured motorist coverage to which he or she is entitled as long as recovery does not exceed insured's actual loss. (i.e. "excess-escape" exclusion violates public policy). *Employers' Fire Ins. Co. v. Baker*, 119 R.I. 734, 383 A.2d 1005. Insurers entitled to reduce uninsured motorist benefits by amounts insured received from third parties. *Sugrue v. Amica Ins. Co.*, 588 A.2d 125 (R.I. 1991).

Uninsured Motorist Coverage. UM coverage must be construed in light of the public policy mandated by the legislature. It's primary object remains indemnification for an insured's loss rather than defeat of his or her claim. *DiTata v. Aetna*, 542 A.2d 245 (R.I. 1988). Exclusion denying uninsured/underinsured motorist coverage to an insured who has already obtained liability benefits from the same policy does not contravene legislative purpose of uninsured motorist statute, and is not against public policy. *Amica v. Streicker*, 583 A.2d 550 (R.I. 1990). Out of state motorist is not required to have uninsured motorist coverage in order to operate in Rhode Island. *Martin, Admx v. Lumbermen's Mut.*, 559 A.2d 1028 (R.I. 1989). Insured struck by car in London is not



entitled to recover under uninsured motorist provision of his automobile insurance policy. *Pollard v. Hartford Ins. Co.*, 583 A.2d 79 (R.I. 1990). Snowmobile accident was covered by the defendant's uninsured motorist policy and provision to the contrary was contrary to uninsured motorist statute. *Sentry v. Castillo*, 574 A.2d 138 (R.I. 1990). Uninsured Motorist Policy covers damages from shooting of insured by an uninsured motorist at motor vehicle accident scene. *Gen'l Accident v. Olivier*, 574 A.2d 1240 (R.I. 1990). Plaintiff's settlement and release of an underinsured motorist resulted in liquidation of damages and thus no further recovery permitted under an underinsured motorist policy. *LeFranc v. Amica*, 594 A.2d 382 (R.I. 1991).

Underinsured motorist coverage was not available where tortfeasor's coverage, including umbrella policy, exceeded insured's coverage limits. *Pennsylvania General Ins. Co. v. Morris*, 599 A.2d 1042 (R.I. 1991); *Archambault v. Federal Ins. Co.*, 690 A.2d 1348 (R.I. 1994).

Where damages of passenger injured in one-car accident exceed liability limit of car owner's policy, automobile insurer not required to make additional payments under uninsured/underinsured provisions of car owner's policy. *Amica v. Streicker*, 583 A.2d 550 (R.I. 1990); *Aetna v. Graziano*, 587 A.2d 916 (R.I. 1991).

Auto liability and physical damage insurance policies, excepting group policies, must provide reduction in premium for persons over age 55 who complete State Motor Vehicle Accident Prevention Course. R.I. Gen. Laws §27-9-7.1.

Motorist can be charged with refusal to take breathalyzer test when driving incident occurs in motorists driveway. *Gentile v. Gill*, 560 A.2d 327 (R.I. 1989). Nondiscretionary automobile roadblocks to check for sobriety operate without probable cause or reasonable suspicion and thus violate Rhode Island constitution. *Pimental v. Department of Transportation*, 561 A.2d 1348 (R.I. 1989).

Certificate of self-insurance not a "policy" under R.I. Gen. Laws §27-7-2.1; requiring the mandatory provision of uninsured motorist protection. *Ellis v. RIPTA*, 586 A.2d 1055 (R.I. 1991).

Stolen or fire damaged vehicle report forms drafted by the State Police are available to all police departments, to be completed by owner of stolen or fire damaged vehicle, R.I. Gen. Laws §42-28-47.

Drunk driving, Additional Penalty. Third or subsequent conviction, court may order seizure and sale of violator's motor vehicle with proceeds paid to State's General Fund. R.I. Gen. Laws §31-27-2.

## AVIATION

Rhode Island has adopted the Uniform Aeronautical Regulatory Act. R.I. Gen. Laws §§1-4-1 to 20. Under the Act, proof that the aircraft was registered in a defendant's name is prima facie evidence that, at the time of the damage, the aircraft was being operated by someone for whose conduct the defendant is legally responsible. Absence of legal responsibility is an affirmative defense to be pleaded and proven by the defendant. R.I. Gen. Laws §1-4-3.

## BROKERS

See "AGENTS AND BROKERS."

## BURGLARY INSURANCE

No statutory regulation. Theft may be proved by circumstantial evidence, despite provision in policy that insured must give affirmative proof of loss under oath. *McDuff v. General Acc. Assur. Corp.*, 47 R.I. 172, 131 A. 548 (1925).

See "THEFT INSURANCE."

## CANCELLATION

Notice of cancellation must be clear, definite and unequivocal to be effective. *Automobile Club v. Donovan*, 550 A.2d 622 (R.I. 1988). Cancellation must be initiated by company and is to be distinguished from surrender. *Wells v. Great Eastern Cas. Co.*, 40 R.I. 222, 100 A. 395 (1917).

Assignee of mortgagee's contract of fire insurance has no authority to terminate mortgagor's contract without proper assignment thereof. *Osborne v. Pacific Ins. of N.Y.*, 91 R.I. 469, 165 A.2d 725 (1960).

Cancellation for fraud in application permitted, despite statute providing that matter represented shall contribute to contingency. *Wells v. Great Eastern Cas. Co.*, 40 R.I. 222, 100 A. 395 (1917).

Insurance regulation and auto policy provision providing effective cancellation upon proof of mailing notice to insured upheld as not against public policy, burden of proving notice is upon insurer. *Trotta v. Pono*, 116 R.I. 702, 360 A.2d 552 (1976). Where policy provides cancellation by mailing notice, notification is fulfilled by proof of mailing. *Larocque v. Rhode Island Joint Reins. Ass'n*, 536 A.2d 529 (R.I. 1988).

Insurer prohibited from canceling any type of coverage whatsoever solely because of area in which insured property is located. R.I. Gen. Laws §27-29-4.1.



Insurance company may refuse to renew a private passenger automobile policy where a chargeable loss occurrence exceeds five hundred dollars or there are more than two chargeable loss occurrences in one year. R.I. Gen. Laws §27-9-4 (b). However, such refusal to renew private passenger auto policy due to accident within annual policy year must be based on determination of fault on part of named insured. R.I. Gen. Laws §27-9-4. Notice of cancellation or renewal of fire insurance policy must be delivered in hand to named insured or left at last address or forwarded to said address by certified mail. R.I. Gen. Laws §27-5-3.4 (a).

### CHATTEL MORTGAGE

See also "FIRE INSURANCE."

Where mortgage contract between credit union and owners of automobile provided that in event credit union paid premium for automobile insurance, it would add such sums to outstanding balance of owner's loan. Credit union clearly intended to compute interest on any money expended in keeping insurance active. Interest due on any amount paid by credit union for insurance represented a valid consideration and converted credit union's promise to procure insurance into a binding contract. So that credit union's failure to keep policy from lapsing due to its failure to pay premium would be deemed a breach of contract, entitling automobile owners to assert a right of action which would offset any amount of money owing to credit union on their loan after automobile was destroyed. *East Providence Credit Union v. Geremia*, 239 A.2d 725, 103 R.I. 597 (1968). **CONSTRUCTION OF POLICY**

Policies are construed in accordance with law of state where issued. *Coderre v. Travelers' Ins. Co.*, 48 R.I. 152, 136 A. 305 (1927). When premium is paid and policy issued and accepted in Rhode Island, it is Rhode Island contract. *Keenan v. John Hancock Ins. Co.*, 50 R.I. 158, 146 A. 401 (1929). Applied to renewal of Massachusetts policy in Massachusetts. *Columbian Nat'l Life Ins. Co. v. Industrial Trust Co.*, 57 R.I. 325, 190 A. 13 (1937). In case of ambiguity, policy is generally construed most favorably to insured, *Textron, Inc. v. Aetna Cas. & Sur. Co.*, 638 A.2d 537 (R.I. 1994), and strictly as against insurer. *Jerry's Supermarket v. Rumford Ins.*, 586 A.2d 539 (1991).

Whenever insured claims policy is ambiguous, policy must be examined in its entirety and words used must be given their plain everyday meaning. *Mallone v. Holyoke Mut. Ins. Co.*, 658 A.2d 18 (R.I. 1995). *But cf.*, policy constitutes contract of adhesion. *Bush v. Nationwide Mut. Ins. Co.*, 448 A.2d 782 (1982). In absence of statutorily declared policy to contrary, parties to insur-

ance policy are free to contract as they desire. *Textron v. Liberty Mut. Ins. Co.*, 639 A.2d 1358 (1994).

Phrase "private automobile" construed strictly when used with phrase "passenger conveyance." *McGowan v. Connecticut Gen. Life Ins. Co.*, 110 R.I. 17, 289 A.2d 428 (1972); phrase "automobile . . . not furnished for regular use of . . . named insured," appearing in non-owned automobile definition, held ambiguous. *Ricci v. USF&G*, 110 R.I. 68, 290 A.2d 408 (1972).

Policy exclusion denying uninsured motorist coverage to an insured who has already obtained liability benefits from same policy does not contravene statute or public policy. *Union Ins. Co. of Providence v. Dubuc*, 1997 W.L. 625180 (R.I. 1997).

Policy with clause covering general hazard subject to specific exclusion, not ambiguous or inconsistent. *Crook v. Kalamazoo, Sales & Svc.*, 82 R.I. 387, 110 A.2d 266 (1954). Contractual limitation of action in policy is binding on insured despite absence of prejudice to insurer. *Donahue v. Hartford Fire Ins. Co.*, 110 R.I. 603, 295 A.2d 693 (1972).

"Basic property insurance" defined for purposes of Federal Riot Reinsurance Fund. R.I. Gen. Laws §27-33-10. Typical multiperil business insurance policy exclusion for electricity losses "taking place away from insured's premises" vague and unenforceable. *Jerry's Supermarkets v. Rumford Ins.*, 586 A.2d 539 (R.I. 1991); *Jerry's Supermarkets, Inc. v. Rhode Island Insurers' Insolvency Fund*, 692 A.2d 697 (R.I. 1997).

Under policy covering injuries from "use" of car while injured is "in or upon" car, person is "upon" car when placing hands and knees on car to stop it from rolling into wall, *Sherman v. New York Cas. Co.*, 78 R.I. 393, 82 A.2d 839 (1951). *But cf. Hollingworth v. American Guarantee*, 105 R.I. 693, 254 A.2d 438 (1969) (no coverage for patron at gas station not otherwise connected to automobile).

Policy requirement under uninsured motorist clause of physical contact between insured vehicle and uninsured motorist's vehicle is void as against policy inherent in uninsured motorist statute, R.I. Gen. Laws §27-7-2.1; *Pin Pin H. Su v. Kemper Ins. Co. and American Motorists Ins.*, 431 A.2d 416 (R.I. 1981); *Velino v. Commercial Union Assur.*, 431 A.2d 421 (R.I. 1981).

Failure of insured or injured party to provide timely notice of claim to insurer pursuant to terms of policy is fatal to injured party's subsequent claim against insurer. *Dixon v. American Reins. Co.*, 447 A.2d 85 (R.I. 1984). Family-exclusion clauses upheld in absence of statute to contrary. *Faraj v. Allstate Ins. Co.*, 456 A.2d 582 (R.I. 1984). Child family member, specifically excluded from



liability coverage under family exclusion clause of policy, held to be entitled to coverage under uninsured motorist provisions of her father's auto policy on ground that auto was uninsured as to child under family exclusion clause. *Faraj v. Allstate Ins. Co.*, 486 A.2d 582 (R.I. 1984). No recovery for decedent's parents under uninsured/underinsured motorist provision of mother's policy where decedent not a "resident" family member. *Barricelli v. American Univ. Ins. Co.*, 583 A.2d 1270 (R.I. 1990). Policy restriction limiting uninsured motorist coverage to accidents within United States valid. *Pollard v. Hartford Ins. Co.*, 583 A.2d 79 (R.I. 1990). Insurance contract's arbitration provision must be placed immediately before testimonium clause or signatures or else insured has option of compliance or not. R.I. Gen. Laws §10-3-2; *Pacheco v. Nationwide Mut. Ins. Co.*, 114 R.I. 575, 337 A.2d 240 (R.I. 1975).

### CONTRIBUTION

See "LIABILITY INSURANCE."

### DAMAGES

See Also "DEATH."

Damages for property damage measured as amount necessary to restore property as of date of damage when damage is temporary. *Tortolano v. DiFilippo*, 115 R.I. 496, 349 A.2d 48 (1975). When damage is permanent, diminution of value standard should be employed. *Greco v. Mancini*, 476 A.2d 522 (R.I. 1984).

Additur of \$50,000 approved in personal injury case where verdict of \$40,000 did not respond to merits. *Roberts v. Kettelle*, 116 R.I. 283, 356 A.2d 207 (1976).

Negligent infliction of mental distress is independent cause of action. Although showing of physical impact is not required, plaintiff must be related to victim, actually witness the incident and be aware of injuries and manifest physical symptoms resulting from emotional distress. *Marchetti v. Parsons*, 638 A.2d 1047 (R.I. 1994).

Causing wrongful death to unborn but full-term viable fetus prior to birth is compensable under wrongful death act. *Presley v. Newport Hosp.*, 117 R.I. 177, 365 A.2d 748 (1976). Nonviable five-week old fetus not a "person" for purposes of recovery under the wrongful death statute. *Miccolis v. Amica*, 587 A.2d 67 (R.I. 1991).

Interest on judgment computed at rate of 12% from date cause of action accrued to date of rendition of judgment. R.I. Gen. Laws §9-21-10. Prejudgment interest statute does not apply to judgment based on State Torts Claim Act. *Andrade v. State*, 448 A.2d 1293 (R.I. 1982). Prejudgment interest is appropriately awarded in

cases wherein the State is performing a proprietary function. *Matarese v. Dunham*, 689 A.2d 1057 (R.I. 1997). Frivolous appeal does not warrant additional prejudgment interest. *Martin v. Lumbermen's Mut.*, 559 A.2d 1028 (R.I. 1989).

Where defendant's liability insurer rejects written demand of plaintiff to settle within policy limit, it shall be liable for all interest due even where judgment and interest are in excess of policy coverage. R.I. Gen. Laws §27-7-2.2; *Assermely v. Allstate Ins.*, 728 A.2d 461 (R.I. 1999).

Consortium. Unemancipated minor may recover damages for loss of parental society and companionship; parents may recover for loss of minor child's society and companionship. R.I. Gen. Laws §10-7-1.2. Any loss of consortium claim, although an independent cause of action, is derivative in nature and subject to "per person" limitation in injured party's policy. *Allstate v. Pogorilich*, 605 A.2d 1318 (R.I. 1992). Recovery for loss of homemaker services permitted in suit for personal injuries. R.I. Gen. Laws §9-1-47.

Improper *lis pendens* is a slander of title which warrants punitive damages. *DeLeo v. Nunes*, 546 A.2d 1344 (R.I. 1988).

Award of damages must rest upon legally competent evidence and may not be product of speculation or conjecture; trial justice in non-jury trials must make specific findings of fact upon which he bases his decision. *White v. LeClerc*, 468 A.2d 289 (R.I. 1983); R.C.P. 52 (a). Direct action against insurer under §27-7-2 provides remedy to injured party only to extent of limits stated in policy, generally no interest over limits may be awarded. *Barber v. Canela*, 570 A.2d 670 (R.I. 1990). However, interest in excess of policy limits may be awarded where good faith settlement demand is rejected by insurance company. *Armacost v. Owen*, 11 F.3d 267 (1st Cir. 1993). Where insurer of defendant rejects plaintiff's demand, defendant can assign to plaintiff his bad faith claim against insurer. *Mello v. General Ins.*, 525 A.2d 1304 (R.I. 1987).

Insurer not required to indemnify injured parties for punitive damages assessed against its insured. *Allen v. Simmons*, 533 A.2d 541 (R.I. 1987). Punitive damages are generally allowed only when defendant has acted intentionally, maliciously or in bad faith. *Palmisano v. Toth*, 624 A.2d 314 (R.I. 1993). Whether a party is entitled to punitive damages is question of law for trial justice. *Id.* Successor corporation may be liable for award of punitive damages entered against predecessor corporation. *Douglas v. Bank of N.E.*, 566 A.2d 939 (R.I. 1990).

See also "LIABILITY INSURANCE, Bad faith."



## DEATH

See Law Digest Tables.

Wrongful Death. Statutory action where deceased would have had action for personal injuries. R.I. Gen. Laws §§10-7-1 to 10-7-5; *Hall v. Knudsen*, 535 A.2d 772 (R.I. 1988). Damages not considered as part of decedent's estate, but rather as awardable to prescribed beneficiaries. R.I. Gen. Laws §10-7-10; *Aetna Cas. & Sur. Co. v. Curley*, 585 A.2d 640 (R.I. 1991).

In addition to action for wrongful death created by R.I. Gen. Laws §10-7-1, executor or administrator of deceased may bring action for hospital, medical and other expenses incurred, including diminution of earning power until time of death and amount recovered shall go to decedent's estate and become part thereof. R.I. Gen. Laws §§10-7-5 to 10-7-8. Bar that furnishes intoxicants to driver who kills someone on roads may properly be named defendant in suit for wrongful death under Civil Damages Act. *Beaupre v. Boulevard Billiard Club*, 510 A.2d 415 (R.I. 1986). Rhode Island does not recognize the tort of social host liquor liability. *Ferreira v. Strack*, 652 A.2d 965 (R.I. 1995); *Marty v. Garcia*, 667 A.2d 282 (R.I. 1995). Release signed by driver before his death to settle suit against other motorist barred wrongful death action by driver's widow and son. *Hall v. Knudsen*, 535 A.2d 772 (R.I. 1988).

Measure of damages is prospective pecuniary loss to estate of deceased. *McCabe v. Narragansett Electric Co.*, 26 R.I. 427, 59 A. 112 (1904); *Romano v. Duke*, 111 R.I. 459, 304 A.2d 47 (1973). By statute, such pecuniary loss is considered as present value of gross prospective life expectancy income less decedent's prospective personal expenses. §10-7-1.1. Pecuniary damages include value of homemaker services R.I. Gen. Laws §10-7.1.1 (1). In making such calculation, means and personal habits are to be considered, and result is to be reduced to present value.

Recovery also permitted for decedent's suffering. R.I. Gen. Laws §10-7-7. Jury entitled to consider pension and social security income as part of pecuniary damages. *Pray v. Narragansett*, 434 A.2d 923 (R.I. 1981). Minimum recovery from person or corporation found liable is \$100,000. R.I. Gen. Laws §10-7-2, as amended. *Romano v. Duke*, 111 R.I. 459, 304 A.2d 47 (1973).

Limitation in death suits is 3 years after death, or within 3 years of discovery of wrongful act which caused death. R.I. Gen. Laws §10-7-2. Three (3) year statute of limitation on death action strictly construed. R.I. Gen. Laws §10-7-2; *Nascimento v. Phillips Petroleum*, 115 R.I. 395, 346 A.2d 657 (1975). Requirement under Wrongful Death Act, R.I. Gen. Laws §§10-7-1 to

10-7-4, that action for wrongful death be commenced within three years after death of deceased person should be construed as condition imposed upon right of action created by legislature and not merely as statute of limitations. *Short v. Flynn*, 118 R.I. 441, 374 A.2d 787 (1977).

Fact that calculation of damages may be highly speculative in death case is no bar to action or award. *Presley v. Newport Hosp.*, 117 R.I. 177, 365 A.2d 748 (1976). *But cf. Miccolis v. Amica*, 587 A.2d 67 (R.I. 1991). No requirement for institution of criminal proceedings against defendant as condition to maintaining civil action. R.I. Gen. Laws §10-7-9; *Foster v. De Andrade*, 88 R.I. 442, 149 A.2d 713 (1959).

Damages determinable as of date of death and not to be affected by remarriage of surviving spouse or other conditions arising thereafter. *Wiesel v. Cicerone*, 106 R.I. 595, 261 A.2d 889 (1970). 1981 amendment to R.I. Gen. Laws §10-7-2, changing limitations period in wrongful death actions from two years to three years is not retroactively applicable. *Westfall v. Whittaker, Clark & Daniels*, 571 F. Supp. 304 (D.R.I. 1983).

Decedent's personal representative may not recover wrongful death damages, which would go to decedent's only surviving child whose negligence was proximate cause of death. *Aetna v. Curley*, 585 A.2d 640 (R.I. 1990). Where spouse is not legally entitled to recover, wrongful death act permits recovery of benefits by a decedent's next of kin. *Commercial Union v. Pelchat*, 727 A.2d 676 (R.I. 1999).

## DISABILITY

See "ACCIDENT AND HEALTH INSURANCE."

## FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables; "Automobiles, Compulsory Coverage."

Person may not operate a vehicle on a public highway in Rhode Island if financial responsibility is not in effect with respect to the vehicle. R.I. Gen. Laws §§31-47-1 to 31-47-19. Vehicle owners and operators are required to have coverage per accident in the amount of \$25,000 for bodily injury or death of one person, \$50,000 for bodily injury or death of two or more persons and \$25,000 for destruction of property or a \$75,000 combined single limit. R.I. Gen. Laws §31-47-2. Owner is responsible for negligence of driver where consent has been given. R.I. Gen. Laws §31-33-6. Individuals involved in accidents are required to report accidents resulting in bodily injury, death or property damage exceeding \$500.00 within 10 days. R.I. Gen. Laws §31-33-1. Within twenty days of receipt of accident report, registry determines amount of security sufficient to



satisfy judgment unless operator or owner is exempt due to insurance. R.I. Gen. Laws §31-31-5. Failure to deposit security resulting in license suspension. R.I. Gen. Laws §31-31-9. Individuals who have been convicted of or have forfeited bail for certain motor vehicle offenses, or who have failed to pay judgments relating to motor vehicle accidents, are required to prove ability to respond in damages for liability in subsequent accidents in the amounts per accident of \$25,000 for bodily injury or death for one person, \$50,000 for bodily injury or death of two or more persons and \$25,000 for property damage or \$75,000 combined limit. R.I. Gen. Laws §31-32-2.

## FIRE INSURANCE

Appraisal and Arbitration. Upon failure of appraisal both parties are equally bound to try to secure another. *Messler v. Williamsburg Ins. Co.*, 42 R.I. 460, 108 A. 832 (1920). In case of total loss, appraisers are required to hold hearing and to permit parties to present evidence. *Gregory v. Pawtucket Mut. Ins. Co.*, 58 R.I. 434, 193 A. 508 (1937).

Mortgagee is not affected by act or negligence of mortgagor unless he had knowledge thereof and failed to act. *Riddell v. Rochester Ins. Co.*, 36 R.I. 240, 89 A. 833 (1914).

Award may be accepted in part. *Shepard v. Springfield Fire Ins. Co.*, 41 R.I. 403, 104 A. 18 (1918).

Award must be itemized. *Sauthof v. American Cent. Ins. Co.*, 34 R.I. 324, 83 A. 441 (1912).

Failure of insurer to demand appraisal within 60 days after filing of proof of loss is waiver of appraisal or arbitration as condition precedent to suit. *De Paola v. National Ins. Co., et al.*, 38 R.I. 126, 94 A. 700 (1915).

Failure of arbitration through no fault of insurer does not dispense with necessity of complying with condition of policy. *Grady v. Home Ins. Co.*, 27 R.I. 435, 63 A. 173 (1906).

Assignment. Recognized unless prohibited by policy. *Clark v. Allen*, 11 R.I. 439, 23 A.R. 496. Interest in policy may pass by will. *Sherman v. Howes*, 39 R.I. 26, 97 A. 16 (1916).

Binder. Oral contracts of insurance are recognized, but alleged contracts must contain all requisites. *Overton v. Washington Nat'l Ins. Co.*, 106 R.I. 387, 260 A.2d 444 (R.I. 1970).

Cancellation. See "CANCELLATION."

Chattel Mortgage. Encumbering insured property with chattel mortgage subsequent to issuance of policy renders policy voidable at option of insurer. *Inventasch v. Superior Ins. Co.*, 48 R.I. 321, 138 A. 39 (1927).

Friendly Fires. Fire escaping from furnace but burning nothing outside of furnace is friendly fire. *Solomon v. U.S. Fire Ins. Co.*, 52 R.I. 134, 165 A. 214 (1933). Cigarette falling from ash tray while burning is hostile fire. *Swering v. Connecticut Fire Ins. Co. et al.*, 55 R.I. 252, 180 A. 343 (1935).

Lien. Municipal lien on fire insurance proceeds where damage to dwelling by fire or other casualty is in excess of \$10,000. R.I. Gen. Laws §§45-47-1 to 45-47-10.

Mortgage Clause. Standard mortgage clause is separate contract with mortgagee. *Old Colony Co-op Bank v. Nationwide*, 114 R.I. 289, 332 A.2d 434 (R.I. 1975); *Peerless v. Bizier*, 653 A.2d 70 (R.I. 1995); such clause has effect of creating two separate insurance contracts; one with mortgagor and other with mortgagee. *Osborne v. Pacific Ins. Co. of N.Y.*, 91 R.I. 469, 165 A.2d 725 (1960). Mortgagee entitled to insurance, even though mortgagor is not entitled and repairs property. *Old Colony Bank v. Yorkshire Ins. Co., et al.*, 53 R.I. 439, 167 A. 111 (1933). Policy language stipulating one (1) year limitation on actions on fire policies applies equally to mortgagee, mortgagor and assignees. *Greater Providence Trust Co. v. Nationwide Mut.*, 116 R.I. 268, 355 A.2d 718 (1976).

Ownership. Policy is personal contract and not incident of ownership of insured property. *Hoxsie v. Providence Mut. Fire Ins. Co.*, 6 R.I. 517 (1860).

Proof of Loss. Generally required unless waived in writing. Late filing does not bar recovery in absence of insurer proving prejudice. *Siravo v. Great American Ins.*, 410 A.2d 116 (1980). Denial of liability is waiver of proof of loss. *Moran v. Commerce Ins. Co.*, 68 R.I. 56, 26 A.2d 533 (1942).

Submission to appraisal is not waiver of proof. *Fournier v. German-American Ins. Co.*, 23 R.I. 36, 49 A. 98 (1901).

Reformation. Policy may be reformed for mutual mistake. *Dubreuil v. Allstate Ins. Co.*, 511 A.2d 300 (R.I. 1986).

Severable Contracts. See "Mortgage Clause."

Smoke and Soot Damage. Not covered, if caused by friendly fire. *Solomon v. U.S. Fire Ins. Co.*, 55 R.I. 154, 165 A. 214 (1933).

Standard Provisions. Statutory form of policy. R.I. Gen. Laws §§27-5-1 to 27-5-11. Standard fire insurance policies, provisions of which were prescribed by Legislature, do not give rise to independent cause of action sounding in tort for bad faith. *A.A.A. Pool Svc. Supply v. Aetna Cas. & Sur. Co.*, 121 R.I. 96, 395 A.2d 724

(1978). In all other actions, insurer's bad faith refusal to settle claim may give rise to independent tort action for compensatory and punitive damages. *Bibeault v. Hanover Ins.*, 417 A.2d 313 (R.I. 1980).

Damage from nuclear risks excluded from coverage of statutory form of policy. R.I. Gen. Laws §27-5-3.1.

In absence of provision in standard form of policy, mortgagor's contract of insurance is not terminated by foreclosure of mortgage. *Osborne v. Pacific Ins. Co. of N.Y.*, 91 R.I. 469, 165 A.2d 725 (1960). In absence of provision in standard form of policy, change in insured's interest in insured property from owner to purchase money mortgagee does not void fire policy. *American Equity Assur. Co. v. Pioneer Coop. Fire Ins. Co.*, 100 R.I. 375, 216 A.2d 139 (1966).

In action on homeowners policy, breach of contract claim must be severed from bad faith claim. Insured must prevail on former as a matter of law before later claim is considered. *Corrente v. Fitchburg Mut.*, 557 A.2d 859 (R.I. 1989).

Fact that restaurant was temporarily used or occupied before construction completed, does not justify conclusion that restaurant was occupied within meaning of policy. *Water Street Development v. J.W. Corr Agency*, 539 A.2d 967 (R.I. 1988).

### FRAUD

See "AGENTS AND BROKERS"; "REPRESENTATIONS AND WARRANTIES."

### GUEST CASES

See "AUTOMOBILES."

### HOSPITALS

See also "MALPRACTICE".

Hospital has lien for medical or other service furnished person injured by accident not covered by workmen's compensation act, upon filing notice with city or town clerk and mailing copy to person liable. R.I. Gen. Laws §§9-3-4 to 9-3-8.

Rights of Patients. Specified, in part by statute. R.I. Gen. Laws §§23-16-19.1 to 23-16-20.

Statutory immunity of hospitals for negligent or malicious acts of their officers, agents or employees has now been abrogated by R.I. Gen. Laws §9-1-26.

### HUSBAND AND WIFE

See Law Digest Tables.

Obligations. Husband and wife have mutual obligation to pay necessary expenses incurred by the other. *Landmark Medical v. Gauthier*, 635 A.2d 1145 (R.I. 1994).

Right to Sue each other in Tort. Interspousal immunity abrogated with respect to all causes of action R.I. Gen. Laws §15-4-17.

Right to recover under policy. When determining whether innocent spouse can recover under fire policy, after other spouse commits intentional act which causes damage, issue is whether spouses' obligation to refrain from such conduct was joint or several. *Dolcy v. Rhode Island Joint Reins. Ass'n*, 589 A.2d 313 (R.I. 1991).

### INFANTS

See "AUTOMOBILES, Age"; "NEGLIGENCE, Age."

For release involving sum in excess of \$10,000 to be valid and binding as to rights of injured minor, it must be executed on minor's behalf by court appointed guardian ad litem and approved by court. *Julian v. Zayre Corp.*, 116 R.I. 518, 388 A.2d 813 (1978); R.I. Gen. Laws §33-15-1-1.

Standard of care as applied to children is that degree of care which children of same age, education and experience would be expected to exercise in similar circumstances. *Caparco v. Lambert*, 121 R.I. 710, 402 A.2d 1180 (1979).

Parent may be held liable for injuries caused to his or her unemancipated minor child by said parent's negligence. R.I. Gen. Laws §9-1-3.1.

Parents liable for torts of unemancipated minors up to \$1,500. R.I. Gen. Laws §9-1-3; *But see* R.I. Gen. Laws §12-19-33.

### INLAND MARINE

When no express or implied contract is formed between insured and insurer, insurer is not subject to liability for failure to secure rider for a standard policy that would provided coverage for otherwise excluded event. *Kenney Mfg. Co. v. Starkweather & Shepley, Inc.*, 643 A.2d 203 (R.I. 1994).

### LIABILITY INSURANCE

Bad faith. Liability insurers' bad faith refusal to settle may give rise to independent tort action and award of both compensatory and punitive damages, but not attorney fees. *Bibeault v. Hanover Ins. Co.*, 590 A.2d 398 (1991). To avoid bad faith liability, insurer may enter into a nonwaiver agreement to defend injured and later

question coverage or bring declaratory judgment action on questions of coverage. *Rumford Prop. & Liab. Co. v. Carbone*, 590 A.2d 398 (R.I. 1991). Decision codified by statute and reasonable attorney fees now recoverable. R.I. Gen. Laws §9-1-33. The language of §9-1-33 applies only to insurers and not to insurer's employees. *LeFranc v. Amica Mut. Ins. Co.*, 594 A.2d 382 (1991). Bad faith does not lie if there is reasonable basis for denial. *Bartlett v. John Hancock*, 538 A.2d 997 (R.I. 1988). Reliance on "ambiguous" policy exclusion is not unreasonable or basis for bad faith claim. *Pressman v. Aetna Cas.*, 574 A.2d 757 (R.I. 1990). In bad faith action, discovery of insurer's entire claim file not permitted until resolution of underlying breach of contract claim. *Bartlett v. John Hancock*, 538 A.2d 997 (R.I. 1988). Insured does not have a cause of action for insurer's bad faith refusal to pay a claim until insured establishes that insurer breached its duty under the contract of insurance. *Bartlett v. John Hancock*, 538 A.2d 997 (1988). Bad Faith claim against insurer assignable to injured claimant for limited purpose of collecting excess judgment over policy limits. *Mello v. General Ins.*, 525 A.2d 1304 (R.I. 1987).

Where defendant's liability insurer rejects written demand of plaintiff, it shall be liable for all interest due, even where judgment and interest total sum in excess of policy coverage. *Armacost v. Owen*, 11 F.3d 267 (1st Cir. 1993). R.I. Gen. Laws §27-7-2.2. An insurance company's fiduciary obligations include a duty to consider seriously a plaintiff's reasonable offer to settle within the policy limits. *Assermely v. Allstate Ins.*, 728 A.2d 461 (R.I. 1999).

Contribution between Joint Tortfeasors. Uniform act adopted. R.I. Gen. Laws §§10-6-1 to 10-6-11; actions for contribution must be commenced within one year after first payment made by joint tortfeasor which discharges common liability, or is more than his pro rata share thereof. R.I. Gen. Laws §10-6-4. The release of one joint tortfeasor does not discharge the other tortfeasors unless the release so provides, but reduces the claim against other tortfeasors in amount of consideration paid for release, or in any amount or proportion by which release provides that total claim shall be reduced if greater than the consideration paid. R.I. Gen. Laws §10-6-7. For act to apply, joint tortfeasors must be liable in tort for the same injury to claimant. *Lawrence v. Pokraka*, 606 A.2d 987 (R.I. 1992). In determining whether an occurrence between two or more parties is a common wrong, two important factors will be time at which each party acted or failed to act and whether a party had ability to guard against negligence of other party. *Wilson v. Kransnoff*, 560 A.2d 335 (1989).

Cooperation. Insured is bound by provision in automobile liability policy requiring him to cooperate with insurer to assist in settlements, to assist in getting evidence, and to give truthful statement in good faith so insurer is in position to determine whether to defend action or make settlement offer. *Oguansuada v. General Acc. Ins. Co. of Am.*, 695 A.2d 996 (R.I. 1994). Testimony varying from previous statements not breach of condition as matter of law. *Ciacco v. Norfolk & Dedham Mut. Fire*, 90 R.I. 379, 158 A.2d 277 (1960).

Coverage. Insurance company is required to reveal policy limits within 14 days of written request. R.I. Gen. Laws §27-7-5.

Dealer. If dealer loans car with his plates, then his coverage applies. But if dealer affixes driver's own plates and issues temporary registration, dealer is exempt from liability for operation. *Flanagan v. Pierce Chevrolet*, 410 A.2d 428 (R.I. 1980). Liability exemption afforded dealer who affixes driver's own plates cannot be circumvented by suing dealer's insurer directly instead of suing dealer. *Finck v. Aetna Cas. & Sur. Co.*, 432 A.2d 680 (R.I. 1981).

Notice. Compliance with automobile liability policy condition which requires written notice of an accident as soon as practicable after occurrence is a condition precedent to an insurer's liability. Timely notice is satisfied if insured acts diligently and with reasonable dispatch in light of all circumstances and facts of particular case. Whether additional insured under omnibus clause has reasonably met notice requirement, ignorance of coverage as well as diligence in determining whether coverage exists are relevant to determination. *Cinq Mars v. Travelers Ins. Co.*, 100 R.I. 603, 218 A.2d 467 (1966).

Source of notice to insurer is of no import if insurer was sufficiently informed of accident within reasonable time. *Sinclair Oil Corp. v. New Hampshire Ins. Co.*, 107 R.I. 469, 268 A.2d 281 (1970). Insurer must show prejudice. *Pennsylvania General Ins. v. Becton*, 475 A.2d 1032 (R.I. 1984).

Coverage. Coverage subject to duty to defend tort actions where complaint contains allegations potentially bringing case within risk coverage of policy. *Craven v. Metropolitan Prop. & Cas. Ins. Co.*, 693 A.2d 1022 (R.I. 1997). Where policy so provides, insurer need not defend a suit brought because of an incident which clearly occurred after the insured's off-premises operations have been "completed or abandoned." *Baker v. Maryland Cas. Co.*, 73 R.I. 411, 56 A.2d 920 (1948). Where plaintiff was four or five steps shy of entering parked vehicle when accident occurred, she was not getting in vehicle within definition of occupying under policy. *Gleason v.*



*Merchants Mut. Ins. Co.*, 589 F. Supp. 1474 (D.C.R.I. 1984).

Defense of Action. Assumption of defense without reservation estops insurer from disclaiming. *Humes Constr. Co. v. Philadelphia Cas. Co.*, 32 R.I. 246, 79 A. 1 (1911).

Obligation to defend. If allegations in complaint against insured bring injury complained of within coverage, insurer must defend, irrespective of insured's ultimate liability. *Hingham Mut. v. Heroux*, 549 A.2d 265 (R.I. 1988). Duty to defend suit against insured is broader than duty to indemnify and its existence is not dependent on whether injured party will prevail against insured. *Employer's Fire Ins. Co., v. Beals*, 103 RI 623, 240 A.2d 397 (1968). If conflict of interests arises between insured and insurer, insured may decline insurer's attorney and choose independent counsel subject to reasonable approval of insurer, cost of such independent counsel to be borne by insurer. *Employers Fire Ins. Co. v. Beals*, 103 R.I. 623, 240 A.2d 397 (1968). Insurer, while relying on allegations in determining whether to defend, may nevertheless become liable to pay judgment if evidence shows unintentional harm notwithstanding intentional act. *Angelone v. Union Mut. Ins. Co.*, 113 R.I. 230, 319 A.2d 344 (1974). An insurer which refuses to defend its insured may subsequently be obligated to pay damages or settlement assessed against insured in addition to costs of defense and attorneys fees. *Conanicut Marine Svcs., Inc. v. Insurance Co. of North Am.*, 511 A.2d 967 (R.I. 1986).

Insurer not liable to defend claim arising out of assault and battery personally committed by insured. *Thomas v. American Univ. Ins. Co.*, 80 R.I. 129, 93 A.2d 309 (1952). Allegations that physicians revealed patient's blood alcohol level to public without consent causing emotional distress are potentially within coverage of medical malpractice policy and may trigger duty to defend. *Mellow v. M.M.J.U.A.*, 567 A.2d 367 (R.I. 1989). Intent to cause harm and injury will be inferred in case involving child sexual molestation relieving insurer of duty to defend and indemnity whether policy contains intentional act exclusion provision. *Peerless Ins. Co., v. Viegas*, 667 A.2d 785 (1995).

Insurer not obligated to pay, in excess of policy limits, pre-judgment interest imposed by statute, *Factory Mut. Liab. Ins. Co. of Am. v. Cooper*, 106 R.I. 632, 262 A.2d 370 (1970), unless it arbitrarily and unnecessarily exposes its insured to liability in excess of the policy coverage; such as where insurer refuses to pay face value of policy in settlement. *Etheridge v. Atlantic Mut.*, 480 A.2d 1341 (R.I. 1984).

Jury. Mere mention of insurance coverage during course of trial does not constitute per se grounds for passing case. *Cochran v. Dube*, 114 R.I. 149, 330 A.2d 76 (1975). Where reference to liability insurance is made at trial, it is duty of trial justice to issue cautionary instruction and to determine whether jury can reasonably be expected to disregard such reference. *Lewis v. Allard*, 108 R.I. 534, 277 A.2d 744 (1971); *Mattos v. Patriarca*, 111 R.I. 475, 304 A.2d 355 (1973). However, intentional mention of insurance by plaintiff with object to prejudice jury against defendant ordinarily warrants passing case. *Lavigne v. Ballantyne*, 66 R.I. 123, 17 A.2d 845 (1941).

Loading and unloading provision of omnibus clause. "Complete Operation" doctrine adopted. The entire operation of moving goods between the vehicle and place to which they are being delivered is included in addition to the immediate removal of the goods from the vehicle. *Cinq-Mars v. Travelers*, 100 R.I. 603, 218 A.2d 467 (1966); *Sinclair Oil Corp. v. New Hampshire Ins. Co.*, 107 R.I. 469, 268 A.2d 281 (1970).

Towing. Towing is a contemplated "use" of a vehicle falling within the parameters of an omnibus clause in an automobile policy. *Mullins v. Federal Dairy Co.*, 568 A.2d 759 (R.I. 1990).

Medical Pay Coverage. Held to extend to reasonable medical expenses incurred for wife of named insured sustained while occupant of insured's vehicle. *Nagy v. Lumbermen's Mut.*, 100 R.I. 734, 219 A.2d 396 (1966).

Reformation. Policy may be reformed for mutual mistake. *Hunt v. Century Indem. Co.*, 58 R.I. 336, 192 A. 799 (1937); *Hopkins v. Equitable Life Assur. Soc'y*, 107 R.I. 679, 270 A.2d 915 (1970).

Rights of injured party against Insurer. May sue insurer if insured cannot be found. R.I. Gen. Laws §§27-7-1, 27-7-2. Injured person must make "good faith" effort to find insured without success before he is entitled to bring action against insurer. *Goodman v. Turner*, 512 A.2d 861 (R.I. 1986). Insurer also directly amenable to suit by injured party if resident insured dies before suit (absent probate proceedings), where non-resident insured dies before suit, or where insured defendant dies prior to judgment. R.I. Gen. Laws §27-7-2. Direct action against insurer of tortfeasor by injured party is allowed when that tortfeasor has filed for bankruptcy so long as injured party cannot recover in excess of available coverage. R.I. Gen. Laws §27-7-2.4; *Giroux v. Purington Bldg. Systems Inc.*, 670 A.2d 1227 (R.I. 1996). Statute applies only to Rhode Island policies. *Coderre v. Travelers Ins. Co.*, 48 R.I. 152, 136 A. 305 (1927). Statute permitting substitution of insurer allows substitution when insured dies and suit is pending despite fact that



one spouse survived and liability was joint. *Chalou v. Lapierre*, 443 A.2d 1241 (R.I. 1982).

Uninsured motorist coverage. Insurer to make uninsured motorist coverage available in equal amount to bodily injury liability limits. R.I. Gen. Laws §27-7-2.1 (A). Insured's one rejection, at least ten years old, of uninsured motorists coverage is insufficient to satisfy requirement that insurer offer such coverage. *American Universal Ins. Co. v. Russell*, 490 A.2d 60 (R.I. 1985). Arbitration clause when not placed immediately before testimonium clause is enforceable solely at insured's option, in which event it becomes insured's exclusive remedy under such coverage. R.I. Gen. Laws §10-3-2. Tortfeasor is "uninsured motorist" to extent that coverage in effect at time of accident was less than statutory minimum of \$25,000. *Allstate Ins. Co. v. Fusco*, 101 R.I. 35, 223 A.2d 447 (1966); *Ziegelmayr v. Allstate Ins. Co.*, 121 R.I. 818, 403 A.2d 653 (1979). Underinsured motorist added to definition of uninsured motorist for purposes of statutory mandated coverage. R.I. Gen. Laws §27-7-2.1 (g). To maintain UM action, claimant must prove his damages exceed tortfeasor's liability limits. *General Accident Ins. Co. v. Cuddy*, 658 A.2d 13 (1995). Uninsured motorist coverage applicable if tortfeasor's insurer becomes insolvent subsequent to accident. R.I. Gen. Laws §27-7-2.1, abrogating rule in *Fagnant v. Pacific Ins. Co. of N.Y.*, 107 R.I. 709, 270 A.2d 919 (1970); *Falco v. Rhode Island Insurers' Insolvency Fund*, 690 A.2d 332 (R.I. 1997). Insurer held to statutory minimum for uninsured motorist coverage and exclusion reducing coverage in proportion to coverage from collateral sources is void. *Aldcroft v. Fidelity & Cas. Co. of N.Y.*, 106 R.I. 311, 259 A.2d 408 (1969). Coverage from collateral sources may be deducted insofar as it represents a double recovery. *Poulos v. Aetna*, 119 R.I. 409, 379 A.2d 362 (1977). Arbitration provision allowing jury trial if award is greater than \$25,000 void as against public policy. *Pepin v. American Universal, Ricci v. INA*, 540 A.2d 21 (R.I. 1988).

Stacking. Stacking permitted, irrespective of policy language, where insured has paid two or more premiums for U.M. coverage in a single policy. R.I. Gen. Laws §27-7-2.1 (i). Where insured pays two premiums for uninsured motorist coverage on two vehicles then insured can recover up to aggregate sum of coverage of such vehicles. *Taft v. Cerwonka*, 433 A.2d 215 (R.I. 1981). See also *Cardoso v. Nationwide Mut. Ins. Co.*, 659 A.2d 1097 (R.I. 1995). Whether a policy effectively prohibits stacking depends on the reasonable expectations of the insured. *Constant v. Amica*, 497 A.2d 343 (R.I. 1985). A policy which prohibits stacking should be upheld because, by insuring additional vehicles, an insurer assumes greater risk. *Lemoi v. Nationwide Mut. Ins. Co.*,

453 A.2d 758 (R.I. 1982); *Mancini v. Utica Mut. Ins. Co.*, 653 A.2d 727 (R.I. 1995).

Insured could not stack added death benefit provided under policy of vehicle not involved in collision. *Pacitti v. Nationwide*, 626 A.2d 1284 (R.I. 1993).

Automobile insurers, each of which included provision in policy limiting liability for damages incurred as result of negligence of uninsured motorist to \$10,000, were not entitled to share in proceeds of safety responsibility bond posted by uninsured motorist tortfeasor until insured's loss was fully paid. *Lombardi v. Merchants Mut. Ins. Co.*, 429 A.2d 1290 (R.I. 1981). Term "hit and run", as used in uninsured motorist statute is used to describe motorist who has caused, or contributed to, accident and flees without being identified; physical contact is not essential part of definition. *Pin Pin H. Su v. Kemper Ins. and American Motorists Ins. Co.*, 431 A.2d 416 (R.I. 1981). See also, *Velino v. Commercial Union Assur. Co.*, 431 A.2d 421 (R.I. 1981). Insurer shall notify policy holder of availability of med pay coverage and include med pay coverage on renewal policies when coverage is requested by insured in writing. R.I. Gen. Laws §27-7-2.5.

Extraterritorial coverage clause of automobile liability policy automatically extended limits of policy to amount required by Motor Vehicle Safety Responsibility Act. *Amick v. Liberty Mut. Ins. Co.*, 455 A.2d 793 (R.I. 1983). Extraterritorial policy coverage exclusion upheld where insured injured by London motorist. *Pollard v. Hartford*, 583 A.2d 79 (R.I. 1990).

Tortfeasor's failure to carry minimum automobile liability insurance required by statute is condition precedent to injured insured's recovery under uninsured motorist provisions of policy. *Ziegelmayr v. Allstate Ins. Co.*, 403 A.2d 653 (R.I. 1979). But see *Blais v. Aetna Cas. & Sur. Co.*, 526 A.2d 854 (1987).

#### LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

R.I. Gen. Laws, §9-1-36 enumerates the statutes of limitation for most causes of action.

Limitation of actions for personal injury is three (3) years. R.I. Gen. Laws §9-1-14. Actions arising under R.I. Gen. Laws 9-1-2, which gives persons injured as result of a crime or offense the right to bring action, follows the three year statute of limitations for personal injury. *Lyons v. Town of Scituate*, 554 A.2d 1034 (R.I. 1989). Similarly, claims brought against nonperpetrator-defendants for injuries from childhood sexual abuse fall under the three (3) year statute of limitations of R.I. Gen.



Laws §9-1-14(b). *Kelly v. Marcantonio*, 678 A.2d 873 (R.I. 1996). Claims arising from auto accidents must be brought within three (3) years of the accident. *Benner v. J.H. Lynch & Sons*, 641 A.2d 332 (R.I. 1994).

Where a plaintiff brings a products liability action for alleged personal injuries, the three (3) year limitation of R.I. Gen. Laws §9-1-14 applies, not the ten (10) year of R.I. Gen. Laws §9-1-13. *Nappi v. John Deere & Co.*, 717 A.2d 650 (R.I. 1998). The statute of limitation set forth in R.I. Gen. Laws §9-1-13(b), barring any action against manufacturer for injuries caused by a defective product unless said action is commenced within ten (10) years after product was first purchased for use or consumption, is unconstitutional because it violates the fundamental guarantee of access to courts protected by Art. I, §5 of Rhode Island Constitution. *Kennedy v. Cumberland Eng'r Co.*, 471 A.2d 195 (R.I. 1984); see also *Burke v. Bayerische Motoren Werke Aktiengesellschaft*, 471 A.2d 206 (R.I. 1984).

Statute of limitation for actions based on strict liability does not begin to run until damage occurs for which recovery is sought. *Romano v. Westinghouse Elec. Co.*, 114 R.I. 451, 336 A.2d 555 (1975). Whether due diligence was exercised by plaintiff in bringing defendant before the court in a John Doe complaint for purposes of tolling the statute of limitations is a question of fact. *Hall v. Insurance Co. of North Am.*, 666 A.2d 805 (R.I. 1995).

In a drug product-liability action where manifestation of injury, cause of that injury, and person's knowledge of wrongdoing by manufacturer occur at different points in time, accrual of statute of limitation begins when person discovers, or with reasonable diligence should have discovered, wrongful conduct of manufacturer. Plaintiff's conduct in discovering cause of action will be judged by both objective and subjective standard. *Anthony v. Abbott Labs.*, 490 A.2d 43 (R.I. 1985).

Limitation period for actions against architects, professional engineers, contractors, sub-contractors and materialmen for defects in construction is ten (10) years after substantial completion of construction. R.I. Gen. Laws §9-1-29. See *Leeper v. The Hillier Group*, 543 A.2d 258 (R.I. 1988) (architect); *Qualitex v. Coventry Realty*, 557 A.2d 850 (R.I. 1989) (manufacturer).

Actions for legal malpractice are governed by R.I. Gen. Laws §9-1-14.3, which provides a three (3) year statute of limitations.

Limitation of action for medical malpractice is three (3) years from time of alleged occurrence, or within three (3) years of time that malpractice should, in exercise of reasonable diligence, have been discovered. R.I. Gen. Laws §9-1-14.1. Where a medical malpractice

action was brought on behalf of a minor, minor could not add new defendant more than seven (7) years after the occurrence. *Dowd v. Rayner*, 655 A.2d 679 (R.I. 1995). A plaintiff does not necessarily need the assistance of an expert to discover medical malpractice, nor is the determination of the discovery date in a case necessarily a question of fact for the jury. *Ashey v. Kupchan*, 618 A.2d 1268 (R.I. 1993).

Statute of limitations in cases involving improvements to real property begins to run when evidence of injury to property is sufficiently significant to alert injured party to possibility of defect. *Boghossian v. Ferland Corp.*, 600 A.2d 288 (R.I. 1991).

Four (4) year statute of limitations in U.C.C. is available to plaintiff only if there is buyer - seller relationship between plaintiff and defendant. *Plouffe v. Goodyear Tire & Rubber Co.*, 118 R.I. 288, 373 A.2d 492 (1977).

The tort of intentional interference with a contract is a property interest created by contract and is subject to ten (10) year statute of limitations. *McBurney v. Roszkowski*, 687 A.2d 447 (R. I. 1997).

Rhode Island's Wrongful Death Act created new right of action and no exception to time limitation is permitted. *Westfall v. Whittaker, Clark & Daniels, Metropolitan Talc Co.*, 571 F. Supp. 304 (D.R.I. 1983). Limitation of action for wrongful death is three (3) years from time wrongful act, neglect or default is discovered or in the exercise of reasonable care, should have been discovered. R.I. Gen. Laws §10-7-2.

Action may be commenced for or against a deceased person for a cause of action which has accrued and for which the applicable statute of limitations had not run prior to said person's decease or within sixty (60) days thereafter. Such action must be brought no more than one (1) year after appointment of the estate's executor or administrator and within three (3) years of date of death. R.I. Gen. Laws §9-1-21.

Statute of limitations may be tolled while a person is under a legal disability caused by unsound mind, imprisonment, absence from country or infancy. R.I. Gen. Laws §9-1-19. Although statute of limitations is designated as an affirmative defense in R.I. Super. Ct. R. Civ. P. 8(c), modern practice permits it to be raised by a motion to dismiss where the defect appears on the face of the complaint. *Young v. Park*, 116 R.I. 568, 359 A.2d 697 (1976). R.I. Gen. Laws §9-1-19, as the general disability tolling statute, does not affect or supersede the provisions of §9-1-14.1 which addresses the effects of disabilities on limitations of actions for malpractice.



Under the Rhode Island Savings Statute, R.I. Gen. Laws §9-1-22, applicable statutes of limitations are not tolled by actions filed in another state. *Goyette v. Suprenant*, 622 A.2d 1001 (R.I. 1993).

A plaintiff cannot implead a third party defendant after the applicable limitations period has run. *Laliberte v. Providence Redevelopment Agency*, 108 R.I. 420, 288 A.2d 502 (1973); *Silva v. Home Indem. Co.*, 416 A.2d 664 (R.I. 1980).

Injured party's attempt to add a new party defendant does not relate back so as to avoid effect of statute of limitations where it is apparent that injured party's delay was result of conscious election to pursue action only against original defendant. *Peloso v. Rhode Island Sand & Gravel Co., Inc.*, 114 R.I. 232, 330 A.2d 900 (1975). For an amendment adding a defendant to relate back, the plaintiff must establish that the defendant knew or should have known that it would have been named originally but for a mistake in order for amendment to relate back to the original complaint. *Grande v. Almacs, Inc.*, 623 A.2d 971 (R.I. 1993).

An adult's loss of consortium claim cannot relate back to spouse's claim so as to avoid the applicable statute of limitations. *Normandin v. Levine*, 621 A.2d 713 (R.I. 1993). The "party changing" relation-back provisions of Rule 5(c) of the Super. Ct. R. Civ. P. generally apply only to the addition or substitution of defendants. *Balletta v. McHale*, 823 A.2d 292 (R.I. 2003).

Liability of an employer in the negligent supervision or hiring of an unfit employee is an entirely separate and distinct basis from the liability of an employer under the doctrine of respondent superior such that the relation back doctrine of R.I. Super. Ct. R. Civ. P. 15(c) cannot be invoked to permit amendment to complaint. *Mainella v. Staff Builders Industrial Svc.*, 608 A.2d 1141 (R.I. 1992).

The right of an insurer to recover amounts paid under U.M.B.I. policy from owner of uninsured vehicle is based on its subrogation to rights of its insured. Therefore, such actions are governed by the statute of limitations for the underlying claim, which may not be extended by rule allowing joinder of third party defendant for contribution. *Silva v. Home Indem. Co.*, 416 A.2d 664 (R.I. 1980) (Three year statute of limitations for personal injury claim applicable); *Hawkins v. Gadoury*, 713 A.2d 799 (One year statute of limitations for contribution/indemnity claim applicable (begins to run from date of payment)). Insured has no duty to bring an action against an uninsured motorist in order to protect insurer's subrogation rights. *Aetna Cas. & Sur. Co. v. Sulivan*, 607 A.2d 879 (R.I. 1992).

A limitation of action contained in an insurance policy, if reasonable, is binding on insured despite absence of prejudice to insurer. *Donahue v. Hartford Fire Ins. Co.*, 110 R.I. 603, 295 A.2d 693 (1972).

Settlement negotiations can bring on estoppel if accompanied by statements or conduct calculated to lull claimant into reasonable belief that case will be settled without suit. *Gagner v. Strekouras*, 423 A.2d 1168 (R.I. 1980). To establish estoppel, a plaintiff must show either that he had been assured settlement would be reached or that the insurer intentionally prolonged negotiations to cause him to let the limitation period run. *Hay v. Pawtucket Mut. Ins. Co.*, 824 A.2d 458 (2003).

## MALPRACTICE

Medical Malpractice Reform Act declared unconstitutional in its entirety as violative of equal protection clause of Fourteenth Amendment of the U.S. Constitution. *Boucher v. Sayeed*, 459 A.2d 87 (R.I. 1983); *Joseph v. Sage*, 459 A.2d 87 (R.I. 1983). Provision of confidentiality of Health Care Information Act (§5-37.3-6), exempting confidential health care information from compulsory legal process, declared unconstitutional as violative of Separation of Powers mandated by Art. 3 of Rhode Island Constitution and Art. 1, §5 guaranteeing right to justice to all persons. *Bartlett et al v. Danti*, 503 A.2d 515 (R.I. 1986). Privileged Communications Act, R.I. Gen. Laws §9-17-24, declared unconstitutional as violative of Separation of Powers mandated by Art. 3 of Rhode Island Constitution and Art. 1, §5 of the Rhode Island Constitution which guarantees right to justice to all persons. *State v. Almonte*, 644 A.2d 295 (R.I. 1994).

If physician, as aid to diagnosis, does not avail himself of all of scientific means and facilities available to him, such is evidence of negligence. *Schenck v. Roger Williams Gen. Hosp.*, 119 R.I. 510, 382 A.2d 514 (1977).

Physician liable in wrongful death for malpractice resulting in death of a viable fetus immediately before birth. *Presley v. Newport Hosp.*, 117 R.I. 177, 365 A.2d 748 (1976).

Provision in professional liability insurance contract making insurance applicable to events preceding date of contract only if suit brought or claim made during currency of policy (i.e. "discovery" provisions) does not violate public policy. *Gereboff v. Home Indem. Co.*, 383 A.2d 1024 (R.I. 1978).

Insurer shall have contractual right to settle any claim up to limits of policy without insured's consent. R.I. Gen. Laws §42-14-2.1, as amended by P.L. 1986, Ch. 350.



Limitation of action for medical malpractice is three years from time of alleged occurrence, or within three years of time that medical malpractice should, in exercise of reasonable diligence, have been discovered. R.I. Gen. Laws §9-1-14.1. This reasonable diligence standard for the running of the statute of limitations applies to a plaintiff's investigation of who may have exposure to liability. *Dionne v. Baute*, 589 A.2d 833 (R.I. 1991). A layman may be able to discover medical malpractice without assistance of an expert. *Ashley v. Kupchan*, 618 A.2d 1268 (R.I. 1993).

Even if party moves to compel production of "peer review board" documents court is prohibited by R.I. Gen. Laws §23-17-25 from granting that motion. *Cofone v. Westerly Hosp.*, 504 A.2d 998 (R.I. 1986).

However, imposition of restriction of privileges or requirement of supervision imposed on physician for unprofessional conduct shall be subject to discovery and admissible in proceeding against physician for performing or health care facility which allows said physician to perform medical procedures which are subject of such restriction. R.I. Gen. Laws §23-17-25.

In medical malpractice actions there is an exception to collateral source rule. R.I. Gen. Laws §9-19-34.1.

Failure of health care provider to bill for professional services is inadmissible in medical malpractice case. R.I. Gen. Laws §9-19-35.

So long as a physician exercised reasonable prudence in reaching decisions which are within the standard of care, liability cannot be imposed merely because, in retrospect, the decision turned out to be wrong. *DiFranco v. Klein*, 657 A.2d 510 (R.I. 1995).

Rhode Island has adopted the national standard of care. *Sheely v. Memorial Hosp.*, 710 A.2d 161 (R.I. 1998).

Residents are to be held to the same standard of care as licensed physicians. *Baccari v. Donat*, 741 A.2d 262 (R.I. 1999).

Rhode Island has adopted the "emergency exception" to the duty to obtain informed consent. *Miller v. Rhode Island Hosp.*, 625 A.2d 778 (R.I. 1993).

In cases of informed consent, the court has stated that it is not necessary that a physician tell the patient any and all of the risks and dangers of a proposed procedure. Materiality is to be the guide. Materiality is the significance a reasonable person, in what the physician knows or should know is this patient's position, would attach to the disclosed risk in deciding whether to submit or not submit to the surgery or treatment. *Lauro v. Knowles*, 739 A.2d 1183 (R.I. 1999).

A person possessing expertise in a subject by virtue of knowledge, skill, training, education, or experience may express an expert opinion on that subject. Witness does not have to practice the same specialty as the defendant. *Flanagan v. Wesselhoeft*, 712 A.2d 365 (R.I. 1998).

Rhode Island has adopted the theories of apparent authority and corporate negligence for hospitals. *Rodriguez v. The Miriam Hosp.*, 623 A.2d 456 (R.I. 1993).

## NEGLIGENCE

**Assumption of Risk.** Court must discern from evidence whether plaintiff voluntarily exposed himself to known and appreciated danger. Standard is subjective and keyed to what injured party in fact sees, knows, understands and appreciates. *Filosa v. Courtois Sand & Gravel*, 590 A.2d 100 (R.I. 1991). If plaintiff has voluntarily elected one of number of alternatives, he will be held to have assumed risks attending choice of such alternative if other conditions of assumption of risk doctrine are present. *Rickey v. Boden*, 421 A.2d 539 (R.I. 1980); *Drew v. Wall*, 495 A.2d 229 (R.I. 1985).

**Attractive Nuisance.** Restatement, Torts Second §339 view adopted. *Haddad v. First National Stores, Inc.*, 109 R.I. 59, 280 A.2d 93 (1971). Foreseeability is a critical factor in determining what constitutes an attractive nuisance. *Bateman v. Mello*, 617 A.2d 877 (R.I. 1992).

**Charitable Corporation.** The doctrine of charitable immunity has long been rejected in Rhode Island. *Brown v. Church of the Holy Name*, 105 R.I. 322, 252 A.2d 176 (1969).

**Comparative Negligence.** Doctrine applicable by statute. R.I. Gen. Laws §9-20-4. Comparative negligence statute does not abrogate defense of assumption of risk. *Kennedy v. Providence Hockey Club*, 119 R.I. 70, 376 A.2d 329 (1977).

**Conflicts of Law.** Doctrine of *lex loci delicti* abandoned in tort cases in favor of interest-weighting approach. *Cribb v. Augustyn*, 696 A.2d 285; *Woodward v. Stewart*, 104 R.I. 290, 243 A.2d 917 (1968); *Berardi U.S.A. v. Employers Mut. Cas. Co.*, 526 A.2d 515 (1987). Thus, interest weighting is done even where tort causes damage to real property, *Cribb v. Augustyn*, 696 A.2d 285.

**Contribution between Joint Tortfeasors.** Uniform act adopted. R.I. Gen. Laws §§10-6-1 to 10-6-11. Actions for contribution must be commenced within one year after first payment made by joint tortfeasor which discharges common liability, or is more than his pro rata share thereof. R.I. Gen. Laws §10-6-4.



Comparative Negligence. Effective only for purpose of diminishing amount of recovery in proportion to extent of such negligence. R.I. Gen. Laws §9-20-4. Trial justice can use additur and remittur to correct jury's assessment of liability in comparative negligence situation. *Cotrona v. Johnson & Lualer*, 501 A.2d 728 (R.I. 1985); *Gardiner v. Schobel*, 521 A.2d 1011 (R.I. 1987).

Damages. Required to be assessed by jury in cases of default and submission, unless cause shown. Plaintiff may waive intervention of jury. R.I. Gen. Laws §9-20-2.

Tortfeasor not entitled to credit for amounts received by injured party from collateral sources. *Colvin v. Goldenberg*, 101 R.I. 338, 273 A.2d 663 (1971); *Moniz v. Providence Chain Co.*, 618 A.2d 1270 (R.I. 1993).

Imputed Negligence. Member of unincorporated association cannot maintain negligence action against it as the negligence of the association is imputed to plaintiff-member. *Walsh v. Israel Couture Post, No. 2274 V.F.W. of the U.S.*, 542 A.2d 1094 (R.I. 1988).

Infants. Child born alive has right of action against tortfeasor for pre-natal injuries, regardless of viability at time of injury. *Sylvia v. Gobeille*, 101 R.I. 76, 220 A.2d 222 (1966). Infant may recover damages for loss of parental society and companionship. R.I. Gen. Laws §10-7-1.2. No right of action lies for five-week old non-viable fetus which dies ventre sa mere. *Miccolis v. Amica*, 587 A.2d 67 (R.I. 1991).

Interest on Judgment. Computed at rate of 12% from date cause of action accrued to date of rendition of Judgment. Past judgment interest shall be calculated at a rate of 12% and shall accrue on both the principal and the prejudgment interest. R.I. Gen. Laws §9-21-10.

Invitee, licensee, trespasser. Distinction abolished insofar as degree of care owed by land owner in lieu thereof is substituted issue as to whether landowner has used reasonable care for safety of all persons reasonably expected to go upon premises. *Marioenzi v. DiPonte*, 114 R.I. 294, 333 A.2d 127 (1975). Holding in *Marioenzi* departed from in regard to trespassers. Landowners owe trespassers no duty save to refrain from willful or wanton injury. *Tantimonico v. Allendale Mut. Ins. Co.*, 637 A.2d 1056 (R.I. 1994); *But cf. King v. Narragansett Elec. Co.*, 1995 W.L. 941391 (R.I. Super. 1995).

Negligence. "Firefighter's rule" applies in Rhode Island. *Mignone v. Fieldcrest Mills*, 556 A.2d 35 (R.I. 1989); *Labrie v. Pace Membership Warehouse, Inc.*, 678 A.2d 867 (R.I. 1996). Such rule applies also to police officers. *Smith v. Tully*, 665 A.2d 1333 (1995); *Aetna v. Viera*, 619 A.2d 436 (R.I. 1993); *Peerless Ins. Co. v. Nault*, 701 A.2d 320 (R.I. 1997). Same does not apply

when alleged tortfeasor is employer. *Kaya v. Partington*, 681 A.2d 256 (R.I. 1996).

Landlord and Tenant. Landlord is liable to tenant and others on premises by tenant's consent for latent or hidden defect existing at time of letting and known to landlord but not to tenant, etc. *Monti v. Leand*, 108 R.I. 718, 279 A.2d 743 (1971); *Ward v. Watson*, 524 A.2d 1108 (R.I. 1987). Landlord may be sued in tort for breach of covenant to repair, and this covenant extends to all persons who are lawfully on premises. *Givens v. Union Invest. Corp.*, 116 R.I. 539, 359 A.2d 40 (1976). Landlord has no statutory or common law right of indemnity against doctors in third party action by landlord against doctors for contribution and indemnity arising out of a slip and fall on landlord's premises. *Krasnoff v. Singsen*, 560 A.2d 335 (R.I. 1989).

Last Clear Chance Doctrine. Doctrine is recognized. For doctrine to apply, there must be a showing that defendant has an existing opportunity after he becomes aware of plaintiff's peril to avert the consequences of his negligence and he fails to exercise that opportunity. *Cinq-Mars v. Standard Cab Co.*, 103 R.I. 103, 235 A.2d 81 (1967).

Physical impact not requisite to recovery for mental and emotional harm accompanied by physical symptoms which directly results from negligence of another such as where nonnegligent mother witnesses death of child. *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975).

Proximate Cause Doctrine. Doctrine is recognized. Leaving unlocked vehicle with key in ignition is not concurrent proximate cause of injuries caused by thief in subsequent collision. *Keefe v. McArdle*, 109 R.I. 90, 280 A.2d 328 (1971). Proximate cause distinguished from past condition or circumstance in *Roberts v. Kettelle*, 116 R.I. 283, 356 A.2d 207 (1976).

Negligent infliction of emotional distress requires physical manifestation for recovery by parents of brain damaged child. *Reilly v. United States*, 547 A.2d 894 (R.I. 1988).

Negligence not presumed from mere happening of accident. *Coia v. Eastern Products Co.*, 85 R.I. 128, 127 A.2d 858 (1956); *Konicki v. Lawrence*, 475 A.2d 208 (R.I. 1984). Passive negligence (non-liability producing) and active negligence distinguished. *Mailloux v. Steve Soucy Construction Co., Inc.*, 116 R.I. 348, 356 A.2d 493 (1976).

Res Ipsa Loquitur—Evidentiary Rule as expressed in Restatement Second Torts adopted and exclusive control requirement rejected. *Parrillo v. Giroux Co., Inc.*, 426 A.2d 1313 (R.I. 1981).



Parents liable for wilful torts of minor children to extent of \$1500. R.I. Gen. Laws §9-1-3.

Notice. Injured party must prove that defective condition existed for period sufficient to give premises owner or occupier reasonable notice (actual or constructive) and, further, that despite such notice, such owner or occupier, failed to remove condition or warn of its existence. *Pandozzi v. Providence Lodge 14, Elks*, 496 A.2d 928 (R.I. 1985); *Lombardi v. Dryden Corp.*, 114 R.I. 202, 330 A.2d 416 (1975). Notice of defect or dangerous condition on premises imposes duty on defendant-owner to remedy condition or to warn plaintiff-customer of danger. *Fisher v. Almac's, Inc.*, 117 R.I. 244, 366 A.2d 161 (1976); *Piascik v. Shepard Co.*, 374 A.2d 795 (R.I. 1977).

State and Municipalities. Liable in tort to extent of \$100,000 for governmental functions, §9-31-2; legislature may expand limitation in individual cases, R.I. Gen. Laws §9-31-4; no limitation as to proprietary functions, R.I. Gen. Laws §9-31-2, R.I. Gen. Laws §9-31-3; action must be commenced within three years of accrual of claim. R.I. Gen. Laws §9-1-25. When government acts in same manner as a private individual the only difference between the state and other tort defendants is the limitation on liability contained in R.I. Gen. Laws §9-31-2; public duty doctrine does not apply. *Catone v. Medberry*, 555 A.2d 328 (R.I. 1989). Additionally, government may be liable where plaintiff was identifiable or its conduct was egregious. *Haley v. Town of Lincoln*, 611 A.2d 845 (R.I. 1992).

Municipalities have duty to maintain highways in reasonably safe condition for bicycles as well as motor vehicles. R.I. Gen. Laws §24-5-1.

Store Keeper. Owes duty to use due care to protect customer against acts of third parties if there is actual or constructive knowledge of danger. *Enos v. W. T. Grant Co.*, 110 R.I. 523, 294 A.2d 201 (1972).

Supervision. Cause of action exists against state for negligent supervision of day care facility where child is sexually molested. *Gagnon v. State*, 570 A.2d 656 (R.I. 1990).

Subcontractor's promise to indemnify and hold general contractor harmless for latter's negligence does not violate public policy. *DiLorenzo v. Gilbane Bldg. Co.*, 114 R.I. 469, 334 A.2d 422 (1975); *Cosentino v. A.F. Lusi Constr. Co., Inc.*, 485 A.2d 105 (R.I. 1984).

Warranty on fitness of foodstuffs or beverages in sealed containers. Injured person merely has to prove that such was so adulterated as to be unfit for human consumption and to show, causal relationship between consumption and injury; assumption of risk and con-

tributory negligence ordinarily not available as defenses. R.I. Gen. Laws §6A-2-315; *Young v. Coca-Cola Bottling Co.*, 109 R.I. 458, 287 A.2d 345 (1972).

No dog may be declared vicious if injury is sustained by person who was committing willful trespass or other tort upon premises occupied by owner of dog, or was teasing, tormenting, abusing or assaulting dog or was committing or attempting to commit crime, except for minor under age of seven. R.I. Gen. Laws §4-13.1-2, P.L. 1986; *Butti v. Rossi*, 617 A.2d 881.

Parent may be held liable for injuries caused to his or her unemancipated minor child by said parent's negligence. R.I. Gen. Laws §9-1-3.1.

Emergency. Person who voluntarily and gratuitously renders emergency assistance to person in need thereof shall be immune from civil liability for ordinary negligence. R.I. Gen. Laws §9-1-27.1.

Indemnity. Exculpatory indemnity clauses are valid and not inconsistent with public policy. *Corrente v. Conforti & Eisele Co.*, 468 A.2d 920 (R.I. 1983). In indemnity action, if prospective indemnitor is no more responsible for injury than indemnitee then no recovery will be permitted. *Muldowney et al v. Weatherking Products et al*, 509 A.2d 441 (R.I. 1986).

Liquor Liability. Negligence standard applies to suits brought under Dram Shop Act. *Embrey v. Ortiz*, 538 A.2d 1002 (R.I. 1988); *Smith v. Tully*, 665 A.2d 1333 (R.I. 1995). Repeal of Dram Shop Act and creation of more comprehensive Liquor Liability Act. R.I. Gen. Laws §§3-14-1 to 3-14-15. Alcoholic beverage retail licensee liable for damages for negligent or reckless service of liquor to minor or visibly intoxicated individual. R.I. Gen. Laws §§3-14-6 and 3-14-7; P.L. 1986, Ch. 537.

Where bar is liable for negligent service of alcohol, it is joint tortfeasor with drunk driver and is entitled to have driver's settlement offset judgment. *Lawrence v. Pokraka*, 606 A.2d 987 (1992). Trial justice abused discretion by allowing plaintiff to amend complaint on first day of trial to add count based on dram shop act since highly prejudicial to defendant as it set forth legal, distinct theory of liability. *Vincent v. Musone*, 572 A.2d 280 (R.I. 1990).

No personal liability of officer or shareholder of corporation, merely as result of his standing as such, for injuries arising from conduct of other employees of the corporation. *Banks v. Bowen's Landing Corp.*, 652 A.2d 461 (R.I. 1995).

Social Host Liability. Adherence to common-law rule of social-host immunity; deference to legislature to impose duty upon social hosts for torts of guests. Social



hosts owe no duty to persons injured by drunk "party crasher." *Ferreira v. Strack*, 652 A.2d 965 (1995).

Wrongful Death. Statutory minimum recovery increased to \$150,000 to be applied prospectively. R.I. Gen. Laws §10-7-2.

### PENALTY AND ATTORNEY FEES

Duty of an insurer to deal fairly and in good faith with an insured is implied by law. Since violation of this duty sounds in contract as well as in tort, the insured may obtain consequential damages for economic loss and emotional distress and, where appropriate punitive damages. R.I. Gen. Laws §9-1-33; *Bibeault v. Hanover Ins. Co.*, 417 A.2d 313, 319 (1980); *Rumford Prop. & Liab. Ins. Co.*, 590 A.2d 398 (R.I. 1991). But keep in mind, *AAA Pool Svc. v. Aetna*, 395 A.2d 724 (1978), where the court held that there is no claim of the insured under a standard fire insurance policy, absent legislative action.

### PRODUCTS LIABILITY

Privity abolished in actions for injuries from product because of negligence of manufacturer or distributor in design, manufacture, preparation or packaging. *Ritter v. Narragansett Elec. Co.*, 109 R.I. 176, 283 A.2d 255 (1971); *Kelly v. Ford Motor Co.*, 110 R.I. 83, 290 A.2d 607 (1972).

Plaintiff has burden of producing competent evidence to prove existence of defect in product when it left control of manufacturer or seller. *Geremia v. Benny's Inc.*, 119 R.I. 814, 383 A.2d 1332 (1978); *Thomas v. Amway Corp.*, 488 A.2d 716 (R.I. 1985); *Plouffe v. Goodyear Tire & Rubber Co.*, 118 R.I. 288, 373 A.2d 492 (1977).

Persons in business of leasing personal property are strictly liable in tort for injuries proximately resulting from products that they lease in defective condition, which renders such property dangerous. *Brimbau v. Ausdale Equip. Rental Corp.*, 440 A.2d 1292 (R.I. 1982).

Comparative negligence statute, R.I. Gen. Laws §9-20-4, is applicable to actions brought on theories of strict liability and implied warranty as well as negligence. *Fiske v. MacGregor, Div. of Brunswick*, 464 A.2d 719 (R.I. 1983); *Swajian v. General Motors Corp.*, 559 A.2d 1041 (R.I. 1989).

### RELEASE

See Law Digest Tables.

Insurance companies must pay on settled claims within 30 days after a release is executed, or be subject

to a separate cause of action for punitive damages and interest. R.I. Gen. Laws §9-1-50.

A release in a personal injury case is a contract. *Lennon v. MacGregor*, 423 A.2d 820 (R.I. 1980). Ambiguity in the release is construed against the drafter. *LaBelle v. DiStefano*, 85 R.I. 359, 131 A.2d 814 (1957).

Any release or settlement of a claim for personal injuries is voidable at the releasor's option within 30 days of the tortious act, upon return of any consideration received. After the 30 day period, a release is set aside only when it is affirmatively shown that the release is the result of fraud, misrepresentation, an overreaching by one of the parties, or in rare circumstances, mutual mistake. *Boccarossa v. Watkins*, 112 R.I. 551, 313 A.2d 135 (1975). Mutual mistake does not include instances of unknown injuries, unless both parties rely on the same medical opinion as the basis for their assessment of the extent of the injury. *Id.* citing *Marini v. Mutual Benefit Health & Acc. Ass'n*, 69 R.I. 338, 33 A.2d 193 (1943).

Master and servant or principal and agent are considered as a single tortfeasor for purposes of the Joint Tortfeasor Act. R.I. Gen. Laws §10-6-2. Covenants not to sue are given effect according to their terms, with some exceptions. See Uniform Joint-Tortfeasors Act R.I. Gen. Laws §§10-6-1 to 10-6-11. Claimant's release of a party primarily responsible does not bar claim by parties found secondarily liable against the party primarily responsible. *Helgerson v. Mammoth Mart Inc.*, 114 R.I. 438, 335 A.2d 339 (1975).

Validity of a release must be determined according to the following factors: 1) the existence of consideration for the release, 2) the experience of the person executing the release, and 3) the question of whether the person executing the release was represented by counsel. *McClanaghan v. Costa*, 655 A.2d 695 (R.I. 1995).

### REPRESENTATIONS AND WARRANTIES

Defined. Statements in application made as of applicant's own knowledge are warranties. Falsity of answers and not fraud of insured is test applied to warranties. *Leonard v. State Mutual Assur. Co.*, 24 R.I. 7, 51 A. 1049 (1902). Misrepresentation must be material to void policy. *Evora v. Henry*, 559 A.2d 1038 (R.I. 1989).

Statements written into policy which is accepted and retained by insured are warranties. *Affleck v. Potomac Ins. Co.*, 49 R.I. 112, 140 A. 469 (1928). Infant not bound by his warranties. *O'Rourke v. John Hancock Ins. Co.*, 23 R.I. 457, 50 A. 834 (1902); *Keenan v. John Hancock Mut. Life Ins. Co.*, 50 R.I. 158, 146 A. 401 (1929); *Warwick Mun. Employees Credit Union v. McAllister*, 110 R.I. 399, 293 A.2d 516 (1972).



Ordinarily no fiduciary relationship exists between insurer and applicant for annuity or other insurance contract. *Kenney Mfg. Co. v. Starkweather & Shepley, Inc.*, 643 A.2d 203 (R.I. 1994).

### SERVICE OF PROCESS

Domestic corporations may be served by delivering a copy of the summons and complaint to an officer, managing or general agent, or by leaving a copy of the summons and complaint with an employee of the corporation at the corporation's office, or by delivering a copy to an agent appointed by law to receive service of process. R.I. Super. Ct. R. Civ. P. 4(e)(3).

Non-resident individuals, partnerships, associations and foreign corporations with the necessary minimum contacts with the state may be served by mail or by disinterested person where such individual or entity is found. R.I. Gen. Laws §9-5-33 and R.I. Super. Ct. R. Civ. P. 4(e) and (f). The Insurance Commissioner is the agent for service of process for any insurance company not incorporated in Rhode Island. R.I. Gen. Laws §27-2-13. See also R.I. Super. Ct. R. Civ. P. 4(e)(3) and 4(f)(2).

Complete ownership of subsidiary corporation doing business in state was not, without more, sufficient "minimum contact" to give court in personam jurisdiction over parent corporation. *Conn. v. ITT Aetna Finance Co.*, 105 R.I. 397, 252 A.2d 184 (1969). Insurance contract between non-resident insured and foreign insurance company authorized to do business in Rhode Island did not establish necessary minimum contacts to render said non-resident amenable to jurisdiction of Rhode Island courts in action in personam. *De Rentis v. Lewis*, 105 R.I. 240, 258 A.2d 464 (1969). Prospective defendant's relocation to another state has effect of severing minimum contacts and process jurisdiction thereupon ceases. *Lucini v. Mayhew*, 113 R.I. 641, 324 A.2d 663 (1974).

Operation of motor vehicle by non-resident, his servant or agent or by a resident of the State who becomes non-resident prior to commencement of action against him, is deemed as appointment of Director of Transportation as the non-resident's attorney for service of process in any proceedings arising out of any accident in which such person, his servant or agent, may be involved while operating a motor vehicle upon the public highways of state. R.I. Gen. Laws §31-7-6. This provision affords jurisdiction over non-resident motorist when accident occurs on private property adjacent to a public highway. *Hennessey v. Suhl*, 100 R.I. 505, 217 A.2d 434 (1966). Notice of such service and copy of process shall be sent by registered or certified mail before service or forthwith after service by plaintiff or his attorney of record to defendant at address given upon his registration

or operator's license. R.I. Gen. Laws §31-7-7; R.I. Super. Ct. R. Civ. P. 4(e).

Where tolling statute requires service of process with due diligence, the question of due diligence is one of fact requiring an evidentiary hearing. *Souza v. Erie Strayer Co.*, 557 A.2d 1226 (R.I. 1989). Under R.I. Gen. Laws §27-7-2, after plaintiff receives from sheriff summons against insured with "non-est inventus" return, recovery can be sought against insurer directly. *MacZuga v. American Universal Ins. Co.*, 92 R.I. 76, 166 A.2d 227 (1960). See also *Shayer v. Bohan*, 708 A.3d 158 (R.I. 1998).

Subpoena duces tecum could be served upon insurance commissioner seeking documents from non-resident insurance company's non-resident employees. *Telephone Credit Union of R.I. v. Fetela*, 569 A.2d 1059 (R.I. 1990).

### SUBROGATION

Insurer who has paid all or part of loss may sue in name of assured to whose right it is subrogated. Rule 17 (a), R.C.P.

Insurance Company required to first pay insured their deductible before retaining any subrogation recovery. R.I. Gen. Laws §27-7-2.1. Subrogated insurers not entitled to share in proceeds of bond filed by third party defendant with judgment in favor of plaintiff insured is fully satisfied. *Lombardi v. Merchants Mut. Ins. Co.*, 429 A.2d 1290 (1981).

Subrogation agreement is valid and can be enforced by company against its subscriber. *Jennings v. Nationwide Ins. Co.*, 669 A.2d 534 (R.I. 1996). However, subscriber's attorney may be entitled to fee where he or she confers a benefit on company. *Id.* Beneficiary of medical service insurance contract entered into by parent is services covered by contract bound by provision entitling insurer to subrogation against responsible third party. *Hamrick v. Hospital Service Corp.*, 110 R.I. 634, 296 A.2d 15 (1972).

See Limitation Of Time For Commencement Of Action.

### THEFT INSURANCE

Plaintiff must prove taking without consent and intention to deprive him permanently of his property. *Mello v. Hamilton Fire Ins. Co.*, 71 R.I. 510, 47 A.2d 621 (1946).

Theft may be presumed if property is missing from place where action of third person is required to remove such property. *McDuff v. General Acc. Fire & Life Assur. Corp.*, 47 R.I. 173, 131 A. 548 (1925).



Insurer can expressly exclude actual theft by burglary as risk, thus leaving insurer liable only for damages resulting from burglary per se. *C. & G. Mfg. Co. v. Columbia Ins. Co.*, 89 R.I. 62, 150 A.2d 641 (1959).

### WAIVER AND ESTOPPEL

See "FIRE INSURANCE, Proof of Loss"; "LIABILITY INSURANCE, Defense of Action."

Leading Rhode Island case is *Iventasch v. Superior Fire*, 48 R.I. 321, 138 A. 39 (1927), which holds as follows:

Insurer may be estopped to set up breach of condition if by its conduct insured can reasonably believe that breach will not be insisted upon, but burden of proof is on insured.

Settlement negotiations may bring on estoppel as to use of statute of limitations, if conduct is calculated to lull claimant into reasonable belief claim will be settled without suit. *Gagner v. Strekouras*, 423 A.2d 1168 (R.I. 1980). To establish estoppel, plaintiff must show either that insurer assured that settlement would be reached or that insurer intentionally prolonged negotiations. *Pari v. Corwin*, 620 A.2d 86 (R.I. 1993).

Waiver is intentional relinquishment of known right. Where policy provides that there can be no waiver except in writing attached to policy, such provision will be enforced. Limitation of agents' authority to waive conditions, when stated in policy, is notice to insured of scope of agents' authority. *Inventa Sch. v. Superior Fire Ins. Co.*, 48 R.I. 321, 138 A. 39 (1927).

Unconditional acceptance of premiums with knowledge of breach of condition is waiver of breach. *Milkman v. United Mut. Ins. Co.*, 20 R.I. 10, 36 A. 1121 (1897). But not so, if such acceptance is conditional. *Gomes v. Boston Mut. Ins. Co.*, 58 R.I. 428, 193 A. 500 (1937).

Disclaimer of liability by insurer does not waive requirement for proof of loss where disclaimer is not made until after period for filing has expired. *W. & H. Jewelry v. Aetna Cas. & Sur.*, 141 F. Supp. 296 (1956).

Ordinary acts and conduct after time for commencement of suit has expired do not constitute basis for either waiver or estoppel. *Cardente v. Travelers Ins. Co.*, 112 R.I. 713, 315 A.2d 63 (1974).

Insurer which issues policy with arbitration provision located therein in place other than immediately before testimonium clause or signature of parties, as required by statute, waives right to challenge legality of such provision. *Pacheco v. Nationwide Mut. Ins. Co.*, 114 R.I. 575, 337 A.2d 240 (1975). But negotiations af-

ter expiration of limitations period, combined with acts prior to expiration, will present a question of fact as to estoppel. *Gagner v. Strekovas*, 423 A.2d 1168 (R.I. 1980).

### WARRANTIES

See "REPRESENTATIONS AND WARRANTIES."

### WORKERS' COMPENSATION

R.I. Gen. Laws §§28-29-1 to 28-38-25.

Workers' Compensation Law Revised 1992. Numerous changes to the existing statute. For example, under R.I. Gen. Laws §28-29-2 (4), partner and owner are not covered "employees" but are counted to determine if business is subject to statute. "Seasonal occupation" means those occupations in which workers performed on a seasonal basis of not more than sixteen weeks. An employee has an affirmative duty to report any earnings while receiving compensation. R.I. Gen. Laws §28-33-17.1. Benefits may be terminated when employee is capable of gainful employment, as opposed to actually gainfully employed, at an average weekly wage equal to or in excess of that being earned at the time of injury. *Id.* The Rhode Island Supreme Court appears to hold that one entire act is prospective. *F.H. Buttington Co. v. Hannahan*, 622 A.2d 470 (R.I. 1993) (not possible to attach express intent to be legislature's explanation and determine which provisions are retroactive).

One who has received compensation benefits may not reap the benefits of a double recovery, i.e., he cannot receive both workers' compensation benefits and damages from one tortfeasor. He may only sue third party tortfeasor if he first agrees to repay those who paid him compensation. Statute does not require that agreement be in writing, that it be signed by injured employee or by insurer, or that agreement be made at any specific time. *Brimbau v. Ausdale Equip. Co.*, 119 R.I. 14, 376 A.2d 1058 (1977); *Benders v. Board of Governors for Higher Education*, 636 A.2d 1313 (R.I. 1994).

Even if employee is working under concurrent contracts of employment when injured, he is precluded from recovering workers' compensation benefits from one employer if he already has been awarded maximum benefits from other. *Lupo v. Nursery Originals, Inc.*, 400 A.2d 950 (R.I. 1979). Unlike a liability case, an employee cannot rely on the collateral source rule to obtain personal reimbursement from a compensation carrier for medical bills already paid by health insurance. *Moniz v. Providence Chain Co.*, 618 A.2d 1270 (1993).

When determining the liability of successive insurers or employers when one employee is incapacitated by



an injury, start with the principle that liability of employer or insurer continue for all disabilities resulting from compensable injury. *Aguiar v. Control Tower Industries, Inc.*, 496 A.2d 147 (R.I. 1985).

First employer remains liable for employee's continued disability unless separate intervening cause of disability, i.e. an aggravation, ensues. *Branco v. L&M Concrete Forms, Inc.*, 510 A.2d 964 (R.I. 1986).

Worker's incapacity ends once he takes job in which post-injury earnings exceed pre-injury earnings. *Worcester Textile Co. v. Morales*, 468 A.2d 279 (R.I. 1983).

Although injury occurs at place of employment, injury must be incidental to worker's duties or to conditions under which those duties were to be performed. Deviation from duties of employment does not in and of itself destroy causal nexus between those duties and injury if it is substantially motivated by influences that originate in employment. *Lomba v. Providence Gravure, Inc.*, 465 A.2d 186 (R.I. 1983).

Recognition of exception to rule denying compensation for injuries sustained in "going-and-coming", where employer owns and maintains employee parking area, takes affirmative action to control route of employee by directing him to park in that parking area, and employee is injured while traveling directly from lot to plant facility. *Branco v. Leviton Mfg. Co., Inc.*, 518 A.2d 621 (R.I. 1986). Similarly, employer is liable where visiting nurse is injured while traveling between patients' homes. *Toolin v. Aquidneck Island Med. Resource*, 668 A.2d 639 (1995).

**Psychic Injury.** If psychic injury is to be compensable, employee must establish that mental injury is result of physical or dramatically stressful mental stimulus; ordinary stress of occupation is insufficient basis to support claimed mental injury. *Seitz v. L & R Industries, Inc.*, 437 A.2d 1345 (R.I. 1981). Where employer's treatment of employee "exceeded intensity of stimuli encountered by thousands of other employees and management personnel every day," resulting in employee's nervous breakdown, employee is entitled to compensation benefits. *Rega v. Kaiser Aluminum & Chem. Corp.*, 475 A.2d 213 (R.I. 1984). Where as result of concerted campaign of harassment and abuse by co-workers employee became agitated, depressed and lost over 20 pounds, he was entitled to compensation benefits. *Martin v. Rhode Island Public Transit*, 506 A.2d 1365 (R.I. 1986).

**Occupational Diseases.** Where worker has incurred occupational disease while working for multiple employers, last employer is liable either if (a) employee's work with last employer caused aggravation of prior

condition or (b) last employment (no matter how brief) was of same nature and type in which disease was first contracted, regardless of whether last employment aggravated prior condition. *Tavares v. A.C. & S., Inc.*, 462 A.2d 977 (R.I. 1983). Causation is apportioned among employers in occupational disease cases. *Andrade v. Mintell*, 102 R.I. 148 (1967); *Vater v. H B Group*, 667 A.2d 283 (R.I. 1995).

Employee is barred from bringing suit against corporate officers and supervisors acting in managerial capacity for breach of duty to provide safe place of employment when he had recovered worker's compensation for injuries sustained. *Greco v. Farago*, 477 A.2d 98 (R.I. 1984). Shareholders are also afforded protection. *Mitchell v. Burrillville Racing Ass'n*, 673 A.2d 446 (R.I. 1996).

No intentional tort exception to exclusivity provisions as set forth in §28-29-20. *Coakley v. Aetna Bridge*, 572 A.2d 295 (R.I. 1990); *Diaz v. Darnet Corp.*, 694 A.2d 736 (R.I. 1997).

Employee barred from bringing tort action against employer to recover for work-related injuries where employee failed to give notice that he intended to retain common law rights. *Lopes v. G.T.E. Products Corp.*, 560 A.2d 949 (R.I. 1989). Worker who gave proper notice, pursuant to R.I. Gen. Laws §28-29-17, of right of action at common law to recover damages for personal injuries sustained during employment may not, subsequent to injury, elect to receive worker's compensation benefits for on-job injury. *Picirillo v. Avenir, Inc.*, 517 A.2d 606 (R.I. 1986). Wife of worker who received workers compensation benefits was barred by exclusivity provisions of workers' compensation act from pursuing tort action for loss of consortium. *SAMA v. Cardi Corp.*, 569 A.2d 432 (R.I. 1990).

Third party action under indemnity contract with employer held not barred by exclusive remedy provisions of Worker's Compensation Act because contractual obligation between employer and third party plaintiff is independent of statutory duty that employer may owe to employee. *Cosentino v. A.F. Lusi Constr. Co.*, 485 A.2d 105 (R.I. 1984). When non-payment of compensation is beyond control of employer or his insurer they are exempt from penalty. *Lavey v. Olean & Sons*, 502 A.2d 344 (R.I. 1985). Employee is entitled to withhold proportionate share of attorney's fee from amount offered to insurer under insurer's lien. *Hartford Acc. v. Lundy & Rogerson Co.*, 502 A.2d 823 (R.I. 1986).

By including crash rescue workers in R.I. Gen. Laws §45-19-1, which gives policemen, firemen and crash rescue workers greater rights than under Workers' Compensation Act, legislature impliedly excluded them

from Workers' Compensation Act. *Labaddia v. Rhode Island*, 513 A.2d 18 (R.I. 1986).

Workers who voluntarily retired prior to seeking benefits were not entitled thereto as there was no earning capacity that could have been lost or diminished. *Mullaney v. Gilbane Bldg. Co.*, 520 A.2d 141 (R.I. 1987).

Physician not limited to personal examination in rendering opinion that claimant's condition changed over time. *Martinez v. Bar-Tan Mfg.*, 521 A.2d 134 (R.I. 1987).

Testimony of claimant's expert that physical condition had not changed between time of hearing and time of suspension of benefits, despite subsequent injury, supported denial of petition for recurrence of incapacity to work benefits. *Alterio v. Cherry Hill*, 537 A.2d 416 (R.I. 1988); *Costello v. Narragansett Elec. Co.*, 623 A.2d 441 (R.I. 1993).

Concubine not a dependent of worker, thus not entitled to dependency benefits as no blood or marital relationship existed. *Stone v. Goulet*, 522 A.2d 216 (1987); R.I. Gen. Laws §28-33-15.

Trial commissioner is sole transmitting authority with respect to what documents are furnished impartial

medical examiner. *LaFazia v. Connecticut Seafood*, 538 A.2d 670 (R.I. 1988).

Employee may unilaterally withdraw appeal from Dept. of Workers Compensation to the Workers' Compensation Commission. *Chaves v. Detektor*, 569 A.2d 1063 (R.I. 1990). Injured employee who had been receiving benefits pursuant to a decree, could not bring a petition to review that decree as a representative of the employer. *Empire Equip. v. Sullivan*, 565 A.2d 527 (R.I. 1989).

Employee's rights to benefits under commutation agreement cease after employee's death, where death not work-related and occurred after agreement signed but prior to commutation hearing. *Ciambrone v. A,C and S., Inc.*, 649 A.2d 1027 (R.I. 1994).

Special employer, which had hired temporary employment agency employee, is "employer" under Workers' Compensation Act entitled to immunity from negligence suit under Act upon employee's settlement of workers' compensation claim with employment agency. *Sorenson v. Colibri Corp.*, 650 A.2d 125 (R.I. 1994); *Poivier v. Manpower Inc. of Providence*, 689 A.2d 1036 (R.I. 1997).