

DIGEST OF INSURANCE LAW

VERMONT

Courtesy of
Theriault & Joslin, P.C.
Montpelier, Vermont

CIVIL JUDICIAL SYSTEM

Courts of Original Jurisdiction

Superior Courts. Have original jurisdiction over all civil actions generally. 4 V.S.A. §113. Original jurisdiction over declaratory judgments, 12 V.S.A. §4711 *et seq.* Jurisdiction over matters where *ad damnum* exceeds \$3,500 and Small Claims actions for less than \$3,500. Located in each county appellate jurisdiction over Probate Court, Small Claims Court, and Questions of Fact from Department of Labor and Industry and issues certified from the Federal District Court.

District Courts. Criminal matters only, and snowmobile and boating violations pursuant to 12 V.S.A. §5701. *Ad Damnum* must be less than \$3,500. In some counties, assistant judges may elect to decide small claims actions. 12 V.S.A. §5540a.

Probate Courts. Jurisdiction generally over wills, estates, guardians, and wards. 4 V.S.A. §311.

Family Courts. Jurisdiction generally over divorce, child support, visitation and custody. 4 V.S.A. §§451, 454.

Environmental Court. Jurisdiction over all matters arising under 10 V.S.A. Chapters 201 and 220 and matters arising under 24 V.S.A. Chapter 117 and Chapter 61, Subchapter 12.

Appellate Courts

Supreme Court. Concurrent original jurisdiction over proceedings and certiorari, mandamus, prohibition and quo warranto and to issue orders necessary to further justice and execution of law. 4 V.S.A. §2. One chief justice and four associate justices. 4 V.S.A. §4. Notice of appeal is filed with clerk of the trial court where matter was heard and Supreme Court.

LAW

Abbreviations

A. – Atlantic Reporter.
A.2d – Atlantic Reporter, Second Series.

Vt. – Vermont Reports.
Vt. L.W. – Vermont Law Week.
V.R.A.P. – Vermont Rules of Appellate Procedure.
V.R.C.P. – Vermont Rules of Civil Procedure.
V.R.E. – Vermont Rules of Evidence.
V.R.F.P. – Vermont Rules of Family Procedure.
V.R.P.P. – Vermont Rules of Probate Procedure.
V.S.A. – Vermont Statutes Annotated.

ACCIDENT AND HEALTH INSURANCE

See “DISABILITY.”

Contract Law. Cancellation. Actual receipt of notice by insured is condition precedent to cancellation. *Rocque v. Cooperative Fire Ins. Ass'n of Vermont*, 140 Vt. 321, 325, 438 A.2d 383, 385 (1981). Material misrepresentations are grounds for declaring policy void if there is a nexus between the false statement and the decision to issue the policy. *McAllister v. Avemco Ins. Co.*, 148 Vt. 110, 112, 528 A.2d 758, 759 (1987); *see also* 8 V.S.A. §4205; *Martell v. Universal Underwriters Life Ins. Co.*, 151 Vt. 547, 564 A.2d 584 (1989).

Disability. Total disability held to depend on whether it is shown that the insured is unable to work at or follow an employment or occupation for which he is qualified, mentally or physically, by an age, experience, education or training. *Anair v. Mutual Life Ins. Co. of N.Y.*, 114 Vt. 217, 42 A.2d 423 (1945). See also “WORKERS COMPENSATION.”

Excepted Risks. Where under accident policy disability resulting wholly or partly from hernia should be considered sickness, held that hernia and death resulting caused by accidental means. *Corsones v. Monarch Acc. Ins. Co.*, 103 Vt. 379, 154 A. 693 (1931).

Where accident policy excluded death caused by reason of infection except septic infection of visible wound, held that evidence that stick of kindling wood which flew up as insured was cutting same, causing abrasion of skin permitting escape of blood was sufficient to justify jury in finding “visible wound” within



meaning of policy. *Griswold v. Metropolitan Life Ins. Co.*, 107 Vt. 367, 180 A. 649 (1935).

Notice and Proof of Loss. Insurer, upon receipt of notice of claim, will furnish to claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not furnished within fifteen days after giving of such notice claimant shall be deemed to have complied with requirements of policy as to proof of loss upon submitting, within time fixed in policy for filing proofs of loss, written proof covering occurrences, character and extent of loss for which claim is made. 8 V.S.A. §4065(6).

Written proof of loss must be furnished to insurer at its office in case of claim for loss for which policy provides any periodic payment contingent upon continuing loss within ninety days after termination of period for which insurer is liable and in case of claim for any other loss within ninety days after date of such loss. Failure to furnish such proof within time required shall not invalidate nor reduce any claim if it was not reasonably possible to give proof within such time, provided such proof is furnished as soon as reasonably possible and in no event, except in absence of legal capacity, later than one year from time proof is otherwise required. 8 V.S.A. §4065(7).

Proof of loss may be waived by absolute denial of liability by insurer before time has expired for insured to present formal proof of loss under terms of policy. *Northshire Communications, Inc. d/b/a/ WEQX (FM) v. AIU Ins. Co.*, 174 Vt. 295, 811 A.2d 216 (2002). Letter from daughter of insured to insurer's agent held to be insufficient notice of injury under accident policy in that it did not contain particulars sufficient to identify insured. *Jacobs v. National Acc. & Health Ins. Co.*, 103 Vt. 5, 151 A. 565 (1930). Liability policy provision requiring written notice of claim did not defeat coverage when receipt of oral notice by insurer's agent was admitted, policy did not reasonably apprise insured of notice requirement - substantial compliance will suffice. *Putney School, Inc. v. Schaaf*, 157 Vt. 396, 405 599 A.2d. 322, 329 (1991). Under Vermont law, compliance with notice provision of insurance contract is condition precedent to establishing liability of insurer under policy. *Town of Windsor, Vt. v. Hartford Acc. & Indem. Co.*, 885 F. Supp. 666 (D. Vt. 1995).

ACCIDENTAL MEANS

Harm caused by improper and illegal disposal of hazardous material constitutes "occurrence" despite that insured intentionally fed material to the site and neither expected nor intended damage. *Village of Morrisville Water & Light Dept. v. U.S. Fid. & Guar. Co.*, 775 F. Supp. 718 (D. Vt. 1991) (interpreting Vermont law).

ADJUSTERS

8 V.S.A. §4791 (3)-(4) Defined.

8 V.S.A. §§4793, 4800, 4802, 4803 Licensing.

Disciplinary Rule 7-104(A)(1) prohibits plaintiff's counsel from communicating directly with defendant insurance companies without the consent of the company's counsel. *In re Illuzzi*, 159 Vt. 155, 616 A.2d 233 (1992).

AGE

See "AUTOMOBILES"; "LIABILITY INSURANCE"; "NEGLIGENCE."

AGENTS AND BROKERS

8 V.S.A. Chap. 131 Generally.

Duty. Agent has duty to fairly and truthfully explain nature of policy but no obligation to predict and warn of impacts of policy language on every eventuality. *Booska v. Hubbard Ins. Agency, Inc.*, 160 Vt. 305, 627 A.2d 333 (1993). Brokers may be held liable under Consumer Fraud Act. *Carter v. Gugliuzzi*, 168 Vt. 48, 716 A.2d 17 (1998).

For Whom. Unless otherwise directed by customer insurance agency can select in which of several competing companies which it represents it will place risks obtained by it. *Kerr & Elliot v. Green Mountain Mut. Fire Ins. Co.*, 111 Vt. 502, 18 A.2d 164 (1941).

Non-resident insurance broker held to be agent of insured though he received commissions from agents residing in this state through whom he placed insurance. *Bardwell v. Commercial Union Assur. Co.*, 105 Vt. 106, 163 A. 633 (1933). In the context of an insurer-policyholder relationship, an agency relationship can be founded upon the policyholder's performance of administrative tasks on behalf of the insurer. *Abbiati v. Buttura & Sons, Inc.*, 161 Vt. 314, 639 A.2d 988 (1994). The employer who obtains a group insurance policy covering its employees is the agent of the insurance company for every purpose necessary to make effective the group policy, and thus the insurance company has imputed knowledge of facts which the employer knows. *Id.*

Fraud of Agent. Misrepresentation to insurer by its agent estops insurer. *Middlebrook v. Bankers Life & Cas. Co.*, 126 Vt. 432, 435, 234 A.2d 346, 348 (1967); 8 V.S.A. §4802. Rule not affected by fact that agent alone benefited; *Greenough v. U.S. Life Ins. Co. of City of New York*, 96 Vt. 47, 117 A. 332 (1922). Agent's fraud in procuring insurance for insured is act of insured to extent that acts of agent were expected by insured to be done, or were known to insured. *Firemen's Ins. Co. of*



Newark, N.J. v. Butcher, 102 Vt. 183, 147 A. 267 (1929).

Knowledge of Agent. Imputable to insurer as to health of insured. *Pellon v. Connecticut General Life Ins. Co.*, 105 Vt. 508, 168 A.701 (1933).

ARBITRATION

Arbitration Act does not apply to labor interest arbitration nor arbitration agreements contained in contract of insurance. 12 V.S.A. §5653(a). Arbitration agreement must be signed by both parties with an acknowledgement of arbitration. 12 V.S.A. §5652. Acknowledgement needs to meet statutory requirements, mainly that acknowledgement be displayed prominently. 12 V.S.A. §5652(b).

Superior Court will confirm arbitration award unless evidence of corruption, fraud, arbitrator misconduct and other grounds. 12 V.S.A. §§5676-5677. Appeals to Vermont Supreme Court. 12 V.S.A. §5681(b).

ASSIGNMENT

See "FIRE INSURANCE."

ATTORNEYS

Attorneys admitted to practice in front of Vermont Supreme Court. Admin. Ord. & Rules, §1 *et seq.* Conflicts of interest govern generally under Vt. R. Prof. Cond. Rule 1.7, *et seq.* Fee generally governed under Vt. R. Prof. Cond. Rule 1.5. Legal malpractice - 6 years statute of limitations if no personal injury. *Fitzgerald v. Conleton*, 155 Vt. 283, 583 A.2d 595 (1990).

AUTOMOBILES

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

Age. Minimum age 15, with licensed driver over 25 years of age. 23 V.S.A. §615. Junior operator, ages 16 and 17. 23 V.S.A. §607.

Agency. Joint action against master and his servant may be maintained for injuries resulting from negligence of servant for which master is liable under doctrine of respondeat superior. *Daniels v. Parker*, 119 Vt. 348, 126 A.2d 85 (1956); *English v. Myers*, 142 Vt. 144, 454 A.2d 251 (1982).

Comparative Negligence. Modified comparative negligence. 12 V.S.A. §1036. Compare plaintiff's negligence to total negligence of all defendants. If plaintiff is 50% or less negligent, plaintiff recovers that percentage of total damages.

Compulsory Insurance Coverage. 25/50 limits. 23 V.S.A. §800. Statute is directed to owners and operators, not insurance companies and does not operate to require insurance companies to provide coverage outside terms of policy. *Norman v. King*, 163 Vt. 612, 659 A.2d 1123 (1995). Statutory language does not require each vehicle owned by an insured to have its own insurance, limiting in turn uninsured/underinsured motorist coverage to each individual policy. *Monteith v. Jefferson Ins. Co. of New York*, 159 Vt. 378, 381, 618 A.2d 488, 490 (1992).

Alcohol/DWI. Blood alcohol content of .08 or over is permissive inference of intoxication. 23 V.S.A. §1204(a)(2).

Damages. Compensatory, Excess or over Verdict and Punitive. Punitive damages generally not recoverable for ordinary accident on highway. *Walsh v. Segale*, 70 F.2d 698 (2nd Cir. 1934); *Bolsta v. Johnson*, 176 Vt. 602, 604, 848 A.2d 306, 309 (2004).

Family Purpose Doctrine. Rejected. *Jones v. Knapp*, 104 Vt. 5, 156 A. 399 (1931).

Guest Cases. Guest statute repealed as to all causes of action arising on or after March 12, 1970. Driver's negligence not imputed to guest. *LeClair v. Boudreau*, 101 Vt. 270, 143 A. 401 (1928).

Imputed Negligence/Joint Enterprise. Joint venture is a special relationship between two or more parties to engage in and carry out single business purpose for joint profit without partnership or corporate designation. *State of Vt. Environmental Bd. v. Chickering*, 155 Vt. 308, 583 A.2d 607 (1990). Requires community of interest in object and purpose of undertaking and equal right to direct and govern each other's movements and conduct. *Campbell v. Campbell*, 104 Vt. 468, 162 A. 379 (1932). Absence of written agreement is not determinative. *Mislosky v. Wilhelm*, 130 Vt. 63, 286 A.2d 267 (1971).

Both seller and lender of money for purchase of automobiles can be liable for negligent entrustment. *Vince v. Wilson*, 151 Vt. 425, 561 A.2d 103 (1989).

Last Clear Chance. Must be period of time during which person asserting doctrine could not have avoided accident and during which person against whom asserted could have avoided it. *Simplest v. Maynard*, 427 F.2d 1 (2nd Cir. 1970) and *Bates v. Rutland R. Co.*, 105 Vt. 394, 165 A. 923 (1933). Only applies if plaintiff contributory negligent. *Id.*

Ownership/Title. Titles are issued by the Department of Motor Vehicles. "Salvage" titles are issued for scrapped vehicles. "Rebuilt" titles are issued for vehicles which were once scrapped and subsequently repaired. 23 V.S.A. §2093. Liens are recorded with the Department of Motor Vehicles.



Pedestrians. Have right of way in crosswalk. 23 V.S.A. §1051(a). No pedestrian may suddenly leave curb or other place of safety and walk or run into path of vehicle when driver cannot yield. 23 V.S.A. §1051(b). Drivers must still exercise due care to avoid. 23 V.S.A. §1053.

No-Fault. Vermont is not a “no-fault” state.

Motorized Bicycles. Motorcycles entitled to full use of lane and must be ten feet apart from one another. 23 V.S.A. §1115.

Seat Belts. Children under the age of one, or children of any age who weigh less than 20 pounds are required to be restrained in an approved rear-facing restraining system. 23 V.S.A. §1258(a)(1). Children who weigh more than 20 pounds and are between the ages of one and seven years old shall be restrained in an approved child passenger restraining system. 23 V.S.A. §1258(a)(2). Those children between ages 8 and 15 are required to wear an approved safety belt or be restrained in an approved child passenger restraining system. 23 V.S.A. §1258(a)(3).

Motor vehicle operators who are 16 years old or older are required to wear approved safety belts if they are seated in motor vehicles with equipped restraining systems while the motor is in motion on a public highway. *See generally* 23 V.S.A. §1259. The exceptions to this rule include rural mail carriers in the performance of employment, those who drive motor vehicles that make frequent stops and do not exceed 15 miles per hour, operators of farm tractors, emergency medical service personnel, bus or taxi operators, or individuals alternatively covered under 23 V.S.A. §1258. *Id.* Failure to wear safety belts or restraining systems shall not constitute negligence or contributory negligence and is not admissible at trial. 23 V.S.A. §1259(d). Furthermore, the requirements under 23 V.S.A. §1259 may only be enforced if a law enforcement officer detains a motor vehicle operator for a suspected violation of another traffic offense. 23 V.S.A. §1259(e).

Service of Process. Non-resident motorists constructively appoint Commissioner of Motor Vehicles as agent for service. Process must also be mailed to the last known address of the non-resident motorist by mail. Plaintiff’s attorney then files an affidavit showing compliance. 12 V.S.A. §891

Speed Limit. 50 mph unless otherwise posted. 65 mph on Interstates.

Trailers/Weight Limits. Tandems limited to Interstate.

Uninsured and Underinsured Endorsements. *See generally*, 23 V.S.A. §941. Underinsured protection only applies to amount by which tort-feasor is underinsured and does not apply to amount by which tort-feasor’s coverage differs from plaintiff’s total damages or from plaintiff’s insurance other than UM. *Brunet v. American Ins. Co.*, 660 F. Supp. 843 (D. Vt. 1987). Self insurers must provide UIM coverage. *Id.* UM policy denying coverage for accidents while insured occupying vehicle owned by him, but not covered by, policy is unenforceable. Interpolicy, antistacking provisions violate 23 V.S.A. §941. *Monteith v. Jefferson Ins. Co. of New York*, 159 Vt. 378, 383, 618 A.2d 488, 491 (1992). Intrapolicy anti-stacking provisions are allowed under 23 V.S.A. §941. Underinsured motorist provisions limited to “gap” coverage. *Webb v. U.S. Fidelity & Guar. Co.*, 158 Vt. 137, 605 A.2d 1344 (1992). Insurer owes no fiduciary duty to insured and claim arising under UM provision. *Colwell v. Allstate Ins. Co.*, 175 Vt. 61, 819 A.2d 727; *Lauzon v. State Farm Mut. Automobile Ins. Co.*, 164 Vt. 620, 674 A.2d 1246 (1996). When policyholder elects minimum UM coverage, insurer may properly treat uninsured and underinsured motorist coverage as package and require insured to choose common limits. *Merkel v. Nationwide Ins. Co.*, 166 Vt. 311, 693 A.2d 706 (1997). Waiver of UM coverage in initial policy is extended to renewal policy. *Id.*; 23 V.S.A. §941(c). Policy provisions that merely establish priority of coverage among insurers without compromising coverage for insureds do not violate UM statute. *State Farm Mut. Auto. Ins. Co. v. Powers*, 169 Vt. 230, 732 A.2d 730 (1999).

AVIATION

Uniform Act. Not adopted. Aviation law is codified at 5 V.S.A. §201 *et seq.*

Action for Wrongful Death. Same as for tort action on land. 5 V.S.A. §482.

Limits to Liability. There are none.

Service of Process. Secretary of the Department of Aeronautics is appointed as agent for service of process. 5 V.S.A. §484.

BROKERS

See “AGENTS AND BROKERS.”

BURGLARY INSURANCE

Generally to warrant recovery on a policy insuring an automobile against theft there must be more than a wrongful taking. The intent to steal is a necessary ingredient, and may be inferred from facts and circumstances of the case. *Rainville v. Farm Bureau Mut. Auto. Ins. Co.*, 117 Vt. 37, 83 A.2d 599 (1951).

CANCELLATION

See “ACCIDENT AND HEALTH INSURANCE, Contracts”; “LIABILITY INSURANCE”; “FIRE INSURANCE, Contracts.”

CHATTEL MORTGAGE

See “FIRE INSURANCE.”

CONSTRUCTION OF POLICY

Ambiguity of Terms. Construed against the insurer. See e.g. *American Protection Ins. Co. v. McMahan*, 151 Vt. 520, 562 A.2d 462 (1989). Courts construe policy according to its terms and the evident intent of the parties as gathered from contract language. *Cooperative Fire Ins. Ass’n of Vermont v. Gray*, 157 Vt. 380, 599 A.2d 360 (1991). The reasonable expectations of the parties are important in considering the scope of coverage provided because insurance contract is adhesive in nature, contains boilerplate terms not bargained for, read, or understood. *State Farm Mut. Automobile Ins. Co. v. Roberts*, 166 Vt. 452, 697 A.2d 667 (1997). Although courts will strictly construe contract against an insurer, they will not deprive insurer of protection of unambiguous terms placed in the policy for its benefit. *Select Designs, Ltd. v. Union Mut. Fire Ins. Co.*, 165 Vt. 69, 674 A.2d 798 (1996); *DiBartolo v. Underwriters at Lloyd’s of London*, 181 Vt. 609, 925 A.2d 1018 (2007). When a term is ambiguous, however, it is appropriate to refer to evidence outside the four corners of the document to help interpret language of the contract. *Abbiati v. Buttura & Sons, Inc.*, 161 Vt. 314, 639 A.2d 988 (1994). Omission of standard phrase in policy indicates insurer intended different results from that which phrase would have produced. *Northern Security Ins. Co. v. Hatch*, 165 Vt. 383, 387, 683 A.2d 392, 395 (1996). Court will not distort purpose of liability policy, which was to cover bodily injury or property damage arising out of an accident, by applying it to commercial litigation arising out of the city’s breach of contract to purchase a specific amount of goods. *City of Burlington v. National Union Fire Ins. Co.*, 163 Vt. 124, 655 A.2d 719 (1994). Courts will take judicial notice of dictionary definition of terms not defined in an insurance policy. *Simpson v. State Mut. Life Assur. Co. of America*, 135 Vt. 554, 382 A.2d 198 (1977). Inferred - intent rule applied in child molestation case despite allegations of negligence. *TBH By and Through Howard v. Meyer*, 168 Vt. 149, 151-152, 716 A.2d 31, 33 (1998).

CONTRIBUTION

See “LIABILITY INSURANCE.”

No contribution between joint tort-feasors. *Howard v. Spafford*, 132 Vt. 434, 321 A.2d 74 (1974); *Hiltz v. John Deere Indus. Equipment Co.*, 146 Vt. 12, 497 A.2d 748 (1985). Permissible between insurers. *Jefferson Ins. Co. v. Travelers Ins. Co.*, 159 Vt. 46, 50, 614 A.2d 385, 388 (1992).

DAMAGES

Appellate Review. Excessive Verdicts. Needs to be grossly excessive. Rarely overturned for this reason. V.R.C.P. 59(a) requires trial court to offer plaintiff opportunity to remit excess before granting motion for a new trial. V.R.C.P. 59(a). The size of remitter is amount needed to eliminate excess. *Haynes v. Golub Corp.*, 166 Vt. 228, 240, 692 A.2d 377, 389 (1997). Punitive damages need bear no particular relationship to amount of compensatory damages. *Crump v. P&C Food Markets, Inc.*, 154 Vt. 284, 575 A.2d 441 (1990).

Comparative Negligence. 12 V.S.A. §1036.

Indemnification. Indemnity is right accruing to party who, without act or fault, has been compelled by some legal obligation to pay damages occasioned by negligence of another. Indemnity is for total loss sustained by prevailing party. *Morris v. American Motors Corp.*, 142 Vt. 566, 459 A.2d 968 (1982); *Kinsely v. Central Vermont Hosp.*, 171 Vt. 644, 769 A.2d 5 (2000).

Psychic Injuries - Mental Pain and Suffering. May recover for negligent infliction of emotional distress (NEID) if physical peril and impact occurred. If no impact, must show: 1) within zone of danger; 2) subjected to reasonable fear of immediate personal injury; 3) in fact suffered substantial bodily injury or illness. *Brueckner v. Norwich University*, 169 Vt. 118, 730 A.2d 1086 (1999). Intentional infliction of emotional distress (IIED) is recognized. *Sheltra v. Smith*, 136 Vt. 472, 392 A.2d 431 (1978). On claim of reckless infliction of emotional distress, presence required for third parties but not for alleged tortious conduct directed at plaintiff. *Leo v. Hillman*, 164 Vt. 94, 665 A.2d 572 (1995). To prevail on claim if IIED, plaintiff must show extreme and outrageous conduct, done intentionally or with reckless disregard of probability of causing emotional distress that has resulted in suffering of extreme emotional distress. *Denton v. Chittenden Bank*, 163 Vt. 62, 655 A.2d 703 (1994). For purposes of IIED claim, standard for establishing outrageous conduct is high one, and conduct must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decent and tolerable conduct in civilized communities. *Farnum v. Brattleboro Retreat, Inc.*, 164 Vt. 488, 671 A.2d 1249 (1995).



Punitive Damages. Imposed as punishment and as deterrent. *State Agency of Natural Resources v. Riendeau*, 157 Vt. 615, 603 A.2d 360 (1991). Exemplary damages may be assessed where defendant's conduct manifests actual malice in form of physical ill will, insult, or reckless or wanton disregard of plaintiff's rights. *Grabbe v. Veve Associates*, 150 Vt. 53, 549 A.2d 1045 (1988). It is not enough to show that defendant's acts were wrongful; there must be proof of bad spirit or wrong intention. *Brueckner v. Norwich University*, 169 Vt. 118, 730 A.2d 1036 (1999). Punitive damages not recoverable for ordinary collision caused by negligence on highway. *Walsh v. Segale*, 70 F.2d 698 (2nd Cir. 1934). Punitive damage awards are within jury's discretion. *Glidden v. Skinner*, 142 Vt. 644, 458 A.2d 1142 (1983). Award of punitive damages will not be interfered with unless manifestly and grossly excessive. *Sweet v. Roy*, 173 Vt. 418, 801 A.2d 694 (2002). Corporation may be directly liable for punitive damages. *Brueckner v. Norwich University*, 169 Vt. 118, 730 A.2d 1036 (1999). Insured cannot recover punitive damages from UIM carrier as a matter of law. *Pecor v. Elrac, Inc.*, 85 Fed. Appx. 259 (2nd Cir. 2004).

Collateral Source Rule. Allows full recovery against tort-feasor even where he is otherwise compensated by a source independent. *My Sister's Place v. City of Burlington*, 139 Vt. 602, 433 A.2d 278 (1981) and *Coty v. Ramsey Associates, Inc.*, 149 Vt. 451, 546 A.2d 196, cert. denied, 487 U.S. 1236, 108 S. Ct. 2903 (1988); appeal after remand, 154 Vt. 168, 573 A.2d 694 (1990).

Statutory Caps on Awards. None.

Liquidated Damages Clause. Enforceable if reasonable even if no actual damages. *Renaudette v. Barrett Trucking Co., Inc.*, 167 Vt. 634, 712 A.2d 387 (1998).

Liability Insurance. Punitive damages are covered unless specifically excluded. *State v. Glens Falls Ins. Co.*, 137 Vt. 313, 404 A.2d 101 (1979).

DEATH

Abatement and Survival. 14 V.S.A. §1491 *et seq.*

Action for Wrongful Death. Damages. Pecuniary loss to next of kin 14 V.S.A. §1492. Loss of love and companionship by next of kin in wrongful death of minor child. *Harnett v. Union Mut. Fire Ins. Co.*, 153 Vt. 152, 569 A.2d 486 (1989); 14 V.S.A. §1492 (b). Child has separate loss of consortium claim for parent who is dead or permanently comatose. *Hay v. Medical Center Hosp. of Vermont*, 145 Vt. 533, 496 A.2d 939 (1985). Parents can claim damages under the Wrongful Death Act for death of adult child. *Clymer v. Webster*, 156 Vt. 614, 594 A.2d 905 (1991). Parents cannot be next of kin

when decedent had child. *Quesnel v. Town of Middlebury*, 167 Vt. 252, 706 A.2d 436 (1997).

Parties in Interest. Brought on behalf of the estate or minor child. 14 V.S.A. §1492.

Statute of Limitations. Two years from date of death. 14 V.S.A. §1492.

DISABILITY

Disability insurance policies provide coverage for factual disabilities, not legal disabilities. *Massachusetts Mut. Life Ins. Co. v. Ouellette*, 159 Vt. 187, 617 A.2d 132 (1992). Imposing liability on disability insurance companies in case where insured incarcerated because of criminal acts contrary to public interest in discouraging coverage for an insured's intentional conduct. *Id.* Court declines to recognize first party bad faith cause of action where sole claim of bad faith is that insurer relied on office notes of insured's doctor without further inquiry when denying benefits under credit life insurance policy. *Martell v. Universal Underwriters Life Ins. Co.*, 151 Vt. 547, 564 A.2d 584 (1989). Vermont Supreme Court later recognized first party bad faith claims. *Bushey v. Allstate Ins. Co.*, 164 Vt. 399, 670 A.2d 807 (1995).

DOMESTIC RELATIONS

Civil Union. Generally 15 V.S.A. §1201, *et seq.* To establish a civil union it is necessary that the parties be of the same sex and not be party to another civil union or marriage. 15 V.S.A. §1202. Parties to a civil union shall have the same benefits, protections and responsibilities under law as are granted to spouses in a marriage. 15 V.S.A. §1204. The family court has jurisdiction over all proceedings relating to the dissolution of civil unions. 15 V.S.A. §1206.

FINANCIAL RESPONSIBILITY LAW

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

FIRE INSURANCE

Adjusters. Do not have, as matter of law, real or apparent authority to waive forfeiture for breach of warranty or condition subsequent and thus reinstate policy, in absence of proof of authorization, and this notwithstanding that he may waive requirements of proof of loss. *Vinton v. Atlas Assur. Co.*, 107 Vt. 272, 178 A. 909 (1935).

Assignment. Oral assignment valid by ratification, *Wood v. Rutland & Addison Mut. Fire Ins. Co.*, 31 Vt. 552, 1858 WL 4823 (1858), and ratification implied when required by equity, notwithstanding insurer's re-

fusal to ratify. *Boynnton v. Farmers' Mut. Fire Ins. Co.*, 43 Vt. 256, 1870 WL 4814 (1870). Absent agreement to keep premises insured, mortgagee has no claim to proceeds of insurance unless policy is assigned to him. *Plimpton v. Farmers' Mut. Fire Ins. Co.*, 43 Vt. 497, 1870 WL 4529 (1870). Rights of parties to mortgage or sale of premises, to proceeds of insurance, same as to property insured. *Thorp v. Croto*, 79 Vt. 390, 65 A. 562 (1907); *Baker v. Rushford*, 91 Vt. 495, 101 A. 769 (1917). The same defenses are open as if party insured were plaintiff, in suit brought by assignee, where such assignment had been assented to by company. *Reed v. Windsor County Mut. Fire Ins. Co.*, 54 Vt. 413, 1881 WL 13194 (1881).

Chattel Mortgage. Warranty relating to encumbrances, if not literally true, renders policy void; but technical inaccuracy in description of encumbrance is no breach, if statement apprises insurer that property is encumbered, who encumbrancer is, and nature of claim. *Zabarsky v. Employers' Fire Ins. Co.*, 97 Vt. 377, 123 A. 520 (1924).

Contract - Policy. Cancellation. Agent has no right to effect cancellation except under special circumstances. *N. Pelaggi & Co. v. Orient Ins. Co.*, 102 Vt. 384, 148 A. 869 (1930).

Mortgage Clause. Under fire insurance policy with open mortgage or loss payable clause, mortgagee in suit thereon cannot recover if mortgagor burns property, for mortgagee's rights are merely derivative of those of mortgagor. *Girard v. Vermont Mut. Fire Ins. Co.*, 103 Vt. 330, 154 A. 666 (1931).

Reformation. Equity will not reform contract of insurance which was induced by misrepresentation as to title of property insured, although such misrepresentation was made innocently. *Cushman v. New England Fire Ins. Co.*, 65 Vt. 569, 27 A. 426 (1893).

Severable Contracts. Contract not severable, but wholly void, when affected by all-pervading vice, such as fraud or unlawful act. *McGowan v. People's Mut. Fire Ins. Co.*, 54 Vt. 211, 1881 WL 7841 (1881).

Standard Provisions. New York Standard Fire Insurance Policy followed.

Damages. Proof of Loss. "Fire insurance policy shall not be void by reason of failure to make and deliver proof of loss to insurer, until insurer notifies insured in writing to make and deliver proof of loss in accordance with terms of policy and insured fails to make and deliver such proof of loss within thirty days from time of receiving such notice. Omission or defect in such proof of loss shall not render policy void or constitute defense to action thereon, unless insurer notifies insured thereof

in writing within ten days after receiving such proof of loss, particularly specifying in such notice all omissions and defects in such proof of loss and insured neglects for thirty days after receiving such notice to make and deliver new proof of loss wherein such omissions and defects are corrected." 8 V.S.A. §3867.

"Amount of loss under fire insurance policy shall be due and payable in sixty days after receipt by insuring company of satisfactory proofs, and insured may commence action after expiration of that time to recover same." 8 V.S.A. §3868. "Every fire insurance contract written on any property located in this state shall be deemed to be made, executed and delivered in this state." 8 V.S.A. §3869. Notwithstanding statute making loss payable in sixty days after receipt of satisfactory proofs (8 V.S.A. §3868), denial of liability by insurer waives proof and ripens action. *Shields v. Vermont Mut. Fire Ins. Co.*, 102 Vt. 224, 147 A. 352 (1929). If owner executes proof of loss prepared by another, owner must assume responsibility for errors therein to extent they are fraudulent. *Jervis v. Burlington Mut. Fire Ins. Co.*, 113 Vt. 518, 37 A.2d 374 (1944).

Multiple Policies. Concurrent Insurance. Each of several insurers under 80% concurrent insurance policies binding itself for its own proportion of loss, held not concurrently liable. *Citizens' Sav. Bank & Trust Co. v. Fitchburg Mut. Fire Ins. Co.*, 86 Vt. 267, 84 A. 970 (1912).

Damages. Value of building as it stood before fire is measure of damage in case of total loss. *Id.*

Insurable Interest. One must have such right or interest in subject-matter of insurance as law will recognize and protect, being of such character that destruction of property will have direct effect upon it and not remote and consequential effect. *In re Reynolds' Estate*, 94 Vt. 149, 109 A. 60 (1920).

Ownership. "Unconditional and sole ownership" clause in fire insurance policy means that no person other than insured has any title to property and that insured alone will bear entire loss if property should burn. *Bardwell v. Commercial Union Assur. Co.*, 105 Vt. 106, 163 A. 633 (1933). Fire insurance policy is not voided by giving of chattel mortgage on some of insured property by insured though it contains the provision that such policy should be void if any change took place in interest, title or possession of subject of insurance, in view of fact that policy contained further provision that insurer should be liable "only for loss or damage to any other property insured hereunder," such language making policy divisible. *Valenti v. Imperial Assur. Co.*, 107 Vt. 65, 176 A. 413 (1935). Appointment of a receiver does not

affect title to property. *Clifford v. West Hartford Creamery Co.*, 103 Vt. 229, 153 A. 205 (1931).

Tenants and resident family members may be “implied co-insureds” with landlord under fire insurance policy, therefore, insurance company cannot maintain subrogation action. *Union Mut. Fire Ins. Co. v. Joerg*, 175 Vt. 196, 824 A.2d 586 (2003).

GUEST CASES

See “AUTOMOBILES, guests.”

HOSPITALS

Evidence - Records. Records generally not released without a subpoena or a request for production of documents. But see Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) for new privacy regulations.

Liens. These are valid and enforceable.

Warranties. A claim for improper care is one for malpractice not breach of warranty.

Immunity. There is no charitable immunity rule.

HUSBAND AND WIFE

Community Property. Vermont is not a community property state.

Interspousal Immunity. Abolished.

Wife can sue her husband for personal injuries received by her during her marriage while riding as guest in automobile operated by her husband by reason of his alleged negligence. *Richard v. Richard*, 131 Vt. 98, 300 A.2d 637 (1973); 15 V.S.A. §§61, 66.

Loss of Consortium. Derivative action brought by either spouse. 12 V.S.A. §5431. Vermont Constitution, Chapter 1, Article 7, allows the spouse of injured worker to claim loss of consortium against a third party, regardless of exclusivity provision of worker’s compensation statute. *Lorrain v. Ryan*, 160 Vt. 202, 628 A.2d 543 (1993). Must be married at time of incident. *Harris v. Sherman*, 167 Vt. 613, 708 A.2d 1348 (1998).

INDEMNIFICATION

Indemnification. Generally, provided by express agreement, or where circumstances will imply a right as described in Restatement (Second) of Restitution, §95. *Knisley v. Central Vermont Hosp.*, 171 Vt. 644, 769 A.2d 5 (2000).

INFANTS

See “AUTOMOBILES, Age”; “NEGLIGENCE.”

Vermont law does not bar institution of suit by minor child against parent based on alleged negligence of parent. *Wood v. Wood*, 135 Vt. 119, 370 A.2d 191 (1977).

Minor child can maintain action for loss of consortium when a parent has been rendered permanently comatose. *Hay v. Medical Center Hosp. of Vermont*, 145 Vt. 533, 496 A.2d 939 (1985).

INLAND MARINE

No cases on coverage.

LIABILITY INSURANCE

Cancellation. See 8 V.S.A. §4223 and 4224.

Compromise of Claims. Under public liability policy, insurer has complete control of defense, may settle or litigate at its option and, if having acted in good faith, cannot be held liable for failure to settle. *Johnson v. Hardware Mut. Cas. Co.*, 108 Vt. 269, 187 A. 788 (1936); see also 8 V.S.A. §§4203-4204, and 8 V.S.A. Ch. 129 and Banking and Insurance regulation 79-2.

Contribution among Joint Tort-feasors. None. *Howard v. Spafford*, 132 Vt. 434, 321 A.2d 74 (1974).

Cooperation of Insured in Defense of Action. Insurer, in going to trial knowing of insured’s failure to cooperate, held to waive forfeiture on that ground in action on judgement against insured. *Francis v. London Guarantee & Acc. Co.*, 100 Vt. 425, 138 A. 780 (1927).

Notice to Insurer. It is after insurer has assumed its contract obligation and undertaken defense that cooperation clause in liability policy comes into effect, and is therefore condition subsequent. *U.S. Fidelity & Guar. Co. v. Gable*, 125 Vt. 519, 220 A.2d 165 (1966).

Intentional misrepresentation of a material fact is a refusal to cooperate and vitiates policy. *Quintin v. Miller*, 138 Vt. 487, 417 A.2d 941 (1980); *Smith v. Nationwide Mut. Ins. Co.*, 175 Vt. 355, 830 A.2d 108 (2003).

Coverage. Construction of Terms. See e.g. *Utica Mut. Ins. Co. v. Central Vermont Ry., Inc.*, 133 Vt. 292, 336 A.2d 200 (1975); *Simpson v. State Mut. Life Assur. Co. of America*, 135 Vt. 554, 382 A.2d 198 (1977); and *Sanders v. St. Paul Mercury Ins. Co.*, 148 Vt. 496, 536 A.2d 914 (1987). Inferred - intent rule applied in child molestation case on public policy grounds despite allegations of negligence. *TBH By and Through Howard v. Meyer*, 168 Vt. 149, 716 A.2d 31 (1998). Inferred-intent



rule does not apply when alleged perpetrator is minor. *Northern Sec. Ins. Co. v. Perron*, 172 Vt. 204, 777 A.2d 151 (2001). Inferred-intent rules apply in sexual harassment cases. *Serecky v. National Grange Mut. Ins.*, 177 Vt. 58, 857 A.2d 775 (2004).

Standard Provisions. Term “bodily injury” in a homeowners policy is sufficiently vague to determine whether it includes exposure to toxic gas. An insurance carrier faced with this claim must provide a defense. *American Protection Ins. Co. v. McMahan*, 151 Vt. 520, 562 A.2d 462 (1989). “Property damages” includes diminution in value due to the presence of UF foam in the walls of the house. *Id.*

Duty to Defend. Broader than the duty to indemnify and is generally determined by comparing allegations of underlying complaint to policy’s coverage terms. *Select Designs, Ltd. v. Union Mut. Fire Ins. Co.*, 165 Vt. 69, 674 A.2d 798 (1996). Insurer with “expected or intended language” must defend and indemnify insured who aimed, shot at and hit plaintiff, so long as shooter, subjectively, did not intend to hit the plaintiff when insured shot at plaintiff. *Espinet v. Horvath*, 157 Vt. 257, 597 A.2d 307 (1991). Insurer has no duty under automobile policy to defend insured against claims resulting from accident allegedly caused by negligent entrustment and supervision by insured of minor driving different vehicle, where policy excluded liability resulting from use of another family vehicle by someone other than the insured. *Cooperative Fire Ins. Ass’n of Vermont v. Gray*, 157 Vt. 380, 599 A.2d 360 (1991).

Insurance company has no duty to defend contractor sued for building incorrectly sited house under policy language. *Garneau v. Curtis & Bedell, Inc.*, 158 Vt. 363, 610 A.2d 132 (1992).

Exclusions. Since claim fell into intentional act exclusion of policy, which did not cover injuries caused when insured intentionally shoots person, regardless of intended injuries, and such which intent is irrelevant when circumstances are not equivocal. *Cooperative Fire Ins. Ass’n of Vermont v. Bizon*, 166 Vt. 326, 693 A.2d 722 (1997); *City of Burlington v. Association of Gas & Elec. Ins. Services, Ltd.*, 170 Vt. 358, 751 A.2d 284 (2000). Policy language excludes only subjectively intended or expected injuries and an injury that is inflicted in self-defense may be expected or intended. *Espinet v. Horvath*, 157 Vt. 257, 597 A.2d 307 (1991).

Waiver. See *Liberty Mut. Ins. Co. v. Cleveland*, 127 Vt. 99, 241 A.2d 60 (1968); *Fireman’s Fund Ins. Co. v. Knutsen*, 132 Vt. 383, 324 A.2d 223 (1974); *City of Burlington v. Hartford Steam Boiler Inspection and Ins. Co.*, 190 F.Supp.2d 663 (D.Vt. 2002).

Rights of Injured Party against Insurer. Against insolvent or bankrupt insurer for amount of any judgment obtained against insured not exceeding the limits of the policy. 8 V.S.A. §4203(3).

Terms of insurance policy are extended in coverage to extent that company assumes full responsibility within policy limits for defense of claim against insured without reserving any rights. *Mancini v. Thomas*, 113 Vt. 322, 34 A.2d 105 (1943). A bilateral reservation of rights agreement prevents a waiver of the right to dispute coverage. *Vermont Ins. Management, Inc. v. Lumbermen’s Mut. Cas. Co.*, 171 Vt. 601, 764 A.2d 1213 (2000).

Insolvency of Insured. “Insolvency or bankruptcy of insured shall not release company from payment of damages for injury sustained or loss occasioned during life of policy, and in case of such insolvency or bankruptcy action may be maintained by injured person or claimant against company under terms of policy, for amount of any judgment obtained against the insured not exceeding limits of policy.” 8 V.S.A. §4203(3).

Notice. Liability insurer seeking to avoid obligations under policy must show “substantial prejudice” resulting from delay in notice. *Cooperative Fire Ins. Ass’n of Vermont v. White Caps Inc.*, 166 Vt. 355, 694 A.2d 34 (1997).

Jury. The deliberate injection of insurance into case in order to prejudice jury normally reversible error. *Ronay’s Famous Shoes, Inc. v. St. Peter*, 143 Vt. 319, 465 A.2d 1388 (1983); V.R.E. 411.

Punitive Damages. These are covered by liability policy if not specifically excluded. *State v. Glens Falls Ins. Co.*, 137 Vt. 313, 404 A.2d 101 (1979).

Limit of Liability. “Company shall pay and satisfy any judgment that may be recovered against insured upon any claim covered by policy to extent and within limits of liability assumed thereby, and shall protect insured against levy of any execution issued upon any such judicial judgment or claim against insured. No limitation of liability in policy shall be valid if, after judgment has been rendered against insured in respect to his legal liability for damages in particular instance, company continues litigation by appeal or otherwise, unless insured shall stipulate with company, agreeing to continue such litigation.” 8 V.S.A. §4203(1).

Drivers personal policy is primary coverage over coverage afforded under rental agreement. *Champlain Cas. Co. v. Agency Rent-a-Car, Inc.*, 168 Vt. 91, 716 A.2d 810 (1998).

LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Where personal jurisdiction can be obtained over defendant pursuant to 12 V.S.A. §913 and where defendant accepts service of process pursuant to statute and V.R.C.P. 4(e), the tolling provisions of 12 V.S.A. §522 do not apply even though defendant is residing outside the state of Vermont. *Fortier v. Byrnes*, 165 Vt. 189, 678 A.2d 890 (1996).

Six year statute of limitations for breach of contract. 12 V.S.A. §511.

Accrual. Minor, insane or imprisoned at time of accrual may bring suit after a disability removed. 12 V.S.A. §551(a). Time served in military generally not counted in accrual. 12 V.S.A. §553. Cause of action accrues at date of discovery of the injury and legal cause. See, e.g., *Lillicrap v. Martin*, 156 Vt. 165, 591 A.2d 41 (1989).

Fraud. Fraudulent concealment of cause of action tolls statute of limitations until discovered. 12 V.S.A. §555.

Waiver. Must be pled as an affirmative defense in the answer or it is waived. *Lillicrap v. Martin*, 156 Vt. 165, 591 A.2d 41 (1989); V.R.C.P. 8(c).

When suits are commenced in Vermont, Vermont periods of limitations apply. *Industrial Insulation Corp. v. New Hampshire Ins. Co.*, 142 Vt. 476, 457 A.2d 287 (1983). Specific statute of limitations prevails over a general statute. *Cavanaugh v. Abbott Laboratories*, 145 Vt. 516, 496 A.2d 145 (1985); *Bull v. Pinkham Engineering Assocs. Inc.*, 170 Vt. 450, 752 A.2d 26 (2000).

Limitation period determined by the nature of the harm done and not by the cause of action pled. *Kinney v. Goodyear Tire & Rubber Co.*, 134 Vt. 571, 367 A.2d 677 (1976); *Investment Properties, Inc. v. Lyttle*, 169 Vt. 487, 739 A.2d 1222 (1999). Injuries to person and property, assault and battery, false imprisonment, slander and libel - three years, 12 V.S.A. §512. Other civil actions - six years, 12 V.S.A. §511. Skiing injuries - one year, 12 V.S.A. §513. Bridges and culverts - two years, 12 V.S.A. §514. Neglect of official duty by a town clerk - six years, 12 V.S.A. §515.

MALPRACTICE

Medical malpractice - three years from date of incident or two years from date of discovery, but not later than seven years from date of incident. 12 V.S.A. §521. Handicapped discrimination - three years. *Morse v. University of Vermont*, 973 F.2d 122 (2nd Cir. 1992). Prod-

ucts liability - three years where recovery sought is for personal injury. *Kinney v. Goodyear Tire & Rubber Co.*, 134 Vt. 571, 367 A.2d 677 (1976). Breach of express warranty - four years from breach which generally occurs at the time of delivery. 9A V.S.A. §2-725 (1), (2).

Expert Testimony. Plaintiff must produce expert testimony setting forth proper standard of skill and care, that defendant's conduct departed from it, and that departure was the proximate cause, unless deviation from standard of care is so obvious that a layperson could understand issues without need for expert testimony. 12 V.S.A. 1908; *Senesac v. Associates in Obstetrics and Gynecology*, 141 Vt. 310, 449 A.2d 900 (1982).

Informed Consent. Governed by statute and Common Law, *Begin v. Richmond*, 150 Vt. 517, 555 A.2d 363 (1988). Lack of informed consent is failure to disclose alternatives and foreseeable risks and benefits or improperly withholding requested information. 12 V.S.A. §1909(a), (d). Expert testimony required. 12 V.S.A. §1909(e). Right of action does not apply in emergencies. 12 V.S.A. §1909(b).

Standard of Care. The degree of care ordinarily expected by a reasonably skillful, careful and prudent health care professional engaged in similar practice under same or similar circumstances. 12 V.S.A. §1908(1).

Causation. Vermont law does not recognize the "lost chance" doctrine in medical malpractice cases. *Smith v. Parrott*, 175 Vt. 375, 833 A.2d 843 (2003).

Hospitals. Charitable Immunity/Limitations. A person who served without compensation as director, officer or trustee of a non-profit organization qualified as tax-exempt under 26 U.S.C. §501 is subject to immunity from certain actions. 12 V.S.A. §5781. Statute of limitations is as with medical claims. 12 V.S.A. §521. No general immunity for charitable organizations.

NEGLIGENCE

Age. Negligence and contributory negligence of infants discussed. *Johnson's Adm'r v. Rutland R. Co.*, 93 Vt. 132, 106 A. 682 (1919).

Attractive Nuisance. Doctrine not recognized in Vermont but considered recently in *Zukatis by Zukatis v. Perry*, 165 Vt. 298, 682 A.2d 964 (1996).

Assumption of Risk. Primary assumption of risk is defense if plaintiff knew of the existence of the risk, appreciated the extent of the danger and consented to assume the risk. *Wells v. Village of Orleans, Inc.*, 132 Vt. 216, 315 A.2d 463 (1974); *Estate of Frant v. Haystack Group, Inc.*, 162 Vt. 11, 641 A.2d 765 (1994). Where assumption of risk may apply, nature of risk assumed usually will be jury question. *Id.*



Persons who take part in any sport accepts dangers that inhere therein insofar as obvious and necessary. 12 V.S.A. §1037. No liability for inherent risks from equine activities insofar as risks necessary and obvious. 12 V.S.A. §1039(b). No liability to ski areas when persons ski off designated trails. 12 V.S.A. §1038.

Comparative Negligence. Modified; Plaintiff may recover so long as his or her negligence is less than or equal to the combined negligence of all the defendants. 12 V.S.A. §1036. 12 V.S.A. §1037 retains primary assumption of the risk in sports-related activities. *Estate of Frant v. Haystack Group, Inc.*, 162 Vt. 11, 641 A.2d 765 (1994).

Damages. Compensatory. Compensation is provided so as to restore the party damaged, as nearly as possible, to the position he or she would have occupied had no wrong been committed. *Kramer v. Chabot*, 152 Vt. 53, 564 A.2d 292 (1989). Measure of damages to personal property is the fair market value before the injury less the fair market value after the injury. *Murray v. J&B Intern. Trucks, Inc.*, 146 Vt. 458, 508 A.2d 1351 (1986). The jury has liberty of broad discretionary judgment in setting amount of verdict. *Kerr v. Rollins*, 128 Vt. 507, 266 A.2d 804 (1970); *Peterson v. Chichester*, 157 Vt. 548, 600 A.2d 1326 (1991); *Carter v. Gugliuzzi*, 168 Vt. 48, 716 A.2d 17 (1998).

Punitive. Punitive damages are available where defendant's conduct supports a showing of malice. The amount of punitive damages need bear no particular relationship to the amount of compensatory damages. *Crump v. P & C Markets, Inc.*, 154 Vt. 284, 576 A.2d 441 (1990); *Sweet v. Roy*, 173 Vt. 418, 801 A.2d 694 (2002). Financial status and culpability of each defendant must be taken into account in the course of assessing punitive damages. *Coty v. Ramsey Associates, Inc.*, 149 Vt. 451, 573 A.2d 694 (1988). Excessive fines clause of the 8th Amendment does not apply to awards of punitive damages in cases between private parties. *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S. Ct. 2909 (1989). May not be recovered for ordinary collision caused by negligence on highway. *Walsh v. Segale*, 70 F.2d 698 (2nd Cir. 1934); *Bolsta v. Johnson*, 176 Vt. 602, 848 A.2d 306 (2004).

Limitations on Awards. There is an upper limit to a damage award and whether such limit has been surpassed is a question of law. *Newhall v. Central Vermont Hospital, Inc.*, 133 Vt. 572, 349 A.2d 890 (1975). In negligence cases the amount of damages alleged in the complaint is ordinarily in excess of sum which plaintiff expects to recover, and the amount claimed is not a standard for estimating damages. *Dupona v. Benny*, 130 Vt. 281, 291 A.2d 404 (1972). Award of damages must

stand unless grossly excessive. *Dean v. Arena*, 141 Vt. 647, 450 A.2d 1143 (1982).

Definition/Duty. Negligence is the failure to exercise care which the circumstances reasonably require or justly demand. *Thurber v. Russ Smith, Inc.*, 128 Vt. 216, 260 A.2d 390 (1969). Determination of what a careful person would have done under like circumstances, acting on his or her judgment at the time of the accident, rather than on a judgment based on subsequent reflection, is the true test of negligence. *Garafano v. Neshobe Beach Club, Inc.*, 126 Vt. 566, 238 A.2d 70 (1967). Standard of conduct needed to discharge duty of care in any given situation is measured in terms of avoidance of reasonable foreseeable risks to the person to whom such duty is owed. *Green v. Sherburne Corp.*, 137 Vt. 310, 403 A.2d 278 (1979). Generally, there is no duty to control conduct of another to protect third person from harm; exception exists where defendant has power to control another's actions. *Poplaski v. Lamphere*, 152 Vt. 251, 565 A.2d 1326 (1989). There is no duty under common law to aid a person who is in danger. *State v. Joyce*, 139 Vt. 638, 433 A.2d 271 (1981). There is a statutory duty to aid. 12 V.S.A. §519. A rescuer is immune from civil liability for ordinary negligence committed during rescue. *Id.*; *Hardingham v. United Counseling Service of Bennington County, Inc.*, 164 Vt. 478, 672 A.2d 480 (1995).

Government Immunity. Preserved unless waived by purchase of insurance. Municipality may preserve with purchase of special type of coverage. 12 V.S.A. §5601. *Denis Bail Bonds, Inc. v. State*, 159 Vt. 481, 622 A.2d 495 (1993). Sovereign immunity bars suit for negligent inspection by State of private business. *Lafond v. Vermont Dept. of Social & Rehabilitation Services*, 167 Vt. 407, 708 A.2d 919 (1998). Municipalities liable where negligent act arises out of duty that is proprietary. *Hilberby v. Town of Colchester*, 167 Vt. 270, 706 A.2d 446 (1997); *Graham v. Town of Duxbury*, 173 Vt. 498, 787 A.2d 1229 (2001); *Courchesne v. Town of Weathersfield*, 175 Vt. 585, 830 A.2d 118 (2003).

Imputed Negligence. The doctrine of imputed negligence is that in certain relations there shall be visited upon the plaintiff the negligence of another concurring with that of the defendant so as to defeat the action. *Giguere v. Rosselot*, 110 Vt. 173, 3 A.2d 538 (1939). Negligence cannot be imputed to one who is deceived by circumstances calculated to mislead a prudent person. *Menard v. Blanchard*, 117 Vt. 384, 92 A.2d 616 (1952). The doctrine may require an agency relationship or joint enterprise between the negligent third party and the plaintiff. *Morris v. American Motors Corp.*, 142 Vt. 566, 459 A.2d 968 (1983).

Liquor Liability/Dram Shop Act. See 7 V.S.A. §501. The Dram Shop Act provides a cause of action



only to third persons injured by intoxicated person, and it preempts those common-law negligence actions which come within its scope. *Estate of Kelley v. Moguls, Inc.*, 160 Vt. 531, 632 A.2d 360 (1993). It does not preempt those common-law negligence actions which do not come within its scope, so a licensed vendor may be liable in negligence in addition to remedies provided under the Dram Shop Act. *Id.*; see also *Swett v. Haig's, Inc.*, 164 Vt. 1, 663 A.2d 930 (1995).

Joint and Several Liability. No recent cases. Applies to joint defendants in absence of plaintiff's comparative fault under 12 V.S.A. §1036.

Negligence Per Se. Safety rules are not absolute in application under all circumstances but are guides in determining whether actor's conduct meets standard of reasonable prudent person under circumstances. *Smith v. Blow & Cote, Inc.*, 124 Vt. 64, 196 A.2d 489 (1963); *Smith v. Grove*, 119 Vt. 106, 119 A.2d 880 (1956).

Premises Liability. Duty owed to business visitor or other invitee to keep premises reasonably safe. *Mortiboys v. St. Michael's College*, 478 F.2d 196 (2nd Cir. 1973). Landowner generally has no duty or care to protect trespasser from injury caused by unsafe and dangerous conditions on premises. *Buzzell v. Jones*, 151 Vt. 4, 556 A.2d 106 (1989). Landowners owe duty with respect to boundary fences. *Baisley v. Missiquoi Cementary Ass'n*, 167 Vt. 473, 708 A.2d 924 (1998).

Proximate Cause. Finding proximate cause depends upon a showing that negligent act or omission was a cause-in-fact of alleged injury. *Tufts v. Wyand*, 148 Vt. 528, 536 A.2d 541 (1987).

Res Ipsa Loquitur. The doctrine of Res Ipsa Loquitur is recognition that there is a certain class of events which, when established, raise the inference that the injury caused thereby was a result of negligence. *Marsigli v. C.W. Averill Co.*, 123 Vt. 234, 185 A.2d 732 (1962). Circumstantial proof of negligence under Res Ipsa Loquitur requires proof of four elements: 1) legal duty owing from defendant to exercise certain degree of care in connection with the particular instrumentality to prevent the very occurrence that has happened; 2) the subject instrumentality at the time of occurrence must have been under defendant's control such that there could be no serious question concerning defendant's responsibility; 3) the instrument must be the producing cause of injury; 4) the event which brought on the harm must have been such that it would not ordinarily occur except for want of requisite care on part of defendant as person responsible for the injuring agent. *Connors v. University Associates in Obstetrics & Gynecology, Inc.*, 4 F.3d 123 (2nd Cir. 1993); *Gentles v. Lanctot*, 145 Vt. 396, 491 A.2d 336 (1985).

Sudden Emergency. When a person is faced with a sudden peril through no fault of his/her own, such person is not negligent if he/she does what a prudent person would or might have done and such a person will not be held to exercise the same degree of care as when he/she has time for reflection. *Stevens v. Nurenburg*, 117 Vt. 525, 97 A.2d 250 (1953). A mere necessity for quick action does not constitute an "emergency" within the doctrine where the situation calling for such action which reasonably should have been anticipated and which the person charged with negligence should have been prepared to meet. *State v. Graves*, 119 Vt. 205, 122 A.2d 840 (1956). To be a sudden emergency, it must have occurred without any proximate cause on the defendant's part. The test of liability is not whether the injury was accidental, but whether the defendant was at fault. *Mattison v. Smalley*, 122 Vt. 113, 165 A.2d 343 (1960).

NO-FAULT INSURANCE

Vermont is not a "no-fault" state.

PENALTY AND ATTORNEY'S FEES

Statutory Provisions for Failure to Pay Policy Benefits. See 8 V.S.A. §3661 *et seq.* If Offer of Judgment made in civil rights case is silent on attorneys fees and costs, plaintiff may still collect same. *Rule v. Tobin*, 168 Vt. 166, 710 A.2d 869 (1998).

PRIVILEGED COMMUNICATIONS

Attorney/Client. Confidential communications between lawyer and client are privileged. V.R.E. 502(b). Lawyer-corporate client privilege applies to members of control group and to those communications necessary to effectuate legal representation of corporation. 12 V.S.A. §1613.

Insurer/Insured. Some trial courts have adopted the standard set out in *Harriman v. Maddocks*, 518 A.2d 1027 (Me. 1986).

Clergy/Patient. Confidential communication between clergyman and person are privileged. V.R.E. 505(b).

Doctor/Patient. Confidential communication made for purpose of diagnoses or treatment between health care professional (not pharmacist) and patient are privileged. Patient waives privilege when brings personal injury claim, except when disclosure would be highly embarrassing. *Mattison v. Poulen*, 134 Vt. 158, 353 A.2d 327 (1976).

Spousal. Communications, not acts, between spouses that occur during marriage, which do not relate to ongoing criminal activity, are privileged. V.R.E. 504.

PRODUCTS LIABILITY

Strict Liability. Adopted Restatement (Second) of Torts §402(A); *Zaleskie v. Joyce*, 133 Vt. 150, 333 A.2d 110 (1975); *Farnham v. Bombardier, Inc.*, 161 Vt. 619, 640 A.2d 47 (1994). To establish strict liability in a products liability action, a plaintiff must show that the defendant's product is 1) defective; 2) unreasonably dangerous to the consumer in normal use; 3) reached the consumer without undergoing any substantial change in condition; and 4) caused injury to the consumer because of its defective design. *Id.* Lack of negligence or contractual relationship does not bar liability. *Kinney v. Goodyear Tire & Rubber Co.*, 134 Vt. 571, 367 A.2d 677 (1976). Obligation to warn arises where product manufactured is dangerous to extent beyond which would be contemplated by the ordinary purchaser. *Needham v. Coordinated Apparel Group, Inc.*, 174 Vt. 263, 811 A.2d 124 (2002). Those who distribute dangerous articles or agents owe a degree of protection to public proportionate to and commensurate with dangers involved. *Lewis v. Vermont Gas Corp.*, 121 Vt. 168, 151 A.2d 297 (1959). Doctrine imposes upon seller engaged in business of selling product which reaches user without undergoing substantial change, liability for physical harm or property damage to user or consumer resulting from defective condition, unreasonably dangerous, in product sold. *Webb v. Navistar Intern. Transp. Corp.*, 166 Vt. 119, 692 A.2d 343 (1996). Application of Comparative Fault is unresolved. *Id.*

Warranty. Breach of. 9A V.S.A. §§2-316, 2-714, 2-715, 2-607, 2-725. An element in proof of warranty is proof that defect existed in product at time the product left possession and control of defendant. *Hershenson v. Lake Champlain Motors, Inc.*, 139 Vt. 219, 424 A.2d 1075 (1981). Evidence of lack of prior complaints is rarely probative on issue of breach of warranty since breach of warranty gives rise to strict liability which is not necessarily negated by showing of due care or lack of knowledge of the defect on part of manufacturer. *Vermont Food Industries, Inc. v. Ralston Purina Co.*, 514 F.2d 456 (2nd Cir. 1975).

Implied. 9A V.S.A. §§2-314-2-316. Direct proof is not necessary to establish breach of implied warranty of merchantability and implied warranty of fitness for a particular purpose; and circumstantial evidence is sufficient to sustain a verdict if rational inference can be drawn from it that defendant's product was the source of plaintiff's harm. *Hall v. Miller*, 143 Vt. 135, 465 A.2d 222 (1984). To exclude or modify warranties, the lan-

guage must be conspicuous and, in the case of the warranty of fitness, the exclusion must be in writing, and in the case of the warranty of merchantability, the exclusion must mention merchantability. 9A V.S.A. §2-316. In Vermont, implied warranty of merchantability may not be excluded by "as is" clause. *Alpert v. Thomas*, 643 F. Supp. 1406 (D. Vt. 1986).

Duty to Warn. Sufficiency of warning generally jury question; plaintiff must provide evidence showing 1) defendant owed duty to warn, 2) lack of warning made product unreasonably dangerous, hence defective, and 3) defendant's failure to warn was the proximate cause of plaintiff's injury. Claim fails if plaintiff failed to read warning absent showing that it was insufficiently conspicuous as a matter of law. A manufacturer's duty to warn of known product defects arises when product manufactured is dangerous to an extent beyond that which would be contemplated by ordinary purchaser, i.e., a consumer possessing ordinary and common knowledge of the community as to the product's characteristics. The duty extends not only to purchaser but purchaser's employees as well. *McCulloch v. H.B. Fuller Co.*, 61 F.3d 1038 (2nd Cir. 1995); *Ostrowski v. Hydra-Tool Corp.*, 144 Vt. 305, 479 A.2d 126 (1984). Manufacturer has duty to warn where knows or has reason to know of inherent danger at time of sale. *Webb v. Navistar Intern. Transp. Corp.*, 166 Vt. 119, 692 A.2d 343 (1996). May recover in strict liability for inadequate warning if warning made product unreasonably dangerous and was proximate cause of injury. *Id.*; *Needham v. Coordinated Apparel Group, Inc.*, 174 Vt. 263, 811 A.2d 124 (2002).

Damages. Compensation. As with negligence.

Indemnification. Where provided by express agreement, or where circumstances will imply a right as described in Restatement (Second) of Restitution. *Knisely v. Central Vermont Hosp.*, 171 Vt. 644, 769 A.2d 5 (2000).

Punitive. As with negligence.

Defenses. No express right; no implied right; often an argument that the claim is one for contribution, which is not permitted.

RELEASE

Contract Law. A release is a contract and its scope is determined by the intention of the parties as expressed in the terms of a particular instrument considered in light of all facts and circumstances. *Economou v. Economou*, 136 Vt. 611, 399 A.2d 496 (1979).

Consideration. Seal or other good and valuable consideration. Though consideration may be given by

the promise or by some other person, consideration must be bargained for as the exchange for the promise. *Quazzo v. Quazzo*, 136 Vt. 107, 386 A.2d 638 (1978). Exculpatory agreements in lease agreements will be strictly construed and upheld if expressly clear. *Fairchild Square Co. v. Green Mountain Bagel Bakery, Inc.*, 163 Vt. 433, 658 A.2d 31 (1995). Exculpatory clauses should be upheld when freely and fairly made between parties in equal bargaining position and no interference with societal interests. *Behr v. Hook*, 173 Vt. 122, 787 A.2d 499 (2001); *Thompson v. Hi Tech Motorsports, Inc.*, 183 Vt. 218, 945 A.2d 368 (2008). Exculpatory agreements in amateur ski racing are void as contrary to public policy. *Dalury v. S-K-I, Ltd.*, 164 Vt. 329, 670 A.2d 795 (1995); *Spencer v. Killington, Ltd.*, 167 Vt. 137, 702 A.2d 35 (1997).

Accord and Satisfaction. An “accord and satisfaction” is a method of discharging a contract or settling a cause of action arising either from a contract or tort by substituting for such contract a cause of action, an agreement for satisfaction thereof and an execution of such substituted agreement. *Beattie v. Gay’s Exp.*, 112 Vt. 131, 22 A.2d 169 (1941). Party asserting defense of accord and satisfaction must establish that: claim is disputed; he/she offered to pay less than amount purportedly due; and other party accepted and retained lesser amount offered in full settlement of claim. *Eccomunity, Inc. v. Lussier*, 147 Vt. 276, 514 A.2d 711 (1986). Releases are enforceable if clear and unambiguous. *See Smith v. Gainer*, 153 Vt. 442, 571 A.2d 70 (1990).

Covenant Not to Sue. Valid and enforceable. *See e.g. Douglass v. Skiing Standards, Inc.*, 142 Vt. 634, 459 A.2d 97 (1983); *Umali v. Mt. Snow Ltd*, 247 F. Supp. 2d 567 (D. Vt. 2003).

Fraud and Misrepresentation. As with other contracts.

Joint Tort-feasors. A covenant not to sue one of several joint obligors does not release the others. *Pinney v. Bugbee*, 13 Vt. 623, 1841 WL 2823 (1841).

Mistake. As with contracts generally.

REPRESENTATIONS AND WARRANTIES

Statutory provisions. 9A V.S.A. §§2-312-2-318, 2-321, 2-607, 2-714-2-715, 2-725.

Misrepresentations. False statement, though in the form of a warranty or guarantee, made with intent that it be accepted and relied on as assertion of fact, may be made basis of action for false representations. *Potter v. Crawford*, 106 Vt. 517, 175 A. 229 (1934). To support action for fraud or deceit, representations must be of existing facts relating to subject matter of contract, affect-

ing its essence and substance, not matters of judgment or opinion, nor facts that will exist, nor promises. *Anderson v. Knapp*, 126 Vt. 129, 225 A.2d 72 (1966). Consumer action against seller under theory of fraud was properly dismissed where there was no showing that seller’s agents were aware that representations made to consumer were false. *Winton v. Johnson & Dix Fuel Corp.*, 147 Vt. 236, 515 A.2d 371 (1986).

Materiality. When a seller of goods makes description of goods part of the basis for the bargain, seller creates an express warranty that goods will conform to description. *Taylor v. Alfama*, 145 Vt. 4, 481 A.2d 1059 (1984); *see also* 9A V.S.A. §§2-313(1)(b), 2-313(2).

Rescission. Revocation is available as remedy against manufacturer whose product comes with express warranty that is passed on to consumer by seller at time of sale, and which product later proves to have substantial defects that continue to exist after reasonable number of repair attempts, irrespective of any agency relationship between manufacturer and seller. *Gochy v. Bombardier, Inc.*, 153 Vt. 607, 572 A.2d 921 (1990); *see also* 9A V.S.A. §§2-103(1)(d), 2-608(1)-(2).

Reformation. Party seeking reformation has duty of establishing, beyond reasonable doubt, the true agreement to which the contract in question is to be reformed. *George v. Goss*, 137 Vt. 6, 398 A.2d 496 (1979).

SERVICE OF PROCESS

Upon Corporations. V.R.C.P. 4(d)(7), 4(e).

Upon Superintendent of Insurance. V.R.C.P. 4(d)(2).

Upon Non-resident Motorist. Statute providing that substituted service may be made upon Commissioner of Motor Vehicles on basis that, by virtue of operating motor vehicle in state, owner is deemed to have appointed commissioner to be his/her attorney is a valid exercise of power by state, but the statute must make it reasonably probable that notice of service will be communicated to defendant. *Proulx v. Goulet*, 315 F. Supp. 622 (D. Vt. 1970); *see also* 12 V.S.A. §891, 892; V.R.C.P. 4(e).

Personal Service. V.R.C.P. 4(d).

SUBROGATION

In General. Subrogation is an equitable doctrine enabling a party secondarily liable, but who has paid the debt of another, to reap benefit of any securities or remedies which former may hold against principal debtor, use of which will make party whole. *First Vermont Bank & Trust Co. v. Kalomiris*, 138 Vt. 481, 418 A.2d 43 (1980). Subrogation will never be enforced to prejudice rights of equal or higher rank. *St. Johnsbury &*



L.C.R.R. v. Skeels & Weidman, Inc., 124 Vt. 25, 196 A.2d 485 (1963). Right of subrogation is a favorite of the law, and tendency is to extend its application. *Clifford v. West Hartford Creamery Co.*, 103 Vt. 229, 153 A. 205 (1931); *Nationwide Mut. Fire Ins. Co. v. Gamelin*, 173 Vt. 45, 786 A.2d 1078 (2001).

Parties to Action. An insurer who has paid all or part of a loss may sue in the name of the assured to whose rights it is subrogated. V.R.C.P. 17(a); *see also* V.R.C.P. 17(c).

Liability Insurance. Voluntary payment by insurer of claim it is not liable or cannot be subrogated to right of insured; insurers potential subrogation rights may be lost by waiver or estoppel. *Jefferson Ins. Co. v. Travelers Ins. Co.*, 159 Vt. 46, 614 A.2d 385 (1992); *Agency of Natural Resources v. Glens Falls Ins. Co.*, 169 Vt. 426, 736 A.2d 768 (1999). The insurance company shall be subrogated to all rights of the insured against any party, as respects such loss or expense, to the amount of such payments, and the insured shall execute all papers required and shall cooperate with the company to secure to the company such rights. 8 V.S.A. §4203(4).

Collision Insurance. *See above.*

Fire Insurance. *See above.*

Surety. Surety does not assume shoes of debtor whose performance he assures, but takes the position of the creditor who has been satisfied by surety. *American Fidelity Co. v. Dalaney*, 114 F. Supp. 702 (D. Vt. 1953). Subrogation rights of surety bonding company, which was required to pay material suppliers and laborers under its contract of suretyship with contractor upon default of contractor, became enforceable at moment it was required to pay, and did pay, for charges incurred by contractor for labor and material supplied in connection with contract and those rights related back in time when it entered into its contract of suretyship. *First Vermont Bank & Trust Co. v. Village of Poultney*, 134 Vt. 28, 349 A.2d 722 (1975).

Worker's Compensation. Worker's Compensation Insurance Subrogation Act, 21 V.S.A. §624.

WAIVER AND ESTOPPEL

General. "Waiver" and "estoppel," as applied to contracts of insurance, are terms which are interchangeably used, and in each case the meaning and result are the same. "Waiver" is intentional relinquishment or abandonment of known right and may be evidenced by express words or conduct; it involves only one party to contract. "Estoppel" is based on fairness and prevents party from asserting rights which might have existed against another who has relied to detriment on earlier

representations. *My Sisters Place v. City of Burlington*, 139 Vt. 602, 433 A.2d 275 (1981); *Lodge at Bolton Valley Condominium Ass'n. v. Hamilton*, 180 Vt. 497, 905 A.2d 611 (2006). Action of insured in making material fraudulent misrepresentations regarding prior suspensions or revocations of driver's license on insurance application constituted lack of good faith and prevented insured from raising defense of estoppel to insurer's action to void automobile liability policy on ground of misrepresentations but did not prevent insured from raising defense of waiver of misrepresentations. *Firemen's Fund Ins. Co. v. Knutsen*, 132 Vt. 383, 324 A.2d 223 (1974).

Waiver by Agent. In absence of proof of an authorization, an adjuster, while he may waive requirements of proof of loss, has not real or apparent authority to waive a forfeiture for breach of warranty or condition subsequent and thereby reinstate fire policy. *Vinton v. Atlas Assur. Co.*, 107 Vt. 272, 178 A. 909 (1935). Independent adjuster without authority to waive provision in standard fire policy could not estop insurer by his acts or statements in regard thereto, particularly where there was no proof that insured in reliance upon what was said had been induced to put himself in a prejudicial position. *Id.* Insurance company was entitled to protect itself against corruption of its agents by persons so disposed, but provision in application stating the insurer was not bound by knowledge of or statement by agent unless incorporated therein could not be used by company to prevent applicant from proving her own good faith in making application for hospitalization policy. *Middlebrook v. Banker's Life & Cas. Co.*, 126 Vt. 432, 234 A.2d 346 (1967).

Premiums. By continuing to bill debtor and accept premium payments, insurer recognizes continuing existence of insurance policies and was precluded from asserting forfeiture by reason of failure to pay premium. *See e.g. Kimball v. New York Life Ins. Co.*, 96 Vt. 19, 116 A. 119 (1922).

Proof of Loss. Insurer, upon receipt of notice of claim, will furnish to claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not furnished within fifteen days after giving of such notice, claimant shall be deemed to have complied with requirements of policy as to proof of loss upon submitting, within time fixed in policy for filing proofs of loss, written proof covering occurrences, character and extent of loss for which claim is made. 8 V.S.A. §4065(6).

Written proof of loss must be furnished to insurer at its office in case of claim for loss for which policy provides any periodic payment contingent upon continuing loss within ninety days after termination of period for which insurer is liable and in case of claim for any other

loss within ninety days after date of such loss. Failure to furnish such proof within time required shall not invalidate nor reduce any claim if it was not reasonably possible to give proof within such time, provided such proof is furnished as soon as reasonably possible and in no event, except in absence of legal capacity, later than one year from time proof is otherwise required. 8 V.S.A. §4065(7).

Proof of loss may be waived by absolute denial of liability by insurer before time has expired for insured to present formal proof of loss under terms of policy. *Clarke v. Travelers' Ins. Co.*, 94 Vt. 383, 111 A. 449 (1920). Letter from daughter of insured to insurer's agent held to be insufficient notice of injury under accident policy that it did not contain particulars sufficient to identify insured. *Jacobs v. National Acc. & Health Ins. Co.*, 103 Vt. 5, 151 A. 565 (1930).

WORKERS' COMPENSATION

21 V.S.A. §601 *et seq.* Workers compensation law provides injured workers with payments for lost wages and medical expenses without proof of fault. Employers have limited liability. Injured employee must reimburse the carrier if an award is obtained from a third party. *Travelers Ins. Co. v. Henry*, 178 Vt. 287, 882 A.2d 1133 (2005).

Statutory Reference. Original jurisdiction. *See* 21 V.S.A. §§662-664. Superior Court has no jurisdiction to hear petition for declaratory judgment alleging that plaintiff was entitled to recover death benefits under this chapter where plaintiff failed to avail herself of the administrative remedy provided by this chapter. *Demag v. American Ins. Companies*, 146 Vt. 608, 508 A.2d 697 (1986).

Appellate Jurisdictions. Superior Court *de novo* review on factual grounds, 21 V.S.A. §671; Supreme Court review on purely legal grounds, 21 V.S.A. §672.

Benefits. Wages. For temporary total disability, 21 V.S.A. §§642, 645; temporary partial disability, 21 V.S.A. §646; for permanent partial disability, 21 V.S.A. §648; for permanent total disability, 21 V.S.A. §644; *see also* 21 V.S.A. §650.

Medical. 21 V.S.A. §640. Spousal care may be compensable as nursing services under 21 V.S.A. §640 if the services go beyond the ordinary household services. *Close v. Superior Excavating Co.*, 166 Vt. 318, 693 A.2d 729 (1997).

Disability. 21 V.S.A. §§642-650.

Death. 21 V.S.A. §§632-639.

Employment Defined. Casual "worker" and "employee" means a person who has entered into the employment of, or works under contract of service or apprenticeship with, an employer, but shall not include a person whose employment is of a casual nature, and not for the purpose of the employer's trade or business. 21 V.S.A. §601(14)(A).

Dual Capacity. Doctrine recognized. *Derosia v. Duro Metal Products Co.*, 147 Vt. 410, 519 A.2d 601 (1986); *Garrity v. Manning*, 164 Vt. 507, 671 A.2d 808 (1996); *Colwell v. Allstate Ins. Co.*, 175 Vt. 61, 819 A.2d 727 (2003).

Exclusive Remedy. The provisions shall exclude all other rights and remedies of an employee, his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury. 21 V.S.A. §622.

Arising out of and in the course of. 21 V.S.A. §618. "But for" test. If an injury occurs during the "course of employment," it also "arises out of it," unless the circumstances are so attenuated from the condition of employment that the cause of injury cannot reasonably relate to employment. *Shaw v. Dutton Berry Farm*, 160 Vt. 594, 632 A.2d 18 (1993). Even if worker's activity leading to injury is not work per se, the causal connection is not broken.

Occupational Disease. Chapter 11 of Title 21 governing occupational diseases repealed 1999. All diseases previously classified as occupational diseases under Ch. 11 of Title 21 shall be treated as occupational diseases under Ch. 9 of Title 21.

Disablement or death of an employee arising out of and in the course of the employment and resulting from an occupational disease defined, shall be treated as the happening of a personal injury by accident arising out of and in the course of the employment and all the provisions of workers' compensation insofar as consistent apply to such occupational diseases. 21 V.S.A. §601(7). Occupational disease is construed to mean a "disease that results from causes and conditions characteristic of and peculiar to a particular trade, occupation, process or employment, and to which an employee is not ordinarily subjected or exposed outside or away from the employment and arises out of and in the course of the employment." 21 V.S.A. §601(23). Where workers' compensation claimant's exposure over four to six weeks to paint and varnish fumes was unusual to his trade of carpentry, and the carpentry aspects of house-building were usually finished before the painters arrived, and in this case the builder was behind schedule and the painters arrived early, fume-induced acute bronchitis and myocardial infarction were not distinctly associated with or charac-

teristic of claimant's occupation and did not constitute occupational diseases. *Campbell v. Heinrich Savelberg, Inc.*, 139 Vt. 31, 421 A.2d 1291 (1980).

Mental Injuries. In order for mental injuries caused by stress at work to be compensable a workers compensation complaint must show that the stresses at work were of a significantly greater dimension than the daily stresses encountered by all employees. *Bedini v. Frost*, 165 Vt. 167, 678 A.2d 893 (1996).

Pre-existing Injury. The worker's compensation claimant had pre-existing bronchial and arterial diseases aggravation of which caused change from chronic to acute bronchitis, which in turn brought on myocardial infarction, did not undermine conclusion that there was personal injury by accident under Worker's Compensation Act, as aggravation or acceleration of pre-existing condition can constitute personal injury by accident under act. *Campbell v. Heinrich Savelberg, Inc.*, 139 Vt. 31, 421 A.2d 1291 (1980). Although claimant suffered stress-related seizure in 1984 while at work and could no longer work, seizures were due to a brain tumor and claimant would have been in similar situation regardless of the stressful situation. *City of Burlington v. Davis*, 160 Vt. 183, 624 A.2d 872 (1993). The proper inquiry is whether the disability came upon claimant earlier than otherwise would have occurred. *Id.*

Fellow Employee Rule. Worker's Compensation Act, which provides a statutory remedy that is exclusive against employer, does not preclude an employee from bringing an action for negligence against a fellow employee who caused injury. *Garrity v. Manning*, 164 Vt. 507, 671 A.2d 808 (1996); *see also* 21 V.S.A. §§622, 624(a). Co-employees including those in a supervisory capacity, are third parties and may be sued. *Dunham v. Chase*, 165 Vt. 543, 674 A.2d 1279 (1996). The key question in determining when conduct is governed exclusively by workers' compensation is whether negligence occurred in performance of nondelegable duty of

employer as opposed to duty owed to injured employee. *Gerrish v. Savard*, 169 Vt. 468, 739 A.2d 1195 (1999); *see also* 21 V.S.A. §624(a).

Liens. Claims of physicians and hospitals for services rendered under the provisions of this chapter and claims of attorneys for services rendered an employee in prosecuting a claim under the provisions of this chapter shall be approved by the commissioner. When so approved they may be enforced against compensation awards in such manner as the commissioner may direct. 21 V.S.A. §682.

Attorney's Fee. Necessary costs of proceeding under this chapter shall be assessed by the commissioner against the employer or its worker's compensation carrier when the claimant prevails. The commissioner may allow the claimant to recover reasonable attorney fees when he/she prevails. Costs shall not be taxed or allowed either party except as provided in this section. 21 V.S.A. §678(a).

In appeals to the superior or supreme courts, the claimant, if he/she prevails, shall be entitled to reasonable attorney's fees as approved by the court, and interest at a rate of 12% per annum on that portion of any award the payment of which is contested. Interest shall be computed from the date of the award of the commissioner. 21 V.S.A. §678(b).

Officer Liability. A worker who has received workers compensation benefits is barred from suing individual officers, directors and stockholders for conduct that amounts to a breach of corporate employers duty to provide a safe place to work. *Garrity v. Manning*, 164 Vt. 507, 671 A.2d 808 (1996); *see also* 21 V.S.A. §§622, 624(a). A corporate officer may be subject to co-employee liability only for those negligent acts or omissions that breach a personal, rather than a nondelegable corporate, duty owed to a plaintiff employee. *Dunham v. Chase*, 165 Vt. 543, 674 A.2d 1279 (1996); *Gerrish v. Savard*, 169 Vt. 468, 739 A.2d 1195 (1999).