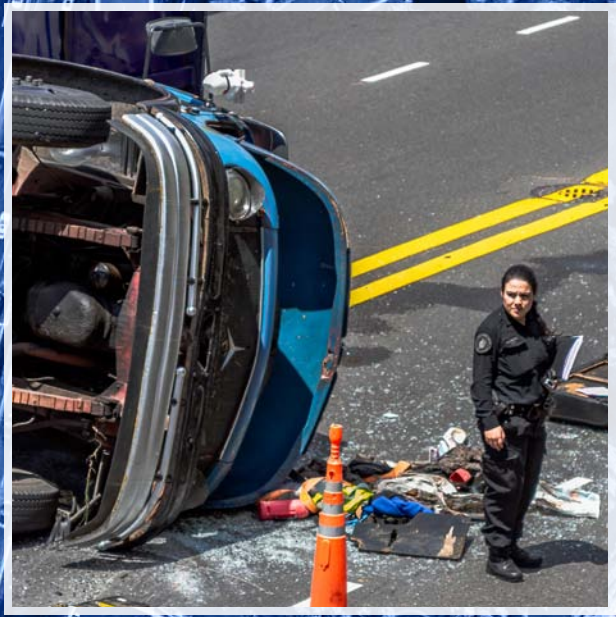
# AUTO LAW Compendium









THE HARMONIE GROUP

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# COMPENDIUM LAST UPDATED: MAY 2020

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***This compendium covers transportation and related insurance issues, including:***

- Bodily Injury
- Property Damage
- Personal Injury Protection
- Medical Payments
- Uninsured/Underinsured Motorist Coverage
- Negligence
- Statute of Limitations
- Licensing Requirements
- Punitive Damages
- Joint and Several Liability
- Workers' Compensation
- Settlement of Claims of Minors
- Unfair Practices
- Alcohol
- Legal Age
- Inter-Family/Spousal Immunity
- Seat Belt Defense
- Wrongful Death
- Liens
- Rental Coverage
- Permissive Use

# Alabama

**Coverage for Bodily Injury and Property Damage:** Automobile liability insurance is compulsory in Alabama. ALA. CODE § 32-7A-4 (1975). A driver is required to provide proof of such insurance. ALA. CODE § 32-7A-6 (1975). Minimum coverage limits are $20,000 because of bodily injury to or death of one person in any one accident and $40,000 because of bodily injury to or death of two or more persons in one accident. Additionally, the insurance must provide $10,000 for injury to or destruction of property or others in any one accident. ALA. CODE § 32-7-6(c) (1975).

Per person limits apply to all derivative claims, such as loss of consortium, *Weekly v. State Farm*, 537 So. 2d 477 (Ala. 1989), unless the definition of bodily injury includes "loss of services," in which case each spouse has his or her own limits. *Allstate v. Tate*, 692 So. 2d 822 (Ala. 1997).

**No Fault Insurance:** No fault insurance does not exist in Alabama.

**Uninsured and Underinsured Motorist Coverage**

**When is it required and in what amounts?** Alabama law provides that all liability insurance policies insuring vehicles registered or principally garaged in this state must provide for uninsured and underinsured motorist benefits. The statute provides that no automobile liability policy shall be issued without uninsured motorist coverage unless the insured rejects the coverage in writing. ALA. CODE § 32-7-23 (1975). Unless there is a written agreement rejecting UM coverage on the part of the named insured in evidence, the courts will interpret all motor vehicle liability insurance policies as providing statutory minimum uninsured motorist coverage. *Ins. Co. of North America v. Thomas*, 337 So. 2d 365 (Ala. Civ. App. 1976).

This requirement has been strictly interpreted. Since the statute provides that only the "named insured shall have the right to reject such coverage," it has been held that a signed rejection of such coverage by the named insured's wife was "legally insufficient." *State Farm Mut. Auto. Ins. Co. v. Martin*, 289 So. 2d 606 (Ala. 1974); *Nationwide v. Nicholas*, 868 So. 2d 457 (Ala. Civ. App. 2003) *distinguished by Progressive Specialty Ins. Co. v. Green*, 934 So. 2d 364 (Ala. 2006)(holding a spouse of a deceased person, who was not a named insured on the deceased person's insurance policy, is not entitled to uninsured-motorist benefits if the deceased, who was the sole named insured, expressly rejected uninsured-motorist benefits.)

Where a corporate insured rejected coverage, but the policy was later transferred to a new corporate insured which did not reject coverage in accordance with the mandate of the statute, it was held that coverage was in effect at the time of the accident. *Key v. Robert M. Duke Ins. Agency*, 340 So. 2d 781 (Ala. 1976).

Both the statute and the cases applying it make it clear that the existence of minimum uninsured motorist coverage is inferred in every automobile liability policy even in the absence of a provision for such coverage in the policy itself. *Ex Parte Potete*, 340 So. 2d 781 (Ala. 1980); *Cline v. Aetna Ins. Co.*, 317 F. Supp. 1229 (S.D. Ala. 1970).

Since its enactment, the statute has required limits equal to the minimum limits for bodily injury or death set forth in the Motor Vehicle Safety-Responsibility Act (ALA. CODE § 32-7-6 (1975)). At the time of the statute's enactment, this Code section was Tit. 36, § 74(46), 1958. At the time the statute became effective in 1966, these limits were $10,000 per person and $20,000 per accident. Code of Alabama, 1958, Tit. 36 § 74(46)(c). These limits were increased to $20,000 per person and $40,000 per accident effective January 1, 1985. Acts of 1984, No. 84-301. An excess policy does not have to provide uninsured motorist coverage. *Sweatt v. Great American Ins. Co.*, 574 So. 2d 732 (Ala. 1990). See the section above on Coverage as minimum liability insurance limits may be changing in Alabama.

**How many uninsured or underinsured coverages may you stack?** ALA. CODE § 32-7-23(c) states: The recovery of an injured person under the uninsured provisions of any one contract of automobile insurance shall be limited to the primary coverage plus such additional coverage as may be provided for additional vehicles, but not to exceed two additional coverages with such contract.

The Alabama Supreme Court held that the plain meaning of ALA. CODE § 32-7-23(c) was to extend stacking to all insureds, whether named or not, if there is additional coverage for another automobile within the same contract. *Travelers Ins. Co. v. Jones*, 529 So. 2d. 234 (Ala. 1988). In *State Farm Mut. Auto. Ins. Co. v. Fox*, 541 So. 2d 1070 (Ala. 1989), the Court held that the three-coverage limitation did not apply when there were different policies for each insured vehicle. As the law presently stands, a named insured may stack up to three coverages within any one policy and there is no limit to the number of policies he may stack. *Id.*.

A passenger may stack up to three coverages on the named insured's policy covering the vehicle in which he was riding as a passenger. *Allstate Ins. Co. v. Alfa Mut. Ins. Co.*, 565 So. 2d 179 (Ala. 1990). Additionally, a passenger may stack any coverages he may have on his own vehicle, subject to the three-coverage per contract limit of § 32-7-23. *State Farm Mut. Auto. Ins. Co. v. Fox*, 541 So. 2d 1070 (Ala. 1989).

**Primary/Secondary Coverage:** The insured's personal policy is considered primary when coverage is available under more than one UM policy. Determination of which insurance coverage is primary, and which, if any, is secondary is dependent upon the language of each policy. *Isler v. Federated Guaranty Mut. Ins. Co.*, 567 So. 2d 1264 (Ala. 1990).

Policy language is important, but a typical policy provides that the policy on the vehicle is primary and that all other policies pro rate according to their limits. *Gaught v. Evans*, 361 So. 2d 1027 (Ala. 1978). An injured party may settle for less than the limits of a primary policy and then recover from a secondary or excess coverage. However, the secondary or excess carrier is given credit for the full policy limits of the primary policy. *State Farm Mut. Ins. Co. v. Scott*, 707 So. 2d 238 (Ala. 1997). The exclusivity-of-remedy provision in Workers' Compensation Act does not bar an employee from recovering uninsured-motorist-/underinsured-motorist (UIM/UM) benefits under the automobile insurance policy issued to his employer. *Frazier v. St Paul*, 880 So. 2d 406 (Ala. 2003).

**Intentional Acts:** The Alabama Supreme Court has held that where an insurance contract expressly provides coverage for intentional acts, the insurer will not be allowed, on public policy grounds, to avoid these provisions in its own contract which would otherwise obligate it. *Bumham Shoes, Inc. v. West American Ins. Co.*, 504 So. 2d 238 (Ala. 1981) *abrogated, on other grounds, by Williamson v. Indianapolis Life Ins. Co.*, 741 So. 2d 1057, 1059 (Ala. 1999)

**Multiple Claims in Excess of Limits:** When the claims of multiple parties exceed the limits of the liability policy, interpleader is the safest procedure. Under the Alabama Rules of Civil Procedure, any party seeking interpleader, may deposit with the court the claimed amount and the court my thereupon order such party discharged from liability as to such claims and the action continued as between the claimant of such money. Ala. R. Civ. P. 22(b). An insurer may be released upon payment of the limits into the court. *Ex Parte Lewis*, 571 So. 2d 1069 (Ala. 1990). Payment of liability insurance limits does not, however, release the separate duty to defend the insured. The duty to defend extends beyond the exhaustion of the policy limit. *Lambert v. State Farm Mut. Auto. Ins. Co.*, 576 So. 2d 160 (Ala. 1991). However, if an underinsured carrier is not made a party to interpleader, then it is not bound by the action taken therein. *Alfa Mut. Ins. Co. v. Barbee*, 693 So. 2d 498 (Ala. Civ. App. 1997).

If an insurer, with the knowledge of more than one adverse claim, pays its limits to one of the claimants, it does so at its own risk, and may be required to make payments in excess of the limits. *Nationwide Mut. Ins. Co. v. Hall*, 643 So. 2d 551 (Ala. 1994).

**Proof of Insurance Coverage:** Generally, proof that the defendant was insured against liability is inadmissible as tending to show negligence or wantonness on the defendant's part. *Cook v. Anderson*, 512 So. 2d 1310 (Ala 1987).

**Collateral Sources:** Alabama law provides that in all civil actions where damages for any medical or hospital expenses are claimed and are legally recoverable for personal injury or death, evidence that the plaintiffs medical or hospital expenses have been or will be paid or reimbursed shall be admissible. ALA. CODE § 12-21-45 (1975).

Upon admission of evidence respecting reimbursement or payment of medical or hospital expenses, the plaintiff shall be entitled to introduce "evidence of the cost of obtaining reimbursement or payment of medical or hospital expenses." ALA. CODE § 12-21-45(c) (1975). "Upon proof ... that the plaintiff is obligated to repay the medical or hospital expenses which have been or will be paid or reimbursed, evidence relating to such reimbursement or payment shall be admissible." Plaintiff may also introduce into evidence the cost of purchasing the insurance which provided the medical benefit. ALA. CODE § 12-21-45(c) (1975).

**Permissive User of Automobile:** Alabama law holds that certain insureds are entitled to uninsured motorist coverage independently of any occupancy or use on their part of a vehicle insured under the policy. These insureds are known as "insureds of the first class." *Holloway v. Nationwide Mut. Ins. Co.*, 376 So. 2d 690, 694 (Ala. 1979). However, Alabama law also recognizes a second group of insureds which includes mere occupants and permissive users of the vehicle under a policy's omnibus liability clause. *Id.* This second class of insureds (i.e. a permissible user) is entitled to uninsured motorist coverage solely because of their occupancy or use of an insured vehicle. *Id.* Therefore, their right to coverage is necessarily tied to and limited by the coverage applicable to such vehicle and as governed by the policy's limits of liability clause. *Id.*

**Subrogation:** In *Ex parte State Farm Fire & Casualty Company*, 764 So. 2d 543 (Ala. 2000), the Alabama Supreme Court overruled *Powell v. Blue Cross and Blue Shield of Alabama*, 581 So. 2d 772 (Ala. 1990) and *Alfa Mutual Insurance Company v. Head*, 655 So. 2d 975 (Ala. 1995), returning to a previous rule regarding subrogation, holding that that an insurer may contract with its insured for subrogation to the insured's claims against a third-party tortfeasor even before the insured has been made whole. The substantive rule to which the court returned is that "while the doctrine of subrogation is of purely equitable origin and nature, it may be modified by contract." The primary significance of the rule is that while equitable principles require that an insured have a full recovery before an insurer has an interest in any recovery by the insured against a third party, those equitable principles do not control if the parties have otherwise agreed.

**ERISA Preemption:** Alabama insurance law, including the right for an insured to deduct a pro-rata share of the litigation costs and attorney fees from any subrogation amount, was preempted in a suit by employer and administrator to recover reimbursement of health-care payments from tort settlement, when the employee welfare benefit plan that did not purchase third-party insurance to satisfy its obligations to its participants was self-funded, even though employees contributed to the plan. EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, § 514(a), (b)(2)(A, B), 29 U.S.C.A. § 1144(a), (b)(2)(A, B). *Culp, Inc. v. Cain*, 414 F. Supp. 2d 1118 (M.D. Ala. 2006).

**Liens for Medical Services:** Alabama provides that all hospitals operating in this state have a lien for charges due to hospital care and treatment upon any actions, judgments, or settlements relating to the patient's injuries for which the treatment was provided. ALA. CODE § 35-11-379 (1975). The lien may be perfected by filing a verified statement of the account with the county probate's office. The filing of the lien is notice to all persons who may be liable for the injuries, whether or not the persons are named in the verified statement. ALA. CODE § 35-11-371 (1975). Accordingly, when effecting a settlement, the county probate office should be consulted to determine if any liens are on file as all settlements are subject to a properly perfected lien.

**Tort, Evidentiary and Other Issues**

**Statute of Limitations:** Alabama law provides, generally, that a suit for negligence must be brought within two years of the accrual date. ALA. CODE § 6-2-38 (1975). However, the statute of limitations does not run against minors, or insane persons, until three years after the termination of their "disability,"or, a lesser period of time after termination of the disability if the specific statute of limitations governing the plaintiff's cause of action is less than three years. ALA. CODE § 6-2-8 (1975). The statute of limitations for breach of contract is 6 or 10 years depending upon whether the contact is under seal.

**Negligence:** Alabama law is a common law pure contributory negligence state. In short, negligence on the part of the plaintiff that proximately contributes to the plaintiff's injuries is a complete bar to the plaintiff's recovery in an action based upon simple negligence of the defendant but, in spite of the rule, our trial courts are generally reluctant to grant summary judgment on this defense which is usually an issue of fact. Contributory negligence, however, is not a bar to the wanton or willful conduct of the defendant.

Under Alabama statute, a parent is liable for the acts of his or her minor child under the age of 18 for the intentional, willful or malicious injury or destruction to real or personal property up to a maximum of $1,000. ALA. CODE § 6-5-380 (1975). Otherwise, the mere fact of parenthood does not render the parents responsible for their child's wrongs. *Southerland v. Roth*, 407 So. 2d 139 (Ala. Civ. App. 1991).

A child under the age of seven is conclusively presumed to be incapable of judgment and discretion and is incapable of owing a legal duty to another and he cannot be guilty of contributory negligence. A child between the ages of seven and fourteen years is presumed to be wanting in that degree of care, judgment and discretion and sensitiveness to danger which belong to an average child who is fourteen years of age, and is therefore presumed to be incapable of committing contributory negligence. This is a rebuttable presumption however, and the defendant can prove that a particular child did possess the care, judgment and discretion and sensitiveness to danger of a person fourteen years of age or older. A person fourteen years of age or older is capable of contributory negligence. *Works v. Allstate Indemnity Co.*, 594 So. 2d 60 (Ala. 1992).

In addition to contributory negligence, a defendant may prove that the plaintiff assumed the risk of injury. In order to prevail on this defense, the defendant must prove the plaintiff had knowledge of the existence of a dangerous condition, and with appreciation of such danger, failed to exercise care for his own safety by puffing himself in the way of the known danger. As with contributory negligence, this defense is a complete bar to plaintiff's recovery.

**Agency:** Use of a vehicle owned by another creates an "administrative presumption" of the driver's agency of the owner. There is a presumption that an employee was acting within the scope of his employment while operating the employer's vehicle, as that concept is used in the law of respondeat superior liability. *Pryor v. Brown and Root USA. Inc.*, 674 So. 2d 45 (Ala. 1995); *Durbin v. B.W. Capps & Son, Inc.*, 522 So. 2d 766, (Ala.1988); *Rogers v. Hughes*, 39 So. 2d 578, 579 (1949); *Tullis v. Blue*, 114 So. 185 (1927).

**Negligent Entrustment:** Negligent entrustment arises when a party entrusts a dangerous instrumentality to an incompetent with knowledge that he or she is incompetent and such entrustment is the proximate cause of the plaintiffs injuries and damages. *Halford v. Alamo Rent-A-Car, LLC*, 921 So. 2d 409 (Ala. 2005). *Pryor v. Brown and Root USA. Inc.*, 674 So. 2d 45 (Ala. 1995). It is necessary in a negligent entrustment action to show negligence on the part of the driver, as well as the driver's incompetence. *Mason v. New*, 475 So. 2d 854 (Ala. 1985).

**Causation:** A negligence plaintiff must prove that defendant's act was the cause-in-fact of the injury as well as the proximate cause defined as the primary moving cause without which the injury would not have been inflicted without the intervention of any new or independent cause. *See e.g., City of Mobile v. Harvard*, 268 So. 2d 805 (1972). The harm inflicted must be foreseeable from the act. *See, e.g. Peters v. Calhoun County Comm'n*,

669 So. 2d 847 (Ala. 1995). Where the acts of two or more tortfeasors combine or concur to produce an injury, each tortfeasor's act is considered the proximate cause of the injury. *See, e.g., General Motors Corp. v. Edwards*, 482 So. 2d 1176 (Ala. 1985).

**Burden of Proof:** In all civil actions, the plaintiff must adduce substantial evidence of all facts at issue before an issue can be submitted to the trier of fact. "Substantial Evidence" is evidence of such quality that fair minded persons exercising impartial judgment might reach different conclusions as to the existence of the fact to be proven. ALA. CODE § 12-21-12 (1975).

**Guest Passenger Statute:** Alabama has a guest passenger statute which provides that no person responsible for the operation of a motor vehicle shall be liable for the injuries or death of a guest passenger unless the injuries or death were caused by the willful or wanton conduct of the person operating the vehicle. ALA. CODE § 32-1-2 (1975). In the ordinary case, the question whether a rider is a passenger for hire or guest is one of fact. *See Roe v. Lewis*, 416 So. 2d 750, (Ala.1982).

The general rule is that if the transportation of a rider confers a benefit only on the person to whom the ride is given, and no benefits other than such as are incidental to hospitality, goodwill or the like on the person furnishing the transportation, the rider is a guest. However, if his carriage tends to promote the mutual interest of both himself and the driver for their common benefit, thus creating a joint business relationship between the motorist and his rider, or if the rider accompanies the driver at the instance of the driver for the purpose of having the rider render a benefit or service to the driver on a trip that is primarily for the attainment of some objective of the driver, the rider is a "passenger for hire" and not a "guest." *Sellers v. Sexton*, 576 So. 2d 172 (Ala. 1991); *Westbrook v. Gibbs*, 231 So. 2d 97 (Ala. 1970); *Harrison v. McCleary*, 199 So. 2d 165 (Ala. 1967).

The general rule is that the sharing of the cost of operating a car on a trip, when the trip is undertaken for pleasure or social purposes and the invitation is not motivated by, or conditioned on, such sharing, is nothing more than the exchange of social amenities and does not transform into a passenger for hire one who, without the exchange, would be a guest. However, where the offer of transportation is conditioned on the passenger's contribution toward the expenses, or where it appears that the arrangement for transportation bears one or more of the indicia of a business arrangement, especially where the arrangement is specifically for transportation, or comprehends a trip of considerable magnitude, or contemplates the repetition of more or less regular rides, the person paying for gasoline and oil consumed or contributing toward other automobile expenses is held to be a passenger for hire and not a guest. This is true even though the ultimate purpose of the arrangement may be for pleasure. *Sellers v. Sexton,* 576 So. 2d 172 (Ala. 1991); *Wagnon v. Patterson*, 70 So. 2d 244 (1954). Where there is disputed evidence as to whether the offer of transportation was conditioned upon contribution toward expenses, a jury question is presented. *Carter v. Reed*, 638 So. 2d 833 (Ala. 1994).

If the rider is a child under 14 years of age, to be a guest the child must be capable of giving his or her consent. *Fox v. Hollar*, 576 So. 2d 223 (Ala. 1991).

Where the insured driver is immunized from liability to a passenger under the Guest Statute, the driver may be an uninsured motorist for purposes of the passengers' policy. *Hogan v. State Farm Mut. Auto. Ins. Co.*, 730 So. 2d 1157 (Ala. 1998), *reversed on other grounds*.

**Choice of Law:** Alabama, following the First Restatement of Conflicts of Law, applies lex lad deliciti, or law of the place of the wrong in tort actions. *See, e.g., Fills v. Minnesota Mining & Mfg. Co.*, 581 So. 2d 819 (Ala. 1991). In practice, this means that the substantive law of the state of the place of plaintiff's injury will govern. *See, e.g., Norris v. Taylor*, 460 So. 2d 151 (Ala. 1984). In contract cases, the law of the state wherein the contract was entered (lex loci contractus) ordinarily governs. *See, e.g., Cincinnati Ins. Co. v. Giron*, 570 So. 2d 595 (Ala. 1990), though Alabama will enforce contractual choice-of-law provisions. *See, e.g., Chazen v. Parton*, 739

So. 2d 1104 (Ala. 1999). Alabama courts will refuse to apply the substantive law of another state when to do so would violate Alabama public policy. *See, e.g., Cherry, Bekaert & Holland v. Brown*, 582 So. 2d 502 (Ala. 1991).

**Death Actions:** The only damages recoverable under Alabama's death statute are punitive damages, the amount depending on the nature of the defendant's act, his degree of culpability, and the need for deterring the defendant and others from committing similar wrongful conduct. *See, e.g., Deaton v. Burroughs*, 456 So. 2d 771 (Ala. 1984). Evidence of loss of earnings, loss of enjoyment of life, and contributions to family are inadmissible because they are irrelevant. A wrongful death plaintiff can also bring a claim (or a separate action), where appropriate, under a breach of warranty theory, for compensatory damages incurred during the period of time between the accident and death. *Benefield v. Aquaslide "N" Dive Corp.*, 406 So. 2d 873 (Ala. 1981).

The decedent's "personal representative" is the proper party plaintiff in a wrongful death action. ALA. CODE § 6-5-410 (1975). In the usual case this is the administrator or executor of the decedent's estate. *See, e.g. Downtown Nursing Home v. Pool*, 375 So. 2d 465 (Ala 1979), *cert. denied*, 445 U.S. 930 (1980). However, if the decedent was killed while at work, the dependents of the deceased employee, as defined in Alabama's workers' compensation act, have the statutory right to bring suit for workers' compensation benefits against the decedent's employer, and such dependents (rather than the "personal representative") have a right to bring a wrongful death action against a third party liable for the decedent's death. ALA. CODE § 25-5-11(1975); *Baggett v. Webb*, 248 So. 2d 275 (Ala. Civ. App.) *cert. denied*, 248 So. 2d 284 (1971). In the case of the death of a minor, either parent (or the custodial parent in the event the parents are divorced) has the right to bring the action. ALA. CODE § 6-5-390-391(1975); *see also Coleman v. Stitt*, 514 So. 2d 1007 (Ala. 1987). If the father and mother are both dead or if they fail to commence the action within six months from the death of the minor, the personal representative of the minor may commence the action. ALA. CODE § 6-5-391(1975).

Damages recovered in a wrongful death action are not subject to the payment of debts or liabilities of the testator or intestate, and are distributed according to the statute of distributions. *See, e.g., Baggett v. Sellers*, 210 So. 2d 796 (Ala. 1968). The provisions for distribution under intestate succession are governed by ALA. CODE §4 3-8-40 et seq. (1975).

The wrongful death statute requires that all actions arising under it be brought in Alabama courts; courts in other states have, however, applied the statute to actions brought in those states. *See, e.g., Spencer v. Malone Freight Lines, Inc.*, 298 So. 2d 20 (Ala. 1974). The statute cannot be used to support an action brought in Alabama where the wrongful act was committed in another state. *See. e.g., Fins v. Minnesota Mining & Mfg. Co.*, 581 So. 2d 819 (Ala. 1991).

**Punitive Damages:** The purpose of awarding punitive damages is to punish the defendant and to deter the defendant and others from doing such wrong in the future. The amount of the award is based upon the character and degree of the wrong and the necessity of preventing similar wrongs. The plaintiff must prove his entitlement to punitive damages by "clear and convincing evidence." ALA. CODE § 6-11-20 (1975).

Unlike most states, the only damages recoverable for wrongful death are punitive damages. Alabama law does not prohibit insurers from providing coverage for punitive damages.

Because ALA. CODE § 6- 5-410, the Alabama Wrongful Death Act, has been interpreted to allow the recovery of punitive damages, a standard liability policy that excluded coverage for punitive damages in a wrongful death case would contravene Alabama law. *Hill v. Campbell*, 804 So. 2d 1107 (Ala. Civ. App. 2001).

Alabama's Uninsured Motorist Statute, as written, permits the recovery of punitive damages, and an exclusion purporting to exclude coverage for punitive damages violates the Uninsured Motorist Act. *Omni Ins. Co. v. Foreman*, 802 So. 2d 195 (Ala. 2001).

In 1999, Alabama enacted certain statutory caps on punitive damage awards. (Earlier enacted caps were invalidated on constitutional grounds. *See Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993). The caps do not apply to actions for wrongful death or intentional infliction of physical injury, or in class actions. ALA. CODE § 6-11 21(h) - (j) (1975 and 2000 Suppj. In cases involving small business defendants (defined as a business with a net worth of $2 million or less at the time of the occurrence made the basis of the suit), punitive damages may not exceed $50,000 or 10 percent of the business's net worth, whichever is greater. ALA. CODE § 6-11-21(c) (1975 and 2000 Supp.).

In cases involving other defendants, punitive damages may not exceed three times compensatory damages or $500,000, whichever is greater ALA. CODE § 6-11-21(a) (1975 and 2000 Supp) except in cases of physical injury, where the caps are three times compensatory damages or $1.5 million, whichever is greater. ALA. CODE § 6-11-21(d) (1975 and 2000 Supp.). For purposes of the statutory cap, physical injury does not include mental anguish or emotional distress. ALA. CODE § 6-11-21(k) (1975 and 2000 Supp.).

**Dram Shop Liability:** Alabama has a statutory cause of action for any person injured "in consequence of another's intoxication, against the seller or provider who has provided liquor or other beverages to the intoxicated person "contrary to the provisions of law." ALA. CODE § 6-5-71 (1975). A person who is injured by reason of his own intoxication cannot recover. *Maples v. Chinese Palace, Inc.*, 389 So. 2d 120 (Ala. 1980). The intoxicated person is not a protected party under the Dram Shop Act. *Weeks v. Princeton's*, 570 So. 2d 1232 (Ala. 1990). A plaintiff proceeding under this statutory claim is not held to the usual standards of proof of causal connection between the illegal sale of beverages and the injury; plaintiff need only prove that the injury was "in consequence of" the intoxication brought about by the illegal sale. ALA. CODE § 6-5-71 (1975); *Duckett v. Wilson Hotel Management Co.*, 669 So. 2d 977 (Ala. Civ. App. 1995). The Alabama Supreme Court has generally declined to apply the statute to cover social hosts and has stated that in the usual case the sale of alcohol by a licensed vendor is an element of the claim. *Hatter v. Nations*, 480 So. 2d 1209 (Ala. 1985); *Beeson v. Scoles Cadillac Corp.*, 506 So. 2d 999 (Ala. 1987). By judicial interpretation, the statutory prohibition on provision of alcohol "contrary to the provisions of law" can include provision to visibly intoxicated persons. *Buchanan v. Merger Enterprises*. 463 So. 2d 121 (Ala. 1984); the sale of liquor by a private bar to a nonmember or nonguest. *Attalla Golf& Country Club, Inc. v. Harris*, 601 So. 2d 1965 (Ala. 1992); and the provision of alcohol to minors. *Martin v. Watts*. 513 So. 2d 958 (Ala. 1987). The direct sale or provision of alcohol to the person causing the injury is a requirement for liability under the statute. *Jones v. B.P. Oil*, 632 So. 2d 435 (Ala. 1993). Both compensatory and punitive damages are recoverable. ALA. CODE § 6-5-71(a) (1975).

A separate statute creates a cause of action in favor of the parent or guardian of a minor (under the age of 21) against anyone who sells or furnishes alcohol to a minor, provided the seller or provider had knowledge of or was chargeable with notice of the minor's minority. ALA. CODE § 6-5-70 (1975).

**Alcohol and Alcohol Related Torts:** It is unlawful to drive or be in actual physical control of any vehicle while there is 0.08 percent or more of alcohol by weight in the driver's blood, or when the driver is under the influence of alcohol, or if the driver is under the influence of a controlled substance to a degree which renders him incapable of driving safely. ALA. CODE § 32-5A-191 (1975). A person under 21, or a bus driver or day care worker, shall not drive or be in physical control of any vehicle if there is 0.02 percent or more of alcohol by weight in the driver's blood. Evidence of the amount of alcohol or controlled substance in a person's blood, urine, breath or other bodily substance, is admissible in civil, criminal, or quasi-criminal proceedings. ALA. CODE § 32- 5A-194 (1975). A person is presumed not to be under the influence of alcohol if there is 0.05 percent or less by weight of alcohol in the person's blood. If a person has more than 0.05 percent, but less than 0.08 percent by weight of alcohol in his/her blood, there is no presumption that the person is under the influence, but the test results may be considered with other competent evidence in determining whether the person is under the influence. If a person has more than 0.08 percent alcohol by weight in the person's blood, the person is presumed to have been under the influence of alcohol. ALA. CODE § 32-5A-194(b) (1-3) (1975).

Alabama has two statutes which create causes of action for alcohol-related torts. First, either a parent, guardian, or person standing in loco parentis to another, has a right of action for damages against any person who unlawfully sells or furnishes spirituous liquors to a minor (provided that the person selling or furnishing liquor to the minor had knowledge of or was chargeable with notice or knowledge of such minority. ALA. CODE § 6-5-70 (1975) ("Civil Damages Act"). A violation of this statute results in strict liability. *McLeod v. Cannon Oil Co*., 603 So. 2d 889 (Ala. 1992). A person "furnishes" liquors to a minor if it can be reasonably inferred from the circumstances that the person to whom the liquors was sold or furnished would permit a minor to consume the liquor. *Laymon v. Braddock*, 544 So. 2d 900 (Ala. 1989).

Additionally, Alabama law provides that every wife, child, parent or other person who shall be injured in person, property, or means of support by any intoxicated person or in consequence of the intoxication has a right of action against any person who, by selling, giving, or otherwise disposing of any liquors to another (contrary to the provisions of law), caused the intoxication of such person. The injured person may recover all damages actually sustained, as well as exemplary damages. ALA. CODE § 6-5-71 (1975) ("Dram Shop Act"). As with the Civil Damages' Act, a violation of this statute results in strict liability. Liability under this statute has not been extended to social hosts providing alcoholic beverages to guest. *Beason v. Schools Cadillac Corporation*, 506 So. 2d 999 (Ala. 1987).

**Bad Faith:** To prove bad faith under Alabama law the plaintiff has the burden of proving:(a) an insurance contract between the parties and a breach thereof by the defendant; (b) an intentional refusal to pay the insured's claim; (c) the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason); (d) the insurer's actual knowledge of the absence of any legitimate or arguable reason; (e) if intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim. *National Security Fire & Casualty Co. v. Bowen*, 417 So. 2d 179 (Ala. 1982). The plaintiff must go beyond a mere showing of nonpayment and prove bad faith nonpayment, which requires nonpayment without any reasonable ground for dispute. In other words, the plaintiff must show that the insurance company had no legal or factual defense to the insurance claim. *Thomas v. Principal Financial Group*, 566 So. 2d 735 (Ala. 1990).

A liability insurer can be liable to its insured for the negligent or wanton failure to pay up to policy limits to meet a settlement demand in a lawsuit pending against an insured. In such instances, the insured's damages could be compensatory or punitive in nature. Alabama law also recognizes the tort of bad faith in the first party context. An insurer may be liable for bad faith by denying a claim without a legitimate, arguable basis in law or fact for the denial. The insurer may also be liable for bad faith if it willfully or intentionally fails to determine whether a lawful arguable basis for denying the claim exists. If an insurer unreasonably delays the processing of a claim, the claim may be considered constructively denied for bad faith purposes. An uninsured motorist insurer may also be liable for bad faith refusal to pay uninsured motorists' benefits if the denial or delay in paying benefits was motivated by an intent to injure the insured or where, under the circumstances of the case, the delay was unreasonable.

An insurer owes a duty to marshal all pertinent facts before denying the claim if the insurer wishes to rely upon these facts as a defense to bad faith. *Aetna Life Insurance Co. v. Lavoie,* 505 So. 2d 1050, 1052-53 (Ala. 1987). Under a theory of an abnormal bad-faith failure to investigate an insurance claim, the insured must show (1) that the insurer failed to properly investigate the claim or to subject the results of the investigation to a cognitive evaluation and review and (2) that the insurer breached the contract for insurance coverage with the insured when it refused to pay the insured's claim. *State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293 (Ala. 1999). However, courts have held that an insured need not prove a breach of contract before recovering for bad faith failure to investigate, if the insured does not sue for breach of contract and the case proceeds to the jury on a claim of bad faith alone. *National Insurance Assoc. v. Sockwell*, 829 So. 2d 111 (Ala. 2002).

**Joint and Several Liability Indemnity and Contribution:** Alabama law holds that all persons are jointly and severally liable for the proximate results of their negligence. There is no contribution between joint tortfeasors, and a general verdict rendered against more than one tortfeasor can be collected from any or all of the tortfeasors at the plaintiff's discretion.

Joint and several liability has the consequence that joint tortfeasors may not obtain contribution or indemnity from other joint tortfeasors, except when an indenmification agreement exists between the liable parties, clearly indicating indemnity of the type of conduct in question. *Crigler v. Salac*, 438 So. 2d 1375 (Ala. 1983). A further, very limited exception to the no-contribution rule exists (though its applicability is not entirely clear) when the party seeking contribution is totally without fault but is held liable solely because of an absolute nondelegable duty to the injured plaintiff. *Consolidated Pipe & Supply Co., Inc. v. Stockham Valves & Fittings, Inc.*, 365 So. 2d 968, 970 (Ala. 1978).

**Miscellaneous**

**Drivers' License:** To obtain a valid Alabama drivers' license, an applicant must (1) be an Alabama resident; (2) furnish a valid residence address; (3) be sixteen years of age; (4) show an acceptable form of personal identification that includes a full name and date of birth; (5) successfully complete a drivers exam, which includes: a vision test, a road signs test, a road rules test and a driving test. ALA. CODE § 32-6-3 (1975). Alabama has adopted the Uniform Commercial Drivers License Act which sets out the licensing requirements for drivers of commercial vehicles, including buses. ALA. CODE § 32-6-49.9 (1975).

**Worker's Compensation:** An injured employee may collect worker's compensation and sue a third party tortfeasor. Additionally, the employer (or worker's compensation insurer) is entitled to reimbursement from a third-party tortfeasor for the amount of compensation paid to the worker on account of the injury of death that the third-party tortfeasor contributed to. ALA. CODE § 25-5-11(1975). Third-party tortfeasors can include the injured worker's co-employees if it can be proved that the co-employees willfully or intentionally pursued a course of conduct which resulted in the injured worker's injury or death. The statute of limitations for third party actions is generally that of the general statute of limitations for personal injury suits, but a worker's compensation carrier or employer has an additional six months to file a suit for reimbursement. ALA. CODE § 6-2-38 (1975).

The Worker's Compensation statute defines compensation as the money benefits to be paid on account of injury or death. Further, the recovery which an employee may receive by action at law is termed "recovery of civil damages," as provided for in Sections 25-5-31 and 25-5-34. "Compensation" does not include medical and surgical treatment and attention, medicine, medical and surgical supplies, and crutches and apparatus furnished an employee on account of an injury. ALA. CODE § 25-5-1(1). By definition, medical expenses are not "compensation" pursuant to workers' compensation statute. *Waters v. Alabama Farmers Co-op., Inc.*, 681 So. 2d 622 (Ala. Civ. App. 1996).

A worker's compensation carrier is entitled to pursue a third party to recover payments made to an injured worker if the worker does not pursue such claims in his own right.

**Settlement of Claims for Minors:** A pro ami settlement is a settlement involving an infant or minor. Anytime there is a settlement with an infant/minor for a guardian or conservator should be appointed to have a court approve a pro ami settlement and to obtain an enforceable release. ALA. CODE § 26-2A-6 (1975). The statute allows settlement with a minor in the amount of $5,000 or less, to be paid to a guardian of the minor, any person having the care and custody of the minor with whom the minor resides, or the judge of probate of the county in which the minor resides. If the amount is $5,000 there is no requirement that a guardian be appointed. Payments under this section must not exceed $5,000 if paid in a single payment, or $3,000 a year if paid in a series of payments, and payments other than by conservator or judge must not exceed the maximum of $25,000 during the minority of the amount awarded. ALA. CODE § 26-2A-6 (1975).

**Legal Age:** Nineteen is the age of majority in Alabama. ALA. CODE § 26-1-1 (a) (1975) or eighteen and married. ALA. CODE § 26-6-1, 30-4-15, 30-4-16 (1975). It is also unlawful for a person under age 21 to purchase, possess or transport alcohol. ALA. CODE § 28-1-15 (1975).

**Parental Immunity:** Alabama maintains the "parental immunity doctrine" which prohibits most civil suits brought by unemancipated minors against their parents for the torts of theft parents. *Mitchell v. Davis*, 598 So. 2d 801 (Ala. 1992). An exception exists for heinous torts such as sexual abuse. There is no interspousal immunity. *Hurst v. Capital*, 539 So. 2d 264 (Ala. 1989).

**Seat Belts:** Alabama law provides that each front seat occupant of a passenger vehicle shall wear a seat belt. ALA. CODE § 32-5B-4 (1975). Evidence of a failure to wear a seat belt shall not be admissible evidence on the issue of contributory negligence or damages. ALA. CODE § 35-5-7 (1975). Alabama Pattern Jury Instructions § 26.28. Additionally, all children under six years of age must use a child restraint system approved by the Federal Motor Vehicle Safety Act. Children aged four through six may utilize seat belts provided by the vehicle manufacturer and still comply with the "child restraint system" requirement. ALA. CODE § 35-5-222 (1975). Evidence of the failure to wear a child restraint device cannot be considered as contributory negligence. *Id.*

**Boating:** A person shall not drive or be in actual physical control of any vessel, or manipulate any water skis, aquaplane, or any other marine transportation device on the waters of this state if there is more than 0.08 percent of alcohol by weight in the operator's blood, or if the operator is under the influence of alcohol, or if the operator is under the influence of a controlled substance to a degree which renders him incapable of driving safely. ALA. CODE 32-5A-191.3 (1975).

# Alaska

**Liability Coverage**

- No fault insurance law does not exist in Alaska.

- Alaska Law provides for pure comparative negligence, where a claimant's contributory fault proportionally diminishes, but does not bar, his or her recovery.[1]

**Mandatory Insurance**

- All motor vehicles subject to registration shall either be insured under a motor vehicle liability policy or a certificate of self-insurance.[2]

- It is a correctable offense to drive without proof of liability insurance.[3] A person may not be convicted if the person produces, in court or in the office of the arresting or citing officer, proof of motor vehicle liability insurance valid at the time of arrest or citation.

**Uninsured/Underinsured Motorist Coverage**

- Insurers are required to offer uninsured/underinsured motorist coverage initially and with each renewal.[4] The UM/UIM coverage offered may not be less than the liability policy limits purchased.

- If an automobile liability policy fails to include equal liability and underinsured motorist coverage, the policy must be reformed to make the underinsured motorist coverage "equal to the limits voluntarily purchased" for liability.[5]

**Bodily Injury**

- All motor vehicle liability policies must provide coverage in the United States and Canada, subject to limits exclusive of interest and costs, with respect to each vehicle as follows:[6]

    - $50,000 because of bodily injury to or death of one person in one accident, subject to the same limit for one person;

    - $100,000 because of bodily injury to or death of two or more persons in one accident.

**Property Damage**

- All motor vehicle liability policies must provide coverage in the United States and Canada, subject to limits exclusive of interest and costs, with respect to each vehicle as follows:[7]

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1 AS 09.17.060
2 AS 28.22.011(a)
3 AS 28.22.019(a)
4 AS 21.89.020(c)
5 *Holderness v. State Farm Fire & Cas. Co.*, 24 P.3d 1235, 1238 (Alaska 2001)
6 AS 28.22.101(d)
7 AS 28.22.101(d)

- $25,000 because of injury to or destruction of property of others in one accident.

**Statute of Limitations**

Property Damage/Trespass:[8] 6 years

Contract Action:[9] 3 years

Bodily Injury and Tort:[10] 2 years

Statute of Repose:[11] 10 years

- Minors: any statue of limitations is tolled until the minor reaches the age of majority (eighteen).[12]

- Alaska has abolished intra-spousal immunity.[13]

**Liability of a Minor**

- A parent of an un-emancipated minor may be liable for up to $15,000.00 and court costs as a result of the minor's knowing or intentional acts.[14] The parent's liability is in addition to, and not in lieu of, the minor's liability.

- The parent, guardian, or spouse who signs a minor's driver's license application is jointly and severally liable for damage caused by the negligence or willful misconduct of the minor.[15] A minor may file proof of financial responsibility with the DMV and, as long as the proof is maintained, the parent, guardian, or spouse is not subject to said liability.

**Punitive Damages**

- In order to recover punitive damages, the plaintiff must prove that the wrongdoer's conduct was outrageous, such as acts done with malice or bad motives or a reckless indifference to the interests of another. Actual malice need not be proved. Rather, reckless indifference to the rights of others, and conscious action in deliberate disregard of them . . . may provide the necessary state of mind to justify punitive damages. Punitive damages require proof by clear and convincing evidence.[16]

- Punitive damages are potentially insurable, but they may be excluded from coverage by an express exclusion.[17]

**Direct Action Against Insurer**

- Direct actions against an alleged tortfeasor's liability insurer are not permitted.[18]

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[8] AS 09.10.050
[9] AS 09.10.053
[10] AS 09.10.070
[11] AS 09.10.055
[12] AS 09.10.140(a)
[13] *Cramer v. Cramer*, 379 P.2d 95 (Alaska 1963)
[14] AS 09.65.255
[15] AS 28.15.071
[16] *Nelson v. Progressive Corp.*, 976 P.2d 859, 864 (Alaska 1999)
[17] *State Farm Mut. Auto. Ins. Co. v. Lawrence*, 26 P.3d 1074 (Alaska 2001)

**Joint and Several Liability**

- Alaska does not use Joint and Several liability.[19]

- Alaska requires an allocation of fault between the parties.[20]

**Workers' Compensation**

- A workers' compensation carrier has a statutory lien against any third-party recovery for the full amount of benefits paid less prorated litigation costs.[21]

**Minor Settlement**

- A court must approve any settlement where a minor is the plaintiff.[22]

- A court hearing is required for any settlement in excess of $25,000.00.

- A court cannot approve a minor settlement unless it determines that the settlement is fair and reasonable.[23]

**Property Damage**

- An owner may obtain loss of use damages for the reasonable period of time required to make repairs to the damaged property.[24]

- An owner may obtain diminution of value of the damaged property, measured by subtracting the post damage market value from the pre damage market value. [25]

**Collateral Sources**

- Yes, in part.

- A party may introduce evidence of collateral sources as long as the collateral sources do not have a right of subrogation by law or contract.[26]

- The collateral source rule is more expansive in medical malpractice actions.[27]

**Blood Alcohol Content**

- The legal age for alcohol consumption is 21.

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[18] *Myers v. Robertson*, 891 P.2d 199, 204 (Alaska 1995)
[19] *Robinson v. Alaska Properties & Inv.*, 878 F.Supp. 1318, 1321 (Alaska 1995).
[20] AS 09.17.080
[21] AS 23.30.015(g).
[22] Alaska Civil Rule 90.2
[23] *In re Estate of Brandon*, 902 P.2d 1299, 1309 (Alaska 1995)
[24] *Burgess Constr. Co. v. Hancock*, 514 P.2d 236 (Alaska 1973)
[25] *Willett v. State*, 826 P.2d 1142, 1144 (Alaska Ct. App. 1992)
[26] AS 09.17.070(a)
[27] AS 09.55.548

- DWI is referred to as driving while under the influence of an alcoholic beverage, inhalant, or controlled substance.

- Operating a vehicle, aircraft or watercraft while under the influence of an alcoholic beverage, inhalant, or controlled substance:[28]

    - (a) A person commits the crime of driving while under the influence of an alcoholic beverage, inhalant, or controlled substance if the person operates or drives a motor vehicle or operates an aircraft or a watercraft:

        - (1) while under the influence of an alcoholic beverage, intoxicating liquor, inhalant, or any controlled substance, singly or in combination; or

        - (2) and if, as determined by a chemical test taken within four hours after the alleged operating or driving, there is 0.08 percent or more by weight of alcohol in the person's blood or 80 milligrams or more of alcohol per 100 milliliters of blood, or if there is 0.08 grams or more of alcohol per 210 liters of the person's breath.

**Seatbelt Defense**

- Failure to wear a seatbelt is relevant evidence of contributory fault.[29]

**Bad Faith**

- The Alaska Unfair Claims Settlement Practices Act[30] prohibits:

    - (1) misrepresentation of facts or policy provisions relating to coverage of an insurance policy;

    - (2) failing to acknowledge and act promptly upon communications regarding a claim arising under an insurance policy;

    - (3) failing to adopt and implement reasonable standards for prompt investigation of claims;

    - (4) refusal to pay a claim without a reasonable investigation of all of the available information and an explanation of the basis for denial of the claim or for an offer of compromise settlement;

    - (5) failing to affirm or deny coverage of claims within a reasonable time of the completion of proof-of-loss statements;

    - (6) failing to attempt in good faith to make prompt and equitable settlement of claims in which liability is reasonably clear;

    - (7) engaging in a pattern or practice of compelling insureds to litigate for recovery of amounts due under insurance policies by offering substantially less than the amounts ultimately recovered in actions brought by those insureds;

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[28] AS 28.35.030

[29] *Hutchins v. Schwartz*, 724 P.2d 1194, 1199 (Alaska 1986)

[30] AS 21.36.125

- (8) compelling an insured or third-party claimant in a case in which liability is clear to litigate for recovery of an amount due under an insurance policy by offering an amount that does not have an objectively reasonable basis in law and fact and that has not been documented in the insurer's file;

- (9) attempting to make an unreasonably low settlement by reference to printed advertising matter accompanying or included in an application;

- (10) attempting to settle a claim on the basis of an application that has been altered without the consent of the insured;

- (11) making a claims payment without including a statement of the coverage under which the payment is made;

- (12) making known to an insured or third-party claimant a policy of appealing from an arbitration award in favor of an insured or third-party claimant for the purpose of compelling the insured or third-party claimant to accept a settlement or compromise less than the amount awarded in arbitration;

- (13) delaying investigation or payment of claims by requiring submission of unnecessary or substantially repetitive claims reports and proof-of-loss forms;

- (14) failing to promptly settle claims under one portion of a policy for the purpose of influencing settlements under other portions of the policy;

- (15) failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

- See AS 21.36.125 for complete listing.

- A first-party insurance contract gives rise to an implied covenant of good faith and fair dealing. Breach of this implied covenant is a tort.[31]

- Bad faith breach of the implied covenant of good faith and fair dealing can give rise to recovery of punitive damages.[32]

**Examples of Cases That May Not be Filed in Small Claims Court**

- Action for recovery of real property

- Actions to foreclose or enforce statutory, common law or possessory liens

- Actions where the claim for relief exceeds $10,000.00[33]

**Mandatory Arbitration**

- Alaska law does not impose mandatory arbitration.

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[31] *State Farm Fire & Casualty Co. v. Nicholson*, 777 P.2d 1152, 1156 (Alaska 1989)

[32] *Id.*

[33] *See* the Alaska Small Claims Handbook.

- A written agreement to submit an existing controversy to arbitration or a provision in a written contract to submit to arbitration in a subsequent controversy between the parties is valid and enforceable.[34]

**Independent Medical Examinations**

- A mental or physical examination is allowed when the mental or physical condition of a party or person is in controversy.[35] The party against whom an order for an examination or the person examined is allowed to request a copy of a detailed written report of the examiner. After this report is delivered, the party requesting the examination is entitled, upon request, to receive any like reports of any examinations, past or future, of the same condition. The party against whom an order is made or the person examined is also allowed to have his or her attorney present at the examination.[36]

**Permissive Use**

Under Alaska state law, automobile insurance policies may extend coverage to a person using an automobile owned by an insured if the person has express or implied permission. The Motor Vehicle Safety Responsibility Act, AS 28.20.010-640, was passed in 1959. One of the purposes behind the Act was to protect the public from damages caused by vehicles operated by persons other than the insured. According to AS 28.20.440(b)(2) an owner's policy of liability insurance should "insure the person named and every other person using the vehicle with the express or implied permission of the named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of the vehicle within the United States or Canada." An insurance policy with a provision that insures not only the owner of the vehicle, but also those who are given permission by the owner to use the vehicle is often referred to as an omnibus clause. In *Johnson v. United States Fidelity & Guar. Co.*, 601 P.2d 260 (Alaska 1979), a car accident was caused by a third person who was given permission to drive the insured vehicle by someone who had received permission from the owner of the vehicle. The Court proclaimed that an omnibus clause in an automobile insurance policy should be "liberally construed." The Court held that the third person was covered under the insurance policy because he had implied permission and acted within the scope of that permission since the owner did not limit the use of his automobile to the person who gave permission to the third person.

Note, however, that AS 28.20.440(l) stipulates that upon request, the insured can exclude coverage under the insurance policy to relatives and persons residing in the same household. *See also Nelson v. Progressive Cas. Ins. Co.*, 162 P.3d 1228 (Alaska 2007).

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[34] AS 09.43.010

[35] Alaska Civil Rule 35

[36] *Langfeldt-Haaland v. Saupe Enters.*, 768 P.2d 1144, 1146 (Alaska 1989)

# Arizona

## Coverage

**Bodily Injury Minimum Limit Required:** Coverage in Arizona is mandatory for bodily injury. The minimum is $15,000 per person per accident and $30,000 per accident. There is no tort threshold that needs to be reached before a B.I. claim can be made. No collateral source can be used as an offset. This is not a no-fault state.

**Property Damage:** Coverage in Arizona is mandatory for property damage. The minimum is $10,000.00. In regards to salvage, you may receive individual bids. There can be a loss of use on a totaled vehicle as well. Courts recognize diminution of value claims on repaired vehicles. In regards to taxes, title and license fee, those must be paid on first party claims. However, there is no guideline in regards to third party claims. State Farm, for instance, takes the position that they do not pay tax, title and license fees on third party claims.

**Personal Injury:** There is no personal injury protection coverage in this state.

**Medical Payments Not Mandatory:** There is no minimum limit of medical payments in Arizona. Medical payment covers reasonable and necessary expenses as a result of the accident. There are no lost wages contained in the medical payment coverage. Again, there is no threshold. There is no indication that coverage has to be rejected in writing. An insurer who makes medical payments in excess of $5,000 shall have a lien for any amount over $5,000. A workman's compensation claimant can receive medical payment benefits. Medical payment benefits do not offset any bodily injury claim. The statute of limitations for medical payment is six years since it arises out of a contract. Med Pay can be offset on UM, UIM, and passenger liability claims if the policy provides so and the injured party receives full recovery.

**Uninsured/Underinsured Motorist Coverage Not Mandatory:** There is no mandatory coverage for underinsured or for uninsured coverage. Uninsured and underinsured must be rejected in writing. If it is not rejected in writing, it will be deemed the same as bodily injury coverage that is supplied in the policy. The statute of limitations for uninsured and/or underinsured motorist coverage is six years since it arises out of a contract. The Laidlaw employee can make an uninsured motorist claim. Uninsured motorists claims are subrogable but underinsured motorists claims are not subrogable. Underinsured and uninsured motorist coverage can be stacked. In other words, if an employee is driving a Laidlaw truck and it is struck by an uninsured motorist, that employee can look towards the Laidlaw coverage and then stack his own personal uninsured motorist coverage. Passenger for hire vehicles are required to maintain $250,000 UM/UIM coverage.

## Negligence

**Pure Comparative Negligence:** Arizona is a pure comparative negligence state. Therefore, if the Laidlaw employee is 10% at fault, then Laidlaw would be liable for 10% of the total damages of the plaintiff or claimant. The negligence of a claimant driver cannot be imputed to a claimant passenger. Passengers may directly sue their drivers.

**Statute of Limitations:** For bodily injury or property damage there is a two-year statute of limitations. A minor has until age 18 before the statute of limitations begins to run. Therefore, a minor has until age 20 to bring a bodily injury or property damage claim. An adjuster must notify an unrepresented party of the statute 60 days before it runs in order to utilize the statute as a defense.

**Licensing Requirements:** By statute, all in-state adjusters are required to be licensed, according to the forms furnished by the Director of Insurance. Adjusters who are licensed or to act as adjusters in the state of their domicile need not be licensed in Arizona to be sent to Arizona by the insurer to investigate a particular loss under a policy, or a series of losses resulting from a common catastrophe. A copy of the statute is provided for your review.

**Punitive Damages:** Punitive damages can be covered by insurance unless expressly excluded by the policy. In an automobile context, punitive damages are very difficult to prove and/or recover except in drunk driving situations. Basically, there has to be a showing of a reckless indifference to the rights of others for punitive damage claim to be made in one.

**Joint and Several Exposure No, but Read the Exception:** There is no joint and several exposure except in imputed (vicarious) type liability cases. In other words, if a Plaintiff is 50% at fault, Defendant A is 25% at fault and Defendant B is 25% at fault. Plaintiff must recover these damages separately from Defendant A and Defendant B. Therefore, if Defendant B has no insurance or limited assets, the Plaintiff would in effect not recover the 25%. However, if a corporation is sued due to the actions of an employee, joint and several liability applies, and the Plaintiff could collect 100% of the proportionate share of the employee from the employee or the employer.

Tortfeasors acting in concert may be found jointly and severally liable. The statute refers specifically to intentional torts.

**Worker's Compensation:** Workman's Compensation is subrogable in the State of Arizona. If the worker brings a third-party claim within one year, a Workman's Compensation lien is automatically assigned to the claim. After the one-year period, the claim is assigned by law to the carrier. However, an assignment back to the claimant employee can be made and need not be in writing, this is all basically done very loosely and in effect either the carrier or the claimant can bring the claim, however, it is very rare for the workman's compensation carrier to bring a claim. In any event, once the lawsuit has been initiated by the employee against a third party, the workman's compensation carrier should be on the check and any payment must be protected. The workman's compensation claimant can collect med-pay benefits. Similarly, a workman's compensation claimant can make a successful uninsured motorist claim under any applicable uninsured motorist coverage.

**Minor Settlements:** Settlements over $10,000 must be approved by the Court. However, if the settlement is less than $10,000, a minor could still bring a claim after age 18 on the basis that the settlement was not approved by the Court. In other words, an insurance company could settle for $1,000, the plaintiff could find out at a later time that his injuries were much more severe than the $1,000 settlement. When he reaches age 18, he could bring a claim against the defendant for the additional loss. The only way to stop this would be to get Court approval on all settlements.

**Bad Faith Issue:** In Arizona, an insurer generally has a responsibility to investigate a claim adequately, evaluate the extent of the claim with a reasonable standard of care, and pay the terms of the claim promptly once it has been approved. To prove up a bad faith claim in court, the plaintiff must show that there was not a reasonable basis for denying benefits in the insurance policy, and the defendant insurer knew or should have known that they were required to make payment. The failure to pay is not unreasonable if there is a fair argument as to whether the claim is valid after an adequate investigation. The standard used by the Court to determine if there is bad faith is reasonableness.

In Arizona, an insurer owes its insured the same duty of good faith and fair dealing in both first- and third-party actions. Clearwater v. State Farm Mut. Auto. Ins. Co., 164 Ariz. 256, 260, 792 P.2d 719, 723 (1990). The standard for determining whether the insurer has breached its duty, however, is different in the two types of cases because of the different relationships and duties that exist between the parties. In third-party actions,

the insurer exclusively controls settlement and the insured bears a disproportionate share of the risk if the insurer fails to accept a reasonable settlement offer within policy limits. Id. In third-party bad faith actions, the trier of fact must decide whether the insurer considered the insured's interests equally with its own interests.

**Alcohol Issue:** Legal level of intoxication is .08. A person driving a commercial vehicle is considered to be under the influence if their BAC is .04 or higher. From .05 to .08 there is no presumption on legal intoxication for non-commercial vehicles. Under .05 there is a presumption of no intoxication. The server of alcohol in a commercial setting can be found liable for a dram shop action. A cause of action exists against private individuals non-licensees, who negligently furnish alcohol to minors.

**Legal Age:** 18 for most issues, 21 for alcohol.

**Inter-Family and Spousal Immunity:** Inter-family and spousal immunity. There is no inter-family or spousal immunity for torts.

**Seat Belt Defense, Yes:** Seat belt defense is available in Arizona. However, the defendant must show what damages the plaintiff would not have sustained if he or she had worn a seat belt. Therefore, an expert is necessary on the issue of damages whenever this defense is alleged.

**Wrongful Death:** The statute of limitations is two years. Parents, spouse or children can recover on a claim for wrongful death. This would include damages for medical expenses, lost wages, grief and pain and suffering those particular family members have gone through, although pain and suffering of the decedent is not recoverable.

**Permissive Use:** Arizona's Financial Responsibility Statute (ARIZ.REV.STAT. § 28-4009) provides that all automobile liability insurance coverage policies must afford coverage to all persons using the insured vehicle with the express or implied permission of the named insured. The permissive user language is found in the policy's omnibus clause. It is well settled that the omnibus clause is to be construed broadly, so as to favor coverage for permissive drivers. *See Hille v. Safeco Ins.*, 25 Ariz. App. 353, 543 P.2d 474 (1975). The permissive user requirement reflects Arizona's general legislative policy to protect the public when a motor vehicle is operated by one other than the insured owner with his consent. *See State Farm Mut. Auto. Ins. Co. v. Williamson*, 331 F.2d 517, 518 (9th Cir. 1964) (applying Arizona law).

Permissive use is a question of fact to be determined by the trier of fact. *See Hille v. Safeco Ins.*, 25 Ariz. App. 353, 543 P.2d 474 (1975). There is a rebuttable presumption that the driver of an automobile causing damage or injury by his negligent operation is using the automobile with the owner's permission. *See id.* That presumption can be rebutted with evidence such as restrictions or limitations in the vehicle's use, course of conduct, scope of permission, or purpose of the trip at issue. *See id.*; *Grain Dealers Mut. Ins. Co. v. James*, 118 Ariz. 116, 118, 575 P.2d 315, 317 (1978).

Arizona follows the "minor deviation" rule for interpreting a policy's omnibus clause. *See James v. Aetna Life & Cas.*, 26 Ariz. App. 137, 546 P.2d 1146 (App. 1976). Under the minor deviation rule, coverage will be found if the permissive user's use is not a gross, substantial or major violation, even though it may have amounted to a deviation. Coverage will be denied if the deviation is "material" or "major." A "material" or "major" deviation occurs when the deviation from the purpose for which the permission was originally granted was substantial in terms of duration, distance, time, or purpose. *See id.* The question of whether a deviation is "minor" or "major" is a question of fact. *See id.*

# Arkansas

**Statute of Limitations**

- Assault and Battery – 1 year. § 16-56-104.
- Bodily Injury – 3 years. § 16-56-105.
- Property Damage – 3 years. § 16-56-105.
- Medical Malpractice – 2 years (generally). § 16-114-203.
- Wrongful Death – 3 years from decedent's date of death. § 16-62-102(c); *Davis v Parham,* 362 Ark. 352, 208 S.W.3d 162 (2005).
- Non-Contact Tort (Slander, Defamation) – 1 year. § 16-56-104.
- Written Contracts – 5 years. § 16-56-111.
- Oral Contracts – 3 years. § 16-56-105.
- Contribution – A claim for contribution can be brought as long as the statute of limitations applicable to the underlying claim (the claim supporting contribution) has not expired. See *Newbern & Watkins*, 2 Arkansas Practice Series: Civil Practice and Procedure § 17.2, 365 (4th ed. 2006)
- Fraud – 3 years. § 4-4-111.
- Indemnity
    - Based on a written contract - 5 years. *Ray & Sons Masonry Contractors, Inc. v. U.S. Fidelity & Guar. Co.,* 353 Ark. 201, 216, 114 S.W.3d 189, 198 (2003).
    - Based on unwritten contract, equitable indemnity, or right incidental to the written contract – 3 years. § 16-56-101(5) & (3); *Larson Mach., Inc. v. Wallace,* 268 Ark. 192, 213, 600 S.W.2d 1, 12.
- Obligations not in writing – 3 years. § 16-56-105(1).
- Other tort actions – 5 years. § 16-56-115.
- Workers' Compensation Disability Claim – 2 years. § 11-9-702(a)(1).
- Workers' Compensation Death claim – 2 years. § 11-9-702(a)(3).
- Product's Liability – 3 years. § 16-116-203.
- Uninsured Motorist/ Underinsured Motorist – 5 years.

**Mandatory Minimum Requirements**

- Auto liability limits required at $25,000 for bodily injury or death of one person in any one accident and $50,000 for bodily injury or death of two or more persons in any one accident. § 27-22-104 (b)(1)-(2).

- Property damage limits required at $25,000 per incident. § 27-22-104(b)(3).

- Every policy covering any private passenger motor vehicle must provide minimum medical and hospital benefits, income disability, and accidental death benefits to the name insured and members of his or her family in the same household injured in a motor vehicle accident, to passengers injured while occupying the insured motor vehicle and to persons other than those occupying another vehicle struck by the insured motor vehicle without regard to fault as follows:

    - All reasonable and necessary medical and hospital benefits incurred within twenty-four hours of the accident up to an aggregate of $5,000 per person;

    - Seventy percent of the loss of income from work between eight days after the accident and up to 52 weeks, but subject to a maximum of $140 per week (For non-income earners, up to $70 per week); and

    - Accidental death benefits in the amount of $5,000, paid to the personal representative of the insured should injury or disease result from the accident cause death within one year of the accident. § 23-89-202.

- Uninsured & Underinsured Motorist Coverage required is $25, 000 for bodily injury or death of any one person in one accident, $50,000 for bodily injury or death of two people in one accident, and $25,000 for property damage in any one accident. §§ 23-89-403(a); 27-19-605(a).

**Uninsured/ Underinsured Motorist Coverage**

- Uninsured Motorist Coverage applies when a tortfeasor does not have insurance, and Underinsured Motorist Coverage applies when a tortfeasor has less coverage than the amount required by law. UM/UIM coverage is designed to guarantee minimum recovery equal to that amount. § 23-89-401.

- Insureds can reject the coverage in writing and that rejection will continue until withdrawn in writing by the insured. § 23-89-403(a)(2).

- UM coverage, like liability insurance, follows the automobile not the person. *Farm Bureau Ins. Co., v. Shelter Mut. Ins. Co.,* 2016 Ark. App. 563, *9, 506 S.W.3d 915, 920 (2016).

**Worker's Compensation**

- Workers' compensation claims are subrogatable. §11-9-410(b). An employer is expressly permitted to file a tort action against a potentially liable third party, seeking recovery for benefits paid to worker so long as the employee is given notice and is permitted, with private counsel, to join the lawsuit and assert a claim against the third party. *Id.*

- AR Made Whole Doctrine – discussion below in separate section

**Wrongful Death**

- The action must be brought by the personal representative of the deceased person. § 16-62-102(b). If there is not a personal representative, then the action must be brought by the heirs at law of the deceased person. *Id.*

- The beneficiaries of the wrongful death action are:

    - the surviving spouse, children, father, mother, brothers, and sisters of the deceased person,

    - persons, regardless of age, standing *in loco parentis* to the deceased person; and

    - persons, regardless of age, to whom the deceased stood *in loco parentis* at any time during the life of the deceased. § 16-62-102(d).

- Damages for wrongful death include pecuniary damages, including a spouse's loss of the services and companionship of the deceased spouse and any mental anguish resulting from the death of the surviving spouse and beneficiaries. § 16-62-102(f)(1). If mental anguish is claimed, it will include grief normally associated with the loss of a loved one. § 16-62-102(f)(2).

- A viable fetus is a person within the meaning of the wrongful death statute. *Aka v. Jefferson Hosp. Ass'n,* 344 627, 641-642, 42 S.W.3d 508, 518 (2001).

- The estate can recover for the decedent's loss of life as an independent element of damages. § 16-62-101.

    - There is no need for an ascertainable period of conscious life between the injury and death. *Durham v. Marberry,* 356 Ark. 481, 492, 156 S.W.3d 242, 248-49 (2004).

**Minors**

- Payments in excess of $1,000 per annum must be approved by the circuit court in the county in which the minor or the person paying or delivering the money or property resides or is domiciled. § 9-26-102(a)(2). Generally, any settlement netting proceeds to a minor in excess of $5000 requires a guardianship and court approval.

- A parent may be liable for negligent supervision of a minor where the parent

    - (1) has the opportunity and ability to control the minor,

    - (2) has knowledge of the tendency or proclivity of the minor to commit acts which normally could be expected to cause injury to others, and

    - (3) after having such opportunity, ability, and knowledge has failed to exercise reasonable means of controlling the minor or appreciably reducing the likelihood of injury to others because of the minor's acts. *Farm Bureau v. Henley,* 275 Ark. 122, 124, 628 S.W.2d 301, 302 (1982) (citing *Bicker v. Owens,* 234 Ark. 97, 350 S.W.2d 522 (1961)).

- Parents may be liable to property destruction by a minor up to $5,000. § 9-25-102 (a).

**Intra Family Immunity**

- Arkansas does not recognize the doctrine of spousal immunity for unintentional torts. *Spears v. Spears,* 339 Ark. 162, 164, 3 S.W.3d 691, 693 (1999)

- Arkansas retains the parental immunity doctrine. *Id.* However, the Arkansas Supreme Court has expressed its willingness to re-evaluate the doctrine. *Id.*

    - The Arkansas Supreme Court has found an exception to the parental immunity doctrine based on motor vehicle liability coverage that provided uninsured motorist benefits to a child for the negligent act of his parents. *Fields v. Farm Bureau,* 350 Ark. 75, 87 S.W.3d 224 (2002).

    - The *Fields* court held that this exception applied retroactively to the specific facts of that case, but prospectively to all other cases. *Id.*

**Seat Belt Defense**

- Arkansas law requires the driver, front seat passengers, and any child under 5 years old to wear a seat belt. § 27-27-702(a).

- A bus driver must wear a seatbelt while operating the bus if it is so equipped.

- The seat belt statute, § 27-37-703, stating that evidence of failure to use a seat belt is not admissible into evidence in a civil action was held unconstitutional by the Arkansas Supreme Court in *Mendoza v. WIS Int'l, Inc.,* 2016 Ark. 157, * 10, 490 S.W.3d 298, 303-304 (2016).

**Alcohol**

- It is unlawful for a person to operate a motor vehicle if that person has a blood alcohol concentration of 0.08% or more. § 5-65-103(a)(2). Limit is lowered to .04% for drivers with a commercial driver's license

- A minor is considered legally intoxicated if they have a 0.02% or more blood alcohol level. § 5-65-303(2).

- The legal drinking age is 21 years old.

- It is an affirmative defense against civil liability for sale of alcohol to an intoxicated person that an alcoholic beverage retailer had a reasonable belief that the person was not clearly intoxicated at the time of such sale or that the person would not be operating a motor vehicle in the impaired state. § 16-126-104.

**Liens**

- If a person knows of facts sufficient to put him on notice that a piece of property is subject to a lien, good faith requires him to pursue the inquiry to the extent of investigating the facts of which he has knowledge , and, if reasonable diligence would have led to the knowledge of the lien, the purchaser is liable. *Riceland Foods, Inc. v. Pearson*, 2009 Ark. 520, 8–9, 357 S.W.3d 434, 440 (2009).

**School/City Busing**

- § 6-19-105 that imported liability on the driver of a school bus for damages incurred due to failure on the driver's party to use reasonable care while transporting the students, has been repealed.

- School districts are among the political subdivisions that are generally immune from tort liability. § 21-9-201.

- Employees and officers of the state (including City bus drivers) are afforded statutory immunity from civil liability from suit for non-malicious acts occurring within the course of their employment, except to the extent that they may be covered by liability insurance, for damages for acts or omissions, occurring within the course and scope of their employment. *Ark. State Med. Bd. v. Byers,* 2017 Ark. 213, *5-6, 521 S.W.3d 459, 463 (2017); § 19-10-305(a).

- All political subdivisions must carry liability insurance on all their motor vehicles in the minimum amounts prescribed by § 27-10-201 *et seq*.

**Premises Liability**

- Arkansas courts recognize three basic categories of persons present on another's property: trespasser, licensee, and invitee.

    - A **trespasser** is a person who "enters on the property of another without permission and without an invitation, express or implied." Ark. Code Ann. § 18-60-108(c). The landowner's only duty to a trespasser is to not injure him by willful or wanton conduct. § 18-60-108(a)(2).

    - A **licensee** is one who goes on the premises of another with the consent of the owner for one's own purposes and not for the mutual benefit of oneself and the owner. *Heigle v. Miller*, 332 Ark. 315, 965 S.W.2d 116 (1998). A person who is on the property primarily as a social guest is deemed to be a licensee. *Id. Noel v. Cox*, 2019 Ark. App. 70, 5, 570 S.W.3d 510, 514 (2019)

    - An **invitee** is one induced to come onto property for the business benefit of the possessor. There are two types of invitees: public and business. A public invitee is invited to enter or remain on the property as a member of the public for a purpose for which the property is held open to the public, such as a hospital or a library. *Lively v. Libbey Mem'l Physical Med. Ctr., Inc.*, 311 Ark. 41, 841 S.W.2d 609 (1992). A business invitee is invited to enter or remain on the property for a purpose directly or indirectly connected with the business dealings of the possessor of the property. *Noel v. Cox*, 2019 Ark. App. 70, 5, 570 S.W.3d 510, 514 (2019)

    - CRIMINAL ACTS OF THIRD PARTIES

**Slip & Fall Cases**

- The principles of slip and fall are set against a general backdrop that an owner has a duty of ordinary care to maintain the premises in a reasonably safe condition for the benefit of invitees. *Wal-Mart Stores, Inc. v. Regions Bank Trust Dept.,* 69 S.W.3d 20, 23-24 (2002).

- To establish a violation of the duty, the plaintiff must prove either that the presence of the substance on the floor was the result of the defendant's negligence, or that the substance had been on the floor for such a length of time that the defendant knew or reasonably should have known of its presence and failed to use ordinary care to remove it. *Id.*

    - The burden is on the plaintiff to show a substantial interval of time between the time of the accident and when the substance appeared on the floor. *Id.*

- The mere fact that a person slips and falls does not give rise to an inference of negligence. *Id.*

- The presence of a foreign and slick substance which causes a slip and fall is not alone sufficient to prove negligence, but instead it must be proved that the substance was negligently placed there or allowed to remain. *Id.*

- Res ipsa loquitur is not applicable to slip and fall cases. *Mankey v. Wal-Mart Stores, Inc.,* 314 Ark. 14, 858 S.W.2d 85, 87 (1993).

**Permissive Use**

- The Arkansas Motor Vehicle Safety Responsibility Act makes it clear that a vehicle owner's liability insurance policy shall insure the owner and any person using the vehicle with express or implied permission of the insured. § 27-19-713(b)(2).

- Instead, in considering scope of permissive use, Arkansas Courts have held that the ―initial permission‖ rule applies. *Commercial Union Ins. Co. v. Johnson*, 294 Ark. 444, 454, 745 S.W.2d 589, 595 (1988). The Initial Permission Rule, also known as the ―Hell or High Water Rule,‖ says that if the vehicle was originally entrusted by the named insured, or one having proper authority to give permission, to the person operating it at the time of the accident, then despite hell or high water, such operation is considered to be within the scope of the permission granted, regardless of how grossly the terms of the original bailment may have been violated. *Id.* at 449, 745 S.W.2d at 592. A deviation from the permitted use is absolutely immaterial under this rule, and the only essential element is that permission be given for use in the first instance. *Id.*

- The ―initial permission rule generally governs unless theft, conversion, or unlawful taking of the vehicle occurred. *Id.* at 454, 745 S.W.2d at 594. The ―initial permission‖ rule may apply where the driver had implied permission to use the vehicle; however, it will not apply where there is insufficient evidence of prior use to determine whether there was implied permission. See *Ison v. Southern Farm Bureau Cas. Co.,* 93 Ark.App. 502, 221 S.W.3d 373 (2006).

**Miscellaneous**

- For timely notice to be a condition precedent to insurance coverage, the policy must use language to that effect, or language that necessarily implies that notice is a condition precedent. *Clark v. Farm Bureau Ins. Co.,* 2016 Ark. App. 196, *3, 487 S.W.3d 402, 404 (2016). When a notice provision does not contain language sufficient to make it a condition precedent, the insurer must show that it was prejudiced by any delay in notice to be relieved from liability. *Id.* (Applies to UM/UIM coverage as well).

- Although it has fallen into disfavor and the Supreme Court has expressed a willingness to reconsider the doctrine, Arkansas courts recognize the doctrine of joint enterprise. *Presley v. Brown,* 2007 WL 3276987, *4, No. CA 06-1309 (Ark. Ct. App. Nov. 7, 2007); *Yant v. Woods,* 353 Ark. 786, 794-95, 120 S.W.3d 574, 579-80 (2003).

**Civil Justice Reform Act of 2003**

- <u>Generally:</u>

    - In any action for personal injury, medical injury, property damage, or wrongful death, the liability of each defendant for compensatory or punitive damages is several only. § 16-55-201(a). Each defendant is only liable for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate several judgments will be rendered against each defendant for that defendant's specific amount. § 16-55-201(b).

- The trial court has limited authority to increase the share against a defendant when the amount of which a defendant is liable is not reasonably collectible upon motion by the plaintiff. § 16-55-203(a)(1). This enables partial reallocation of a share that cannot be collected, and it applies only to the fault shares of named defendants. § 16-55-203(a)(2). A defendant whose share has been increased has a right of contribution against the defendants whose several shares were determined by the court to not be reasonably collectible. § 16-55-203(a)(5). This provision does not apply to punitive damages. § 16-55-203(b).

- Traditional joint and several liability continues in two situations:

  - (1) when the tortfeasors acted in concert with a conscious agreement to pursue a common plan or design to commit and intentional tort and actively took part in that intentional tort; and

  - (2) if the other person or entity was acting as an agent or servant of the party. § 16-55-205.

- Constitutionality:

  - The Supreme Court of Arkansas has held the non-party fault and limitation on presentation of evidence of medical damages provisions unconstitutional based on separation of powers grounds under Art. 4, § 2, amend. 80, § 3 to the Arkansas Constitution. *Johnson v. Rockwell Automation, Inc.,* 2009 Ark. 241, *9, 308 S.W.3d 135, 141-142 (2009)(plaintiffs can present full amount of medical expenses at trial).

  - The Supreme Court of Arkansas has held the punitive damages cap of the CJRA unconstitutional as it limits the amount of recovery outside the employment relationship. *Bayer CropScience LP v. Schafer,* 2011 Ark. 518, *13, 385 S.W.3d 822, 831 (2011).

  - The Supreme Court of Arkansas has held the seat belt - nonuse evidence in civil actions provision unconstitutional. *Mendoza v. WIS International, Inc.*, 2016 Ark. 157, *1, 490 S.W.3d 298, 298 (2016).

**Comparative Fault/Contributory Negligence**

- In all personal injury, wrongful death, or property damage actions in which recovery is predicated upon fault, liability is determined by comparing the fault chargeable to a claiming party with the fault chargeable to the party or parties from whom the claiming party seeks to recover damages. § 16-64-122(a).

- "Fault" means any act, omission, conduct, risk assumed, breach of warranty, or breach of any legal duty which is a proximate cause of any damages sustained by any party. § 16-64-122(c).

- Contributory negligence is determined by asking whether a person exercised such care as a reasonably prudent person would exercise under the circumstances. *Brakensiek v. Nickles,* 216 Ark. 889, 893, 227 S.W.2d 948, 950 (1950).

- If the fault of the plaintiff is greater than 50%, the plaintiff is not entitled to any recovery. § 16-64-122(b). If the fault of the plaintiff is equal or greater than the aggregate fault of the parties from whom the plaintiff seeks recovery, the plaintiff is barred from relief. *Id.* If the fault of the plaintiff is less than the aggregate fault of the defending parties, the plaintiff recovers the amount of damages after they have been diminished in proportion to his own fault. *Id.*

- The plaintiff's comparative fault must be pleaded as an affirmative defense, and the defendant bears the burden of proving comparative fault. Ark. R. Civ. P. 8(c); *Rodgers v. CWR Constr., Inc.,* 343 Ark. 126, 131, 33 s.W.3d 506, 529 (2000).

- For a jury instruction on comparative fault, there must be evidence that the plaintiff's actions were a proximate cause of the damages. *Skinner v. R.J. Griffin & Co.,* 313 Ark. 430, 433, 855 S.W.2d 913, 915 (1993).

- Comparative fault is considered in strict products liability actions for damages relating to personal injuries. *Elk Corp. of Ark. v. Jackson,* 291 Ark. 448, 725 S.W.2d 829 (1987). However, it is inapplicable to actions for breach of implied warranty of merchantability seeking incidental damages for a defective product. *Little Rock Elec. Contractors, Inc. v. Okonite Co.,* 294 Ark. 399, 401, 744 S.W.2d 381, 382 (1988). It is also inapplicable to claims for economic losses. *E.D. Smith & Sons, Ltd. v. Ark. Glass Container Corp.,* 236 F.3d 920, 921 (8th Cir. 2001). It is applicable to malpractice actions, but not those for intentional torts. A) *See Reliance Nat'l Indem. Co. v. Jennings*, 189 F.3d 689 (8th Cir. 1999); *Kellerman v. Zeno*, 64 Ark. App. 79, 88, 983 S.W.2d 136, 141 (1998).

- Assumption of risk by the plaintiff is not a complete bar to recovery, but it is an element to be assessed in comparing fault. *Dawson v. Fulton,* 234 Ark. 624, 627, 745 S.W.2d 617, 620 (1988).

**Joint & Several Liability**

- Under traditional joint and several liability, where concurrent negligent acts result in a single injury, each tortfeasor is jointly and severally liable, and a plaintiff can institute an action against any or all tortfeasors individually or jointly. *Corn v. Farmers Ins. Co.,* 2013 Ark. 444, *6, 430 S.W.3d 655, 659 (2013).

- The CJRA, however, modified joint and several liability making the liability of defendant in personal injury, medical injury, property damage, or wrongful-death cases several only, rather than joint, such that each defendant is only liable for the amount of damages allocated to the defendant in direct proportion to that defendant's percentage of fault. *Id.;* § 16-55-201(a).

- Traditional joint and several liability continues in two situations:

    - (1) when the tortfeasors acted in concert with a conscious agreement to pursue a common plan or design to commit an intentional tort and actively took part in that intentional tort; and

    - (2) if the other person or entity was acting as an agent or servant of the party. § 16-55-205.

- When joint and several liability applies, the right of contribution exists among joint tortfeasors. § 16-61-202(a).

    - A joint tortfeasor is not entitled to a money judgment for contribution until he or she has discharged the common liability by payments or has paid more than his or her pro rata share of the common liability. § 16-61-202(b).

    - The right of contribution is limited to money damages, but does include the right to an allocation of fault as among all joint tortfeasors and the rights provided for in § 16-61-204. § 16-61-202(c).

    - A joint tortfeasor who settles with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement. § 16-61-202(d).

**Collateral Source Rule**

- "The collateral-source rule is a general rule providing that recoveries from collateral sources do not redound to the benefit of the tortfeasor, even though double recovery for the same damage by the injured party may result. . . . For the collateral source rule to apply, the third-party payment must be wholly independent of the tortfeasor." *Jewell v. Fletcher,* 2010 Ark. 195, *22, 377 S.W.3d 176, 191 (2010).

- There are four instances where evidence of collateral income can be admissible:

    - To rebut the plaintiff's testimony that he compelled by financial necessity to return to work prematurely or to forego additional medical treatment;

    - To show that the plaintiff had attributed his condition to some other cause, like sickness;

    - To impeach the plaintiff's testimony that he had paid his medical expenses himself; and

    - To show that the plaintiff had actually continued to work instead of being out of work, as he claimed. *Evans v. Wilson,* 279 ARk. 224, 226, 650 S.W.2d 570 (1983).

**Made Whole Doctrine**

- The made-whole doctrine prevents an insured or an insurer from being unjustly enriched. *Lopez v. United Auto. Ins. Co.,* 2013 Ark. App. 246, *7, 427 S.W.3d 154, 158 (2013).

- An insurer is not entitled to subrogation under the statute unless the insured has been made whole for his loss. *Id.*; § 23-89-207.

- The insured must be wholly compensated before the insurer's right to subrogation arises; therefore, the right only arises in situations where the recovery by the insured exceeds his or her total amount of damages incurred. *Id.* (citing *Riley v. State Farm Mut. Auto. Ins. Co.,* 2011 Ark. 256, 381 S.W.3d 840 (2011)).

- The subrogation lien cannot arise or attach until the insured has received the settlement or damages and until there is a judicial determination that the insured has been made whole. *Id.*

**<u>Damages</u>**

**Punitive Damages**

- The function of punitive damages is to punish the defendant for his wrong, not compensate the plaintiff for his injuries. *Bayer CropScience LP v. Schafer,* 2011 Ark. 518, * 13, 385 S.W.3d 822, 831 (2011).

    - "'Punitive damages' are not intended to remunerate the injured party for the damages he may have sustained. They are not to compensate; they are the penalty the law inflicts for gross, wanton, and culpable negligence, and are allowed as a warning or as an example to defendants and others. Because they are an example as to what the law will do for such conduct when it results in injury to the person or property of others, they are sometimes called exemplary damages." *Id.* (citing *Vogler v. O'Neal,* 226 Ark. 1007, 1015, 295 S.W.2d 629, 634 (1956).

- Because compensation of a plaintiff is not the purpose of exemplary or punitive damages, an award may be somewhat of a windfall to the defendant. *Id.* (citing *Ray Dodge, Inc. v. Moore,* 251 Ark. 1036 479 S.W.2d 518 (1972)).

- The CJRA attempted to place a cap on punitive damages but the *Bayer CropScience* Court held the cap unconstitutional.

- In order to recover punitive damages from the defendants, a plaintiff has the burden of proving by clear and convincing evidence:

    - (1) that the defendants knew or out to have known, in light of the surrounding circumstances, that their conduct would naturally and probably result in damage; and

    - (2) that they continued such conduct with malice or reckless disregard of the consequences from which malice may be inferred or that the defendants intentionally pursued a course of conduct for the purpose of causing damage. *Thy N. Tran v. Thi T. Vo,* 2017 Ark. App. 618, 535 S.W.3d 295 (2017).

- Punitive damages that arise out of accidents are insurable, but those arising out of intentional torts are not. *See Southern Farm Bureau Cas. Ins. Co. v. Daniel*, 246 Ark. 849, 852, 440 S.W.2d 582, 584 (1969).

- There can be no recovery for punitive damages unless actual damages are suffered and assessed. *Id.*

**Compensatory Damages**

- Compensatory damages are awarded for the purpose of making the injured party as close to whole as possible. *Bayer CropScience LP v. Schafer,* 2011 Ark. 518, * 13, 385 S.W.3d 822, 831 (2011) (citing *Dunaway v. Troutt,* 232 Ark. 615, 339 S.W.2d 613 (1960), *overruled on other grounds by United Ins. Co. of Am. v. Murphy,* 331 Ark. 364, 961 S.W.2d 752 (1998)).

**Medical Expenses**

- For medical expenses in personal-injury cases, the party seeking to recover medical expenses has the burden of proving the reasonableness and necessity of those expenses. *Young v. Barbera,* 336 Ark. 120, 126, 233 S.W.3d 651, 655 (2006).

- Expert testimony is not required to provide a sufficient basis as to reasonableness and necessity of the expenses. *Id.*

# California

**Coverage**

**Bodily Injury:**

- Minimum Limit Required: $ 15,000/30,000.
- Is Coverage Mandatory? Yes
- Proposition 213: Claimant must have minimum liability insurance to collect general damages. They still can collect their specials.
- Any tort threshold to be reached before a BI claim can be made? No.
- Explain any threshold: Not Applicable.
- Can collateral sources be used as an offset? No.
- California is Not a No-Fault State.
- P.I.P. Coverage in California? No

**Medical Payments:**

- Minimum Limit Required: None
- What does med pay cover in California? Medical bills incurred within one (1) year of date

  of accident.
- Is there a threshold to be met? No
- Does coverage have to be rejected in Writing? No.
- Is Med pay subrogatable? No.
- Can workers comp claimant receive med-pay benefits? Yes
- Can med pay benefits offset a B.I. claim? Under some policy language.

**Uninsured/Underinsured Motorist:**

- Minimum limit required: Generally, California requires that UM/UIM liability coverage be at least $30,000 for each injured person and $60,000 for multiple injured people all in the same accident. However, if there is a written agreement or waiver to provide lower coverage, then an insured's liability coverage can be reduced to $15,000/ $30,000, or dropped completely
- Mandatory coverage: No.

- Can it be rejected and, if so, does it have to be rejected in writing? Yes

- What is statute of limitations for UMBI? The claimant must, within one (1) year, either settle their case, file an action against the third party, and/or demand written arbitration.

- UMPD: Must demand arbitration within one (1) year.

- Can a Laidlaw employee successfully make a UMBI claim? Yes, but only against their own coverage, not as against Laidlaw.

- Is UM subrogatable? Yes

- Unstacked? No

**Property Damage:**

- Property Damage minimum limit required? $5,000.

- Is P.D. Mandatory: YES.

- Salvage - how must it be handled?: Effective January 2004 the carrier/self inured or a salvage pool authorized by the carrier/self insured shall within 10 days from the settlement of the loss, forward the properly endorsed certificate of ownership or other evidence of ownership acceptable to the department, the license plates, and a fee in the amount of $15 dollars to the department.

- Whenever the owner of a total loss salvage vehicle retains possession of the vehicle, the carrier/self insured shall notify the department of the retention on a form prescribed by the department. The carrier/self insured shall also notify the owner of the responsibility to comply with this subdivision. (The owner shall comply with the 10 day requirement after receipt of the settlement check)

- Loss of use - how handled? Some compensation may be available for loss of use of the vehicle while repairs are being made.

- Can there be loss of use on a totaled vehicle? Yes, for an example, the time between the accident and when the vehicle has been totaled.

- Tax, Title and License Fees: They may be recoverable.

**<u>Other Issues</u>**

**Negligence:**

- Pure comparative, modified comparative, contributory? In California we have comparative negligence. A plaintiff is entitled to recover even if they are 99% at fault.

- Can negligence of claimant driver be imputed to claimant passengers(s)? No

- Can a joint venture be established? Yes, under appropriate circumstances.

**Statute of Limitations:**

- BI: 2 years instead of 1 year, as of 1/1/03. For all accidents that happened before 1/1/02, if they did not file their lawsuit before 1/1/03, their claim is dead. For all accidents that happened between 1/1/02 and 1/1/03, although Krupnick v. Duke Energy Morro Bay, L.L.C 2004 DJAR 2119, holds that the new 2 year statute is not retroactive, there remains a hot dispute in the law right now as to whether those claims had to be filed within a year of the accident or whether the new law expanded their statute to two years. For all accidents happening on or after 1/1/03, they definitely get two years to file.

- PD: Three (3) years from date of accident.

- MINOR: Within one (1) year after the minor reaches his/her eighteenth birthday for BI.

- May / must the adjuster notify the parties of the statute? The California Fair Claims Practices Act requires the adjuster must advise the claimant of the statute of limitation in writing within 60 days of the expiration of the statute of limitations, unless the claimant is known to be represented by counsel (10 CCR 2695.7 (f)). If the claimant first makes his claim within 60 days of the statute, the adjuster must notify him of his SOL date "immediately" (id.).

**Licensing Requirements of Adjusters:**

- None in California

**Punitive Damages:**

- Covered by Insurance? No

- Even if not covered, can these be pled and recovery made? Yes

- Limitations on recovery of punitive damages: In California you must show by clear and convincing proof, as compared to just preponderance of the evidence, that the defendant's conduct was willful, wanton and despicable. This is a jury determination and, thereafter, if the jury finds such conduct, then a second phase of the trial is held on the amount of punitive damages to be awarded, if any.

**Joint and Several Exposure:** Yes and No. There is still joint and several liability for economic damages here in California. However, there is no joint and several liability for non-economic damages.

**Workers Compensation:**

- Is workers comp. subrogatable in California: Yes

- Any limitations: Basically the negligence of the employer acts to reduce the lien.

- How must W.C. lien be proved up and protected by the subrogating W.C. Carrier? Two ways, either the worker's comp. carrier can file a complaint in intervention and/or they can file a notice of lien in the third party action.

- Does W.C. carrier have right of first recovery? Yes.

- Can W.C. claimant collect no fault benefits? California is not a no fault state.

**Minor Compromises:** Contrary to popular belief, there is no "$5,000 rule." All minor's settlements have to be approved by the judge to prevent the minor from having the right to sue again once he turns 18. Many carriers use a $500 rule of thumb or a $1,000 rule or a $5,000 rule as an in house guideline because any injury which gives rise to a settlement for these amounts is very unlikely to become the basis for a future suit, but there is no protection in settling just because the amount is under $5,000.

**Bad Faith:** There is no longer first or third party bad faith issues per say. However, in the first party situation an insured can sue his insurer for the breach of the covenant of good faith and fair dealing, breach of contract, fraud, etc.

**Alcohol Issue:**

- For non-commercial drivers - (a) .08 is per se illegal, regardless of how well he can drive or walk a line, etc.; (b) the driver can still be found to be "under the influence" even if he is less than .08, if the circumstances show that his driving was impaired;

- For commercial vehicles, .04 is per se illegal, regardless of whether he is driving well or not.

**Server:** Server can be held liable if he or she serves an obviously intoxicated minor.

**Legal Age:** 21

**Inter-Family and Spouse Immunity:** Can sue under some policies.

**Seat Belt Defense:** Yes, however only through the use of an expert witness.

**Wrongful Death:** What can an estate collect and what type of actions can the estate bring? In California we do not have a true survival statute so only the heirs of the decedent can bring a wrongful death claim. They are entitled to normal wrongful death damages for loss of society, comfort and support. However, if an estate is open and there were outstanding medical bills and the like incurred prior to

**Other Possible Issues:** (A) Good faith settlement - In California, if Laidlaw settles, it has to get a judge to order that the settlement was in "good faith" (i.e., not too low and in collusion with the plaintiff to "stick" it to a target defendant) in order to bar all present and future cross complaints. If LL does not get such an order, it can still be stuck trying the case on a cross complaint for indemnity, or can be sued for indemnity after the main lawsuit.

**Permissive Use:** California statutory law imposes vicarious liability on the owner of a motor vehicle for any person using it with the express or implied permission:

> Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, expressed or implied, of the owner.

California Vehicle Code section 17150.

As with any other case, the burden is on the plaintiff to prove that the owner gave permission. Bradford v. Sargent 135 Cal.App. 324 (1993). When the issue is implied permissive use, the relationship between the owner and the operator is a major factor, such as whether the parties are related by blood or marriage or

employer/employee, compared to mere acquaintances and strangers. Elkington v. California State Auto. Assn. 173 Cal.App.2d 338 (1959).

The owner's statutory liability is limited, however, to the sum of $15,000 each person and $30,000 each accident for bodily injury, and $5,000 for property damage. Vehicle Code section 16056. If the owner is negligent, or the operator is an employee of the owner acting within the scope of employment, the owner's (employer's) liability is not limited. Because liability is imposed based on the status of being the owner of the vehicle rather than imputation of the operator's liability, certain defenses applicable to the operator are not available to the owner. For example, an operator's immunity from liability to a co-employee pursuant to Labor Code Section 3601 et. seq. (workers' compensation as exclusive remedy) does not extend to an owner who is neither the employer nor a co-employee of the injured party. Galvis v. Petito 13 Cal.App.4th 551, 554 (1993).

Every primary policy of automobile liability insurance (personal or business) must afford permissive user coverage to anyone using the motor vehicle with the express or implied permission of the owner. Insurance Code sections 11580.1(a); 11510(b)(4). The provisions do not apply to an excess policy attaching over the financial responsibility limits of $15,000/$30,000/$5,000. Additionally, by written agreement signed by the named insured, coverage may be excluded as to individuals identified by name. Section 11580.1(d)(1). The policy limit may be reduced to the statutory minimum when the vehicle is operated by a permissive user, provided that the provision reducing limits for a permissive user are clear and conspicuous. Mid-Century Ins. Co. v. Haynes 218 Cal.App.3d 737 (1990). Uncertainties regarding whether the driver had permission are resolved in favor of coverage. Exchange Cas. And Sur. Co. v. Scott 56 Cal.2d 1613 (1961). There may be permissive use under a policy even though there was a finding of no permissive use in the underlying motor vehicle accident case. Id.; see also, Jordan v. Consolidated Mut. Ins. Co. 59 Cal.App.3d 26 (1976).

# Colorado

**(with appendix concerning repealed law)**

## MOTOR VEHICLE INSURANCE

On July 1, 2003, the Colorado legislature allowed the Auto Accident Reparations Act ("Reparations Act"), codified as C.R.S. §§ 10-4-701 *et seq*., to terminate by operation of its "sunset" provisions, bringing PIP and thresholds for bodily injury lawsuits to an end for auto accidents in Colorado. The most salient feature of the Reparations Act was the provision of generous PIP benefits, also called "no-fault" or "direct" benefits, worth up to almost $130,000. Policies issued on or after July 1, 2003, are no longer governed by the insurance requirements of the Reparations Act. However, the Act remains in effect for accidents that occurred under pre-sunset policies. Colorado will operate under dual systems for a number of years into the future.

*(The rules under the old law are preserved in an appendix to the Colorado section of this manual.)*

## ELIMINATION OF TORT MODIFICATION

With the repeal of the Reparations Act, for motor vehicle accidents occurring on and after July 1, 2003, so long as the plaintiff was not under a Reparations Act era policy affording PIP coverage, there are no statutory suit thresholds. Instead, claimants are allowed to sue for even minor injuries.

## COMPULSORY LIABILITY INSURANCE

"Liability" insurance with the following minimum limits is a compulsory requirement under C.R.S. §§ 10-4-619 and 620.

(1) Legal liability for bodily injury or death arising out of the use of a motor vehicle to a limit, exclusive of interest and costs of $25,000 per person in any one accident and $50,000 for all persons in any one accident.

(2) Legal liability for property damages arising out of the use of a motor vehicle to a limit, exclusive of interest and costs, of $15,000 in any one accident.

## "MUST-OFFER" COLLISION OPTION

"Collision" insurance must be offered to an insured. *See* C.R.S. § 10-4-621(2).

## STATUTE OF LIMITATIONS

A three-year statute of limitations period governs all claims arising out of automobile accidents. *See Jones. v. Cox*, 828 P.2d 218 (Colo. 1992); C.R.S. §13-80-101.

## NEW DUTY TO PRODUCE AUTO INSURANCE POLICY UPON REQUEST

Pursuant to C.R.S. § 10-3-1117, which is effective as of January 1, 2020, any automobile insurance carrier who receives a written request from an insured must produce a copy of the complete insurance policy, including any endorsements, within thirty calendar days of receiving the request. Any insured who receives a written request from a claimant or claimant's attorney must also provide to the claimant or claimant's attorney the name of each insurer for the insured and the coverages provided to the insured party.

Upon receiving written request, any insurance carrier providing personal or commercial automobile insurance in Colorado must also produce to a third-party claimant or claimant's attorney a statement setting forth: (1) the name of the insurer; (2) the name of each insured party as the name appears on the declarations page of the policy; and (3) the limits of the liability coverage. The insurance carrier must also produce a copy of the policy, and this written statement and copy of the policy must be provided to the claimant or claimant's attorney within thirty days of receiving any such request. Any insurance carrier that violates the provisions of this statute can be held liable for damages in the amount of $100 per day for each day past the thirty-day limit when the carrier has not complied with the requirements, plus costs and attorney's fees.

The claimant and claimant's attorney are not permitted to disclose any of the information obtained from an insurance carrier to any third-parties, except that the claimant and claimant's attorney may discuss the information with the claimant's own insurance carrier.

A claimant is defined under this statute as any person who has provided notice to an insurer of a potential claim.

## COLORADO DAMAGES CAPS

This summary of damages caps pertains to general tort personal injury claims. It does not pertain to actions against public entities or federal law claims.

### Personal Injury

Overview: Damages for personal injury fall into three categories: economic loss, non-economic loss, and physical impairment/disfigurement. Colorado does not cap damages for economic loss, physical impairment or disfigurement in general tort cases. There are, however, caps and limits on non-economic damages, wrongful death damages and punitive damages. Actions against public entities are capped at $150,000 per person, $600,000 per accident. Medical malpractice actions are subject to their own separate limits, discussed below.

#### Non-Economic Damages – Direct Claims

C.R.S. § 13-21-102.5 limits recovery on non-economic losses. Until Jan. 1, 1998, the person who suffered a direct injury could recover non-economic damages to a limit of $250,000. That limit could be raised to $500,000 if the court found "clear and convincing" justifying the increased limit. For causes of action accruing on an after January 1, 1998, this dual cap was raised to $366,250 and $732,500. *See* Colo. Sec'y of State Certificate, January 9, 2007. For causes of action accruing on an after January 1, 2008, this dual cap was raised to $468,010 and $936,030. *See* Colo. Sec'y of State Certificate, October 17, 2011. For causes of action accruing on and after January 1, 2020, the dual cap is now raised to $613,760 and $1,227,530. *See* Colo. Sec'y of State Certificate, January 14, 2020.

#### Non-Economic Damages – Derivative Claims

Recovery for non-economic derivative loss is prohibited "unless the court finds justification by clear and convincing evidence." C.R.S. § 13-21-102.5(3)(b). If this standard is met, then, for causes of action accruing on and after January 1, 1998, the cap is $366,250. *See* Colo. Sec'y of State Certificate, January 9, 2007. For causes of action accruing on and after January 1, 2008, the cap is $468,010. *See* Colo. Sec'y of State Certificate, October 17, 2011. For causes of action accruing on and after January 1, 2020, the cap is now raised to $613,760. *See* Colo. Sec'y of State Certificate, January 14, 2020.

#### Punitive Damages, aka "Exemplary" Damages

Statutory limitations cap punitive (exemplary) damages to an amount equal to the actual damages awarded. C.R.S. § 13-21-102. Therefore, if a plaintiff is awarded $150,000 in compensatory damages, he or she may only recover up to $150,000 in punitive damages. This limit of equality can be raised to three times the amount of compensatory damages if the offending conduct continues after the lawsuit is filed. C.R.S. § 13-21-102(3).

## Wrongful Death

### Non-Economic and Derivative Non-Economic

For actions accruing on an after January 1, 1998, the wrongful death statute, found in C.R.S. § 13-21-203, provides an inflated-adjusted limit on the amount of non-economic damages the heirs at law of the decedent may collectively recover to $341,250. Colo. Sec'y of State Certificate, January 9, 2007. This amount has been raised to $436,070 for causes of action accruing on or after January 1, 2008. Colo. Sec'y of State Certificate, October 17, 2011. For causes of action accruing on and after January 1, 2020, the cap is now raised to $571,870. *See* Colo. Sec'y of State Certificate, January 14, 2020.

### Solatium in Lieu of Proving Non-Economic Damages

Alternatively, in lieu of proving non-economic damages, the plaintiff(s) may elect in writing to sue for and recover a solatium award. Effective for actions accruing on and after January 1, 1998, the solatium amount stands at $68,250. Colo. Sec'y of State Certificate, January 9, 2007. For actions accruing on and after January 1, 2008, the solatium amount is $87,210. Colo. Sec'y of State Certificate, October 17, 2011. For causes of action accruing on and after January 1, 2020, the cap is now raised to $114,370. *See* Colo. Sec'y of State Certificate, January 14, 2020.

A solatium award is in addition to economic damages and reasonable funeral, burial, interment, or cremation expenses, which expenses may also be recovered in an action under this section. C.R.S. § 13-21-203.5.

## Medical Malpractice

The Healthcare Availability Act (HCAA) limits total damages for a course of care against all defendants to $1,000,000, including derivative claims, except where economic damages exceed $1,000,000, and contains a sub-limit on non-economic loss of $250,000. C.R.S. § 13-64-302(1).

For actions and omissions that occur on and after July 1, 2003, the sub-limit on non-economic loss is raised to $300,000. C.R.S. § 13-64-302.

The $1 million cap can be exceeded upon a showing of "good cause" and that application of the limit would be "unfair" where the non-economic loss sub-limit and economic damages combined exceed $1 million. In that event, "the court may award in excess of the limitation the present value of additional past and future economic damages only." C.R.S. § 13-64-302(1)(b).

The HCAA damages limits have been upheld in the face of a challenge to their constitutionality. *Scholz v. Metropolitan Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993).

The HCAA damages limits include pre-judgment interest. C.R.S. § 13-64-302; *Dupont v. Preston*, 9 P.3d 1193 (Colo. App. 2000), *aff'd* on other grounds, 35 P.3d 433.

## PROPERTY DAMAGE

### Loss Of Use

In addition to any amount the finder of fact may award a plaintiff for damage to his automobile, the finder of fact shall also award, insofar as it has been proved by a preponderance of the evidence, an amount which will reasonably compensate the plaintiff for any loss of use of his automobile during the time reasonably required to make the necessary repairs of the damage caused by the defendant's conduct. The measure of any such damages is the reasonable cost of renting a similar automobile for use while repairs are being made. *See* CJI-Civ. 4th 6:13.

### Rental Vehicles

There is no express requirement for the legal liability insurer to provide the adverse driver with a rental vehicle. However, the reasonable cost of renting a similar vehicle is the measure of damages for loss of use in a tort action. *See* "Loss of Use" above.

### Collision Waiver Of Rental Car Companies

There is no express requirement for the legal liability insurer to pay the collision waiver of the rental car company. However, the third party could argue that the "reasonable cost" of renting a similar vehicle includes payment of the collision waiver.

### Protection Of Lien Holder Rights

There is no statute, regulation or case in Colorado imposing on insurers the obligation to ascertain the identity of motor vehicle lien holders that have been paying third-party liability claims for property damage to motor vehicles. Nor is such an obligation contained in the Colorado Certificates of Title Act. However, in the event an insurer knows of a lien holder, conservative practice would dictate that the lien holder be included on settlement checks paid for property damage.

### Salvage

In Colorado, "salvage vehicle" is defined as "a vehicle that is damaged by collision, fire, flood, accident, trespass, or other occurrence, excluding hail damage, to the extent that the cost of repairing the vehicle to a roadworthy condition and for legal operation on the highways exceeds the vehicle's retail fair market value immediately prior to such damage, as determined by the person who owns the vehicle at the time of such occurrence or by the insurer or other person acting on behalf of the owner." C.R.S. § 42-6-102(17)(a). In assessing whether a vehicle is a "salvage vehicle," the retail fair market value shall be determined by reference to sources generally accepted within the insurance industry including price guide books, dealer quotations, computerized evaluation services, newspaper advertisements, and certified appraisals, taking into account the condition of the vehicle prior to the damage. When assessing the repairs the assessor shall consider the actual retail cost of the needed parts and the reasonable and customary labor rates for needed labor. C.R.S. § 42-6-102(17)(b).

Where an insurer becomes the owner of a salvaged vehicle as a part of a settlement with a claimant owner, the insurer is required to surrender the Colorado certificate of title to the Colorado Department of Motor Vehicles and obtain a salvage title. *See* C.R.S. § 42-6-134. To obtain salvage title, the following steps must be taken:

(1) Obtain from the claimant owner the certificate of title. If the certificate of title is in the possession of a third party lien holder, obtain the certificate of title from the lien holder.

(2) If neither the owner nor any third party lien holder has the certificate of title, obtain a power of attorney from the claimant owner allowing the insurer to execute any documents necessary to obtain a duplicate title and transfer the certificate of title. Where the insurer has only a power of attorney, before being able to obtain salvage title, the insurer would have to first apply for a duplicate title, using the power of attorney, through the office of the Department of Motor Vehicles in which the vehicle is registered or licenses. *See* C.R.S. § 42-6-116. Forms for power of attorney are available from:

Paragon Systems Group
1500 W. 47th Avenue
Denver, CO 80211-0508
Telephone: (303) 433-7481
Fax: (303) 433-7487
Form DR 2175 - Power of Attorney for Motor Vehicle

Or through the Colorado State Department of Revenue's website, at http://www.colorado.gov/cs/Satellite/Revenue-MV/RMV/1212052609911 (last visited July 22, 2013).

(3) Surrender the certificate of title, and apply for a salvage title. This is done through the office of the Colorado Department of Motor Vehicles in the county where the vehicle was registered or licenses. *See* C.R.S. §§ 42-6-136, 42-6-134.

## UNINSURED/UNDERINSURED MOTORIST COVERAGE

### Must Offer

Insurance companies writing motor vehicle liability policies in Colorado are required to extend uninsured motorist coverage to their customers unless the insured rejects such coverage in writing. *See* C.R.S. § 10-4-609(1).

### Minimum Coverage

The minimum coverage for uninsured motorist liability insurance in Colorado is $25,000 per person in any one accident and $50,000 for all persons in any one accident, but in no event shall the insurer be required to provide limits higher than the insured's bodily injury liability limits. *See* C.R.S. § 10-4-609(2).

### Statute Of Limitations

A three (3)-year statute of limitations period governs claims for bodily injury and property damage liability claims arising under uninsured motorist coverage. *See Jones v. Cox*, 828 P.2d 218 (Colo. 1992); C.R.S. §13-80-101.

### Stacking

Anti-stacking provisions pertaining to underinsured motorist coverage are permissible and do not violate public policy. *See Shelter Mutual Insurance Co. v. Thompson*, 852 P.2d 459 (Colo. 1993).

### New Presumption Added to Statute

Effective January 1, 2011, a new evidentiary presumption relating to uninsured tortfeasors goes into effect, making it easier for parties to establish that they were injured by an uninsured motorist. The new presumption and procedures for establishing the same are codified in new sections to C.R.S. § 10-4-609 as follows:

> (6) An alleged tortfeasor shall be deemed to be uninsured solely for the purpose of allowing the insured party to receive payment under uninsured motorist coverage, regardless of whether the alleged tortfeasor was actually insured, if:
>
> (a) The alleged tortfeasor cannot be located for service of process after a reasonable attempt to serve the alleged tortfeasor; and
>
> (b) (I) Service of process on the insurance carrier as authorized by section 42-7-414 (3), C.R.S., is determined by a court to be insufficient or ineffective after reasonable effort has failed; or
>
> (II) (A) The report of a law enforcement agency investigating the motor vehicle accident fails to disclose the insurance company covering the alleged tortfeasor's motor vehicle; and
>
> (B) The alleged tortfeasor's insurance coverage when the incident occurred is not actually known by the person attempting to serve process.
>
> (7) Nothing in subsection (6) of this section voids the alleged tortfeasor's policy if the alleged tortfeasor was actually insured.

## COMPARATIVE NEGLIGENCE

Comparative at 50%.

In Colorado, contributory negligence shall not bar recovery for damages in tort resulting in death or injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made. *See* C.R.S. § 13-21-111(1).

## NEGLIGENCE OF DRIVER NOT IMPUTABLE TO PASSENGER

As a general rule, the negligence, if any, of the driver of the vehicle in which the plaintiff was riding cannot be charged to the plaintiff. *See Dunham v. Kampman*, 547 P.2d 263 (1976). This proposition is not true, however, if the plaintiff is suing a third party for injuries sustained while she was a passenger in a vehicle in which she is also a co-owner. In such a case, the negligence of the driver of the vehicle she was riding in may be imputed to her as a co-owner. *See Hover v. Clamp*, 579 P.2d 1181 (Colo. App. 1978). Where the co-owner as passenger is suing the driver of the vehicle in which she was riding, however, any negligence of the driver cannot be imputed to her in order to reduce the driver's potential liability. *Price v. Sommermeyer*, 584 P.2d 1220, 1223 (Colo. App. 1978).

## DUTY OF MOTOR VEHICLE OCCUPANT IN ACCIDENT

For accidents occurring on and after July 1, 2004, occupants of motor vehicles involved in accidents resulting in death or bodily injury are required to remain at the scene of an accident, should the driver be physically unable to do so. *See* C.R.S. § 42-4-1607(1). This is for purposes of making the report

of required information (driver's name, the driver's address, and the registration number of the vehicle) to the other driver and/or investigating agency and rendering reasonable assistance to injured persons (such as by calling 9-1-1).

## JOINT VENTURE IN OPERATION OF VEHICLE

Under Colorado law, in order for a joint venture or joint enterprise to exist, two or more persons must unite in pursuit of a common purpose. Each person must also have a right to control the operation and management of the vehicle or other instrumentality used by the parties in pursuit of the common purpose. The common purpose may be for profit, pleasure, or convenience of the parties. *See Mayer v. Sampson*, 157 Colo. 278, 402 P.2d 185 (1965); CJI-Civ. 4th 7:22. If a joint venture is proved, the negligence of one venturer is charged against all venturers. *See* CJI-Civ. 4th 8:6.

## PUNITIVE DAMAGES AND INSURANCE COVERAGE

Colorado courts have held that liability insurance policies do not cover awards of punitive damages. *Universal Indemnity Ins. Co. v. Tenery*, 96 Colo. 110, 39 P.2d 776 (1934); *Union Ins. Co. v. Kjeldjaard*, 775 P.2d 55 (Colo. App. 1988); *Gleason v. Fryer*, 30 Colo. App.106, 491 P.2d 85 (1971); *Brown v. Western Cas. and Surety Co.*, 484 P.2d 1254 (Colo. App. 1971) (not selected for official publication). In these cases, the courts apparently based their decisions on policy language, which provided coverage for damages because of bodily injury or property damage, concluding that these terms did not encompass punitive damages.

## STANDARD FOR RECOVERY OF PUNITIVE DAMAGES; CAPS

Under the common law in Colorado, there is no right to punitive damages. *See Murphy v. Hobbs*, 7 Colo. 541, 5 P. 119 (1884). Such a right was statutorily created, and is currently embodied in C.R.S. § 13-21-102, which provides that:

> In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages. *The amount of such reasonable exemplary damages shall not exceed an amount which is equal to the amount of actual damages awarded to the injured party.*

C.R.S. § 13-21-102(1)(a) (emphasis added). Furthermore, the General Assembly defined "willful and wanton conduct" to mean:

> Conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff.

*Id.* at § 13-21-102(1)(b). Additionally, the burden of proof required to sustain an award for punitive damages is "beyond a reasonable doubt." *See* C.R.S. § 13-25-127(2), which provides, in pertinent part, that:

> Exemplary damages against the party against whom the claim is asserted shall only be awarded in a civil action when the party asserting the claim proves beyond a reasonable doubt that the commission of a wrong under the circumstances set forth in section 13-21-102.

The court may increase an award for exemplary damages to a sum not to exceed three times the amount of the actual damages if the defendant has continued the behavior or repeated the action which is the subject of the claim against the defendant in a willful and wanton manner either against the plaintiff or another person during the pendency of the case or the defendant has acted in a willful and wanton manner during the pendency of the action in a manner, which has further aggravated that damages of the plaintiff when the defendant knew or should have known such action would produce aggravation. *See* C.R.S.§ 13-21-102(3)(a)(b).

Finally, the question of the sufficiency of the evidence to justify an award of exemplary damages is a matter of law. *Mince v. Butters*, 200 Colo. 501, 504, 616 P.2d 127, 129 (1980). Not every action entitling a plaintiff to actual damages gives rise to a claim for punitive damages. *Ark Valley Alfalfa Mills, Inc. v. Day*, 128 Colo. 436, 263 P.2d 815 (1953). Significantly, conduct that is merely negligent cannot serve as the basis for exemplary damages. *Tri-Aspen Constr. Co. V. Johnson* 714 P.2d 484, 488 (Colo. 1986). The rationale for such a stringent requirement is that the purpose of punitive damages is not to compensate an injured plaintiff, but to punish the defendant and to deter others from similar conducts in the future. *Leidholt v. Dist. Ct., 619 P.2d 768* (Colo. 1980).

## JOINT AND SEVERAL LIABILITY

Joint and several liability has been abolished by statute in Colorado and replaced with pro rata liability of the defendants. *See* C.R.S. § 13-21-111.5(1) Specifically, in a negligence action brought as a result of death or injury to person or property, no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury, death, damage or loss. C.R.S. § 13-21-11.5(1). However, joint liability will be imposed on two or more persons who consciously conspire and deliberately pursue a common plan or design to commit a tortuous act. *See* C.R.S. § 13-21-111.5(4). Any person held jointly liable under this subsection, shall have the right of contribution from his fellow defendants acting in concert. *Id.*

## WORKER'S COMPENSATION

Generally, the plaintiff injured in the course and scope of his employment is entitled to receive worker's compensation benefits which compensate him in the form of medical benefits as well as temporary total disability benefits (partial or total) and permanent partial disability (partial or total).

The worker's compensation carrier is subrogated to the rights of the injured worker for recovery of workers compensation benefits paid except for PIP. The worker's compensation carrier is the primary obligor for making medical payments ahead of the PIP paid or payable benefits. *See* C.R.S. § 8-41-203; *Tate v. Industrial Claim Appeals Office*, 815 P.2d 15 (Colo. 1991).

## MINOR SETTLEMENTS

Under Colorado law, a person is deemed to be of legal age at eighteen and may enter into a binding contractual obligation. C.R.S. § 13-22-101. Rule 16 of the Colorado Rules of Probate Procedure sets forth the requirements relating to a petition to settle a personal injury claim of a minor. The petition to settle a personal injury claim of a minor child must include the following:

(1) the address of the petitioner's residence;

(2) the name, age, date of birth and address of the minor child;

(3) the names and addresses of the minor child's parents;

(4) the petitioner's relationship to the minor child;

(5) the date of the accident;

(6) a general description of the accident;

(7) a general description of the nature of the injuries received by the minor child;

(8) the type of insurance policy and its limits;

(9) the name of the physician(s) who attended or consulted in the treatment of the minor child;

(10) a general description of the nature, extent and duration of the treatment required or anticipated;

(11) the medical expenses incurred on behalf of the minor child;

(12) the period or probable period of disability resulting from the accident;

(13) if of school age, how long the minor was absent from school by reason of the accident;

(14) if working, how many weeks; wages were lost and the total amount thereof;

(15) the present physical condition of the minor child;

(16) the nature of the damage, if any, to the minor child's property;

(17) the summary of expenses, if any, incurred as a result of any property damage;

(18) the terms of the proposed settlement;

(19) the names and addresses of each party who is or may be liable for the minor child's claim;

(20) the basis of the minor child's claim of liability, and defenses, if any, to that claim;

(21) the status of any claims and if civil action has been filed, the court, case number and parties;

(22) what amount of the settlement, if any, is included for loss of services;

(23) identify the source of funds for payment of any expenses and a summary of what expenses have been paid and will be paid by each source;

(24) any amount that will be paid out of the settlement as attorney fees; and

(25) the petition must be accompanied by a statement of the treating physician.

On receipt of the petition, the court will set the matter for a hearing. The minor must be present at the hearing unless good cause is shown why attendance is not possible. In that case, the court must enter an order allowing the hearing to proceed without the minor present. Colo. R. Probate. Proc. 16. The court will hear testimony about the accident, injuries sustained and recommended settlement. The court then may request additional information or may approve the settlement.

A child under the age of seven at the time of an occurrence is incapable of negligence. *See Benallo v. Bare*, 162 Colo. 22, 427 P.2d 323 (1967); *Fletcher v. Porter*, 754 P.2d 788 (Colo. App. 1988); CJI-Civ. 4th 9:7.

## BAD FAITH ISSUES

### Elements Of Liability - Third Party Cases

"Third-party" bad faith cases are those arising out of a liability claim asserted against the insured by a third party. An example of this type of bad faith case is an action by an insured against his insurer for bad faith failure to settle, subjecting the insured to an excess judgment. In order for the plaintiff to recover from the defendant on his claim of bad faith breach of an insurance contract in a "third-party" case, the trier of fact must find all the following have been proved:

(1) The plaintiff incurred injuries, damages, or losses;

(2) The defendant acted unreasonably; and

(3) The defendant's unreasonable conduct or position was a cause of plaintiff's injuries, damages, or losses.

*See Farmers Group, Inc. v. Trimble*, 691 P.2d 1138 (Colo. 1984); *Travelers Ins. Co. v. Savio*, 706 P.2d 1275 (Colo. 1985); CJI-Civ. 4th 25:1.

### Elements Of Liability - First Party Cases

"First-party" bad faith cases are those arising out of the insured's claim for benefits from the insurer. An example of this type of case is an action by an Auto No-Fault insured against his carrier for bad faith refusal to pay PIP benefits.

In order for the plaintiff to recover from the defendant on his claim of bad faith breach of an insurance contract in a "first-party" case the finder of fact must find all the following have been proved:

(1) The plaintiff incurred injuries, damages, or losses;

(2) The defendant acted unreasonably;

(3) The defendant knew such conduct or position was unreasonable;

(4) or acted in reckless disregard of whether such conduct or position was unreasonable; and

(5) The defendant's unreasonable conduct or position was a cause of the plaintiff's injuries, damages, or losses.

*See Goodson v. American Standard Ins. Co., 89 P.2d 409 (Colo. 2004); Bucholtz v. Safeco Ins. Co. of Am.,* 773 P.2d 590 (Colo.App. 1988); *Boltz v. Security Mut. Life Ins. Co.*, 721 P.2d 1216 (Colo. App. 1986); CJI-Civ. 4th 25:2.

### Unreasonable Conduct Or Position - Defined

Under Colorado law, "unreasonable conduct" means the failure to do an act which a reasonably careful person would do, or the doing of an act which a reasonably careful person would not do, under the same or similar circumstances, to protect the persons insured from injuries, damages, or losses. *See Farmers Group, Inc. v. Trimble*, 691 P.2d 1138 (Colo. 1984); *Travelers Ins. Co. v. Savio*, 706 P.2d 1275 (Colo. 1985); CJI-Civ. 4th 25:3.

Furthermore, "unreasonable position" means a position taken by an insurance company with respect to a claim being made on one of its policies that a reasonably careful person would not take under the same or similar circumstances. *See Farmers Group, Inc. v. Trimble*, 691 P.2d 1139 (Colo. 1984); *Travelers Ins. Co. v. Savio*, 706 P.2d 1275 (Colo. 1985); CJI-Civ. 4th 25:3.

The Colorado statute specifically prohibits the following practices by an insurance company:

- willfully misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

- failing to acknowledge an act reasonably promptly upon communications with respect to claims arising under an insurance policy;

- failing to adopt and implement reasonable standards for the prompt investigation of claims arising under an insurance policy;

- refusing to pay claims without conducting a reasonable investigation based upon all information available;

- failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

- not attempting in good faith to effectuate prompt, fair and equitable settlement of claims in which liability has become reasonably clear;

- compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;

- attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

- attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured;

- making claims payments to insured or beneficiaries not accompanied by a statement setting forth the coverage under which the payments are being made;

- making known to insureds or to claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount of award at an arbitration;

- delaying the investigation or payment of claims by requiring an insured or claimant, or the physician of either of them, to submit a preliminary claim or report, and then requiring the

subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

- failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;

- failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or where the offer of a compromise settlement; or

- raising as a defense or a partial offset in the adjustment of a third-party claim the defense of comparative negligence without conducting a reasonable investigation in developing substantial evidence in support thereof.

*See* C.R.S. § 10-4-642.

**Reckless Disregard - Defined**

Under Colorado law, an insurance company recklessly disregards the unreasonableness of its conduct or position when it acts or takes a position with knowledge of facts that indicate its conduct or position is unreasonable. *See Travelers Ins. Co. v. Savio*, 706 P.2d 1275 (Colo. 1985); CJI-Civ. 4th 25:4.

**Duty Of Good Faith And Fair Dealing**

An insurance company owes to those it insures the duty of good faith and fair dealing. That duty is breached if the company delays or denies payment without a reasonable basis for its delay or denial and the company knows that its delay or denial is unreasonable or it recklessly disregards that fact. *See Farmers Group, Inc. v. Trimble*, 691 P.2d 1138 (Colo. 1984); *Travelers Ins. Co., v. Savio*, 706 P.2d 1275 (Colo. 1985); CJI-Civ. 4th 25:5.

**Actual Damages**

If the trier of fact finds in favor of the plaintiff, the jury will award plaintiff his actual damages, insofar as they have been proved by a preponderance of the evidence and insofar as they were caused by the defendant's unreasonable or bad faith breach of contract, an amount which will reasonably compensate the plaintiff for his injuries, damages, or losses, if any. In determining such damages, the trier of fact shall consider the following:

(1) any non-economic losses or injuries incurred to the present time or which will probably be incurred in the future; and

(2) any economic losses incurred to the present time or which will probably be incurred in the future.

*See Farmers Group, Inc. v. Trimble*, 691 P.2d 1138 (Colo. 1984); CJI-Civ. 4th 25:6.

**Non-Economic Damages**

Under Colorado law, non-economic damages are not generally recoverable in breach of contract claims. Claims for bad faith breach of insurance contract are, however, excepted. See C.R.S. § 13-21-102.5.

Until recently, Colorado courts imposed prerequisites for such recovery. Insureds could only recover extra-contractual non-economic damages, including damages for emotional distress, in bad faith breach of insurance contract claims where they could demonstrate that the emotional distress resulted from a substantial property or economic loss proximately caused by the insurer's tortious conduct. See *Farmer's Group, Inc. v. Trimble*, 768 P.2d 1243 (Colo. App. 1988).

On May 3, 2004, the Colorado Supreme Court expressly overruled *Farmer's Group, Inc. v. Trimble*, 768 P.2d 1243 (Colo. App. 1988), holding that insureds could recover non-economic damages based on traditional tort principles. *See Goodson v. American Standard Ins. Co.*, 89 P.2d 409 (Colo. 2004). *Goodson* thus removed *Trimble's* previous threshold requirements for bad faith claims.

In contrast to *Goodson*, the Colorado General Assembly recently imposed prerequisites for recovery. On May 17, 2004 (shortly after *Goodson* but not in direct response to it as the legislation had been pending for sometime), it enacted legislation, applicable to causes of action filed on or after July 1, 2004, requiring the insured to prove, by clear and convincing evidence, that the non-economic damages claimed were within the contemplation or expectation of the parties and that the breach was willful and wanton. *See* C.R.S. § 13-21-102.5. Willful and wanton is defined as meaning that the insurer intended to breach the contract and that the breach was done without reasonable justification, as well as the contract clearly indicated that non-economic damages were within the contemplation of the parties. *See* C.R.S. § 13-21-102.5.

## ALCOHOL ISSUES

### Legal Limit Of Intoxication

As of July 1, 2004, the legal limits in Colorado have changed. A driver with a Blood Alcohol Content (BAC) more than 0.05% but less than 0.08% is presumed to be driving while his ability is impaired (DWAI). *See* C.R.S. § 42-4-1301(6)(a)(II). If a driver's BAC is 0.08% or more, he is presumed to be driving under the influence (DUI). *See* C.R.S. § 42-4-1301(6)(a)(III).

### Implied Consent Law (Alcohol & Drugs)

Likewise, the Implied Consent Law has been amended to reflect the 0.08% limit. The Implied Consent Law in Colorado provides that if a law enforcement officer suspects that a person is driving under the influence of alcohol or other drug substance and the driver refuses to take the required test or the result of such test indicates a BAC of 0.08% or more, the officer will confiscate the driver's license and issue a "Notice of Revocation or Denial" which becomes a seven (7) day driving permit. *See* C.R.S. § 42-2-126.

### Dram Shop Liability

The Colorado legislature developed a legislative scheme designed to support a policy of placing liability for injuries caused as a result of excessive drinking on the person who consumes excessive amounts of alcohol, rather than the sale or service thereof.

### Tavern Owners

In Colorado, a tavern owner is not civilly liable to any injured individual or his estate for any injury to such individual or damage to any property suffered because of the intoxication of any person due to the sale or service of any alcoholic beverages except when:

(1) It is proven that the tavern owner willfully and knowingly served any malt, vinous, or spirituous liquor to such person who was under the age of twenty-one years or who was visibly intoxicated; and

(2) The civil action is commenced within one year after such service.

*See* C.R.S. § 12-47-801(3)(a)(I)(II). *See also Sigman v. Seafood Ltd. Partnership I*, 817 P.2d 527 (Colo. 1991). For injuries accruing on or after January 1, 1998 to January 1, 2008, the maximum amount of damages that may be recovered against a social host under these statutes is $219,750. For injuries accruing on or after January 1, 2008, the maximum amount is $280,810.

**Social Hosts**

In Colorado, a social host is not civilly liable to any injured individual or his estate for any injury to such individual or damage to any property suffered because of the intoxication of any person due to the sale or service of any alcoholic beverages except when:

(1) It is proven that the social host willfully and knowingly served any malt, vinous, or spirituous liquor to such person who was under the age of twenty-one years; and

(2) The civil action is commenced within one year after such service.

*See* C.R.S. § 12-47-801(4)(a)(I)(II). *See also Charlton v. Kimata*, 815 P.2d 946 (Colo. 1991). For injuries accruing on or after January 1, 1998 to January 1, 2008, the maximum amount of damages that may be recovered against a social host under these statutes is $219,750. For injuries accruing on or after January 1, 2008, the maximum amount is $280,810.

## INJURY TO GUEST

The Guest Statute in Colorado was repealed by the legislature in 1975.

## FAMILY CAR DOCTRINE

The owner or co-owner of a vehicle who is the head of the household is legally responsible to the same extent a driver who is a member of the household would be for any injury or damages caused by any negligence of a driver-member of the household using the vehicle with the express or implied permission of the owner or co-owner. *See Casebolt v. Cowan,* 829 P.2d 352 (Colo. 1992); *Hasegawa v. Day*, 684 P.2d 936, 939 (Colo. App. 1983); CJI-Civ. 4th 11:15. The family car doctrine is not applicable against one who is not the head of the household even though the person may be a co-owner of the vehicle. *See Lee v. Degler* 169 Colo. 226, 454 P.2d 937 (1969).

A "head of a household" is one who assumes or shares the primary responsibility for supervising the general affairs of the household. One parent or both may be head of the household, but in the event of the death of both parents or extended absence or disability, another member of the household may become the head of the household. *See Greenwood v. Kier*, 243 P.2d 417 (1952); CJI-Civ. 4th 11:16. Moreover, a "household" consists of those persons who are living together as a family. *See* CJI-Civ. 4th 11:17.

## SPOUSAL PRIVILEGE

The spousal privilege in Colorado is codified at C.R.S. § 13-90-107(1)(a). That statute articulates that "a husband shall not be examined for or against his wife without her consent . . ." The privileges set

out in the statute include the "rule of spousal disqualification" which prohibits one spouse from testifying against the other without the other's consent. This exception does not apply to a civil action or proceeding by one spouse against the other or if the otherwise privileged information is communicated after the marriage. *See* C.R.S. § 13-90-107(1)(a); *Voight v. The Colorado Mountain Club*, 819 P.2d 1088 (Colo.App.1991); *Burlington Northern R. Co. v. Hood*, 802 P.2d 458 (Colo. 1990); *In re marriage of Bozar*, 779 P.2d 1346 (Colo. 1989); *People v. Lucero*, 747 P.2d 660 (Colo. 1987).

## SEATBELT DEFENSE

Colorado's Safety Belt Law provides that every driver and front seat passenger in a motor vehicle equipped with a safety belt system shall wear a fastened safety belt when the vehicle is in operation. C.R.S. § 42-4-237. There are several exceptions to this law:

Children restrained by a child-restraint system, members of an ambulance team, motorcycles, passenger and school buses, drivers of delivery vans on-the-job, farm equipment, or anyone carrying a written medical statement from a physician stating why he is not physically or psychologically required to wear safety belts. C.R.S. § 42-4-237(3)(b)(3). Evidence of failure to comply with the requirements of the Safety Belt Law is admissible to mitigate damages with respect to any person who was involved in a motor vehicle accident and who seeks in any subsequent litigation to recover damages for injuries resulting from the accident. Such mitigation shall be limited to awards for pain and suffering and shall not be used for limiting recovery of economic loss and medical payments. C.R.S. § 42-4-237(7).

## WRONGFUL DEATH

In Colorado, the legislature codified damages for death by negligence at C.R.S. §§ 13-21-201 to 204.

### Damages For Death By Negligence

**In actions brought under C.R.S. § 13-21-201:**

This section provides for wrongful death actions against owners and operators of railroads, coaches, and all other forms of public conveyance of passengers or freight for hire, where death was caused by driver negligence or a defect or "insufficiency" in the conveyance.

Those entitled to sue are either the spouse or the heirs or both, subject to certain time limits and conditions.

Damages recoverable under this section are no less than $3,000 nor more than $10,000.

**In actions brought under C.R.S. § 13-21-202:**

This section allows for wrongful death actions without the limitations contained in C.R.S. § 13-21-201. The right of action is conditioned merely on whether, had the injured person lived, he or she would have been entitled to sue. Those entitled to sue are the same ones specified in the previous section, C.R.S. § 13-21-201, that is, the spouse and/or the heirs, subject to certain time limits and conditions.

The jury in such a case would be instructed to consider the following factors in determining damages, as provided under C.R.S. § 13-21-203(1):

(1) any non-economic losses, including grief, loss of companionship, impairment of the quality of life, inconvenience, pain and suffering, and emotional stress the plaintiff (and those the plaintiff represents) has have incurred to the present, and any grief, loss of companionship, impairment of the quality of life, inconvenience, pain and suffering, and emotional stress the plaintiff (and those the plaintiff represents) will incur in the future; and

(2) any economic losses, including reasonable funeral, burial, internment, or cremation expenses, and any net pecuniary or financial loss sustained by the plaintiff (and those the plaintiff represents) by reason of the death of the decedent. The net pecuniary or financial loss is the same as the pecuniary or financial benefit the plaintiff (and those the plaintiff represents) might reasonably have expected to receive from the decedent had he lived.

In determining such damages, the trier of fact should consider the age, health, and life expectancy of the decedent, the age, health and life expectancy of the plaintiff (and those the plaintiff represents), the decedent's, habits of industry, his ability to earn money, his disposition to aid or assist the plaintiff (and those the plaintiff represents), and the nature of the relationship between the decedent and the plaintiff (and those the plaintiff represents).

For actions that accrue on and after January 1, 1998, the recoverable damages for non-economic loss or injury are limited to a maximum of $341,250. For actions that accrue on or after January 1, 2008, the recoverable damages for non-economic loss or injury are limited to $436,070. *See* C.R.S. §§ 13-21-203; Colo. Sec'y of State Certificates, January 9, 2007; October 17, 2011.

Effective August 8, 2001, the act was amended for all causes of action accruing on or after that date to allow for exemplary damages where the death complained of was attended by circumstances of fraud, malice, or willful and wanton conduct. *See* C.R.S. § 13-21-203(3)(a). The exemplary damages are limited to the amount of the actual damages awarded. The court may increase any award of exemplary damages to a sum not to exceed three times the amount of actual damages, if it is shown that the defendant has continued the behavior or repeated the action that is the subject of the claim against the defendant in a willful and wanton manner against another person or persons during the pendency of the case; or the defendant has acted in a willful and wanton manner during the pendency of the action in a manner that has further aggravated the damages of the plaintiff when the defendant knew or should have known such action would produce aggravation. *See* C.R.S. § 13-21-203(5)(a)-(b).

Alternatively, in lieu of proving non-economic damages, the plaintiff(s) may elect in writing to sue for and recover only a solatium award. Effective for actions accruing on and after January 1, 1998, the solatium amount stands at $68,250. Colo. Sec'y of State Certificate, January 9, 2007. For actions accruing on and after January 1, 2008, the solatium amount is $87,210. Colo. Sec'y of State Certificate, October 17, 2011. A solatium award is in addition to economic damages and reasonable funeral, burial, interment, or cremation expenses, which expenses may also be recovered in an action under this section. *See* C.R.S. § 13-21-203.5.

**Type Of Action For Recovery**

When the death of a person is caused by a wrongful act, neglect, or default other, and the act, neglect, or default is such as would, if death had not ensured, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensured, shall be liable in an action for damages notwithstanding the death of the party injured. C.R.S. § 13-21-202.

All wrongful death actions in Colorado must be commenced within two years after the cause of action accrues and not thereafter. C.R.S. §§ 13-21-204; 13-80-102(1)(d).

## RELEASES

If there is both liability and a PIP claim, the release must specifically refer to releasing the PIP claim. *See Cingoranelli v. St. Paul Fire and Marine Ins. Co.*, 658 P.2d 863 (Colo. 1983).

In Colorado, third parties do not have a right of direct action against an opposing party's insurance carrier. Therefore, there is no specific need for the insurer to be listed on releases executed by third parties. However, there is no harm in naming insurance companies as releases, or in including "insurers" in the list of parties released under a the terms of an agreement.

## PROTECTING THE CLAIMS INVESTIGATION

If at the time of your investigation you believe there is likely to be legal action taken by the claimant, the claim representative should contact defense counsel for specific guidance and recommendations to prepare for the filing of suit and the defense at trial. Counsel will discuss the case with you and confirm the recommendations in writing.

Without this step, there is little chance that Colorado courts will recognize claim file contents as privileged. *See Hawkins v. District Court*, 638 P.2d 1372 (Colo. 1982) (holding that "because a substantial part of an insurance company's business is to investigate claims made by an insured against the company or by some other party against the insured, it must be presumed that such investigations are part of the normal business activity of the company and that reports and witness' statements compiled by or on behalf of the insurer in the course of such investigations are ordinary business records as distinguished from trial preparation materials"); *Lazar v. Riggs*, 79 P.3d 105 (Colo. 2003) (re-emphasizing *Hawkins'* mandate). This step does not guarantee protection; however, it does provide documentation to support a claim of privilege once suit is filed.

## APPENDIX TO COLORADO MANUAL RE: REPEALED LAW

### Rules under Colorado Auto Accident Reparations Act, C.R.S. §§ 10-4-701 et seq.

### (Repealed July 1, 2003)

*The Colorado legislature allowed the Reparations Act, which mandated PIP coverage and imposed thresholds for the filing of bodily injury liability claims, to expire July 1, 2003. PIP coverage is no longer required in any new or renewed policy after that date. The Reparations Act still governs where a person had PIP coverage under a policy that did not expire until after July 1, 2003. Where a person had entitlement to PIP benefits, the statute provides for a 10-year limit on rehabilitation benefits. Since, unless settled, PIP claims can remain open to the 10-year limit of rehabilitation benefits, and accidents affected by PIP restrictions could occur up through the end of 2003, knowledge of the Reparations Act is still necessary to handle those claims to conclusion. Reparations Act information is therefore preserved in this Appendix.*

## THRESHOLD

In order to recover for bodily injury liability, an injured person must meet one of the following criteria: death; dismemberment; permanent disability; permanent disfigurement; "reasonable need" for medical expenses having a "reasonable value" in excess of $2,500.00 as determined by the Colorado Commissioner of Insurance on a schedule published at least once a year; or loss of earnings or earning capacity extending beyond one year from the accident. *See* C.R.S. § 10-4-714(1)(a)-(f).

**REQUIRED COVERAGES/BENEFITS PAYABLE**

(3) Legal liability for bodily injury or death arising out of the use of a motor vehicle to a limit, exclusive of interest and costs of $25,000.00 per person in any one accident and $50,000.00 for all persons in any one accident. *See* C.R.S. § 10-4-706(1)(a).

(4) Legal liability for property damages arising out of the use of a motor vehicle to a limit, exclusive of interest and costs, of $15,000 in any one accident. *See* C.R.S. § 10-4-706 (1)(a).

**PERSONAL INJURY PROTECTION (PIP) BENEFITS**

Compensation of the insured without regard to fault, as follows:

(1) Payment of all reasonable and necessary expenses for medical, chiropractic, optometric, podiatric, hospital, nursing, x-ray, dental surgical, ambulance, prosthetic services, non-medical remedial cure and treatment rendered in accordance with a recognized religious method of healing, treatment of neurological injuries also known as closed-head injuries and their sequelae, temporomandibular joint disorder, craniomandibular disorder, vestibular auditory, or visual disorders, psychological disorders and cognitive disorders performed within five (5) years after the accident up to a limit of $50,000, except that, to the extent that the benefits offered for rehabilitation and "rehabilitation occupational training" have not been exhausted, the remaining value of such benefits shall be available to the insured or injured person. *See* C.R.S. § 10-4-706 (1)(b).

(2) Payment for the cost of rehabilitation procedures or treatment and rehabilitative occupational training necessary subject to certain standards, i.e., reasonable and appropriate, contribute substantially to rehabilitation, and reasonable cost in relation to rehabilitative effects, up to $50,000 within 10 years of the accident. Treatment of neurological injuries also known as closed-head injuries and their sequelae, temporomandibular joint disorder, craniomandibular disorder, vestibular auditory, or visual disorders, psychological disorders and cognitive disorders shall be considered covered rehabilitation treatments or procedures. *See* C.R.S. § 10-4-706(1)(c)(I)(A)-(E).

(3) Payment of lost wages equivalent to 100% of the first $125.00 of loss of gross income per week, 70% of the next $125.00 of loss of gross income per week, and 60% of any loss of gross income per week in excess thereof, with the total lost wage benefit payable not exceeding $400.00 per week, from work the injured person would have performed had he not been injured during a period commencing the day after the date of the accident, and not exceeding 52 additional weeks. *See* C.R.S. § 10-4-706(d)(I).

(4) Payment of expenses for essential services not exceeding $25.00 per day that are reasonably incurred in lieu of those the injured person would have performed without income during the period commencing the day after the date of the accident and not exceeding 52 additional weeks. *See* C.R.S. § 10-4-706(d)(I).

(5) Compensation on account of the death of a person for whom direct benefits are provided, payable to the estate of the deceased, in the total amount of $1,000. *See* C.R.S. § 10-4-706(e).

**PROMPT PAYMENT OF DIRECT BENEFITS**

Payment of benefits shall be made on a monthly basis. Benefits for any period are overdue if not paid within 30 (thirty) days after the insurer receives reasonable proof of the fact and amount of the

expenses incurred during that period; except that an insurer may accumulate claims for periods not exceeding one month, and benefits are not overdue if paid within 15 (fifteen) days after the period of accumulation. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 (thirty) days after the insurer receives such proof. Any part or all of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 (thirty) days after the insurer receives such proof. In the event the insurer fails to pay such benefits when due, the person entitled to such benefits may bring an action in contract to recover the same. *See* C.R.S. § 10-4-708(1). Benefits provided may be paid by the insurer directly to any persons supplying necessary care, treatment, products, services, or accommodations to the person for whom benefits are required. *See* C.R.S. § 10-4-708.

The Colorado Division of Insurance has promulgated a regulation governing timely payment that states, in pertinent part:

III. RULES

B. In the usual case, for purposes of triggering the thirty-day time period in section 10-4-708(1), C.R.S., the following documents are sufficient to establish reasonable proof of the fact and amount of the expenses incurred:

1. A properly executed application for benefits from the PIP claimant;

2. A notice to an insurer which meets the requirements of § 10-4-708.5, C.R.S.; and

3. A billing statement for a procedure or treatment, which is subject to the obligations of § 10-4-708.6, C.R.S.

C. If an insurer does not pay a claim for benefits under § 10-4-706, C.R.S. within 30 days of receipt of all of the documents described in paragraph B of this rule, the insurer shall immediately notify the PIP claimant and the provider of the reason(s) the claim has not been paid. If the claim has not been paid because an investigation is underway, the insurer shall document in the claim file the actions being taken to investigate the claim and the efforts being made to promptly conclude the investigation.

D. The claim file documentation required by paragraph C of this rule will be reviewed by the Division of Insurance during an investigation of a complaint or during a market conduct examination to determine if the requirements of § 10-4-708(1), C.R.S. § 10-3-1104(1)(h) (II), (III), (IV), and (V), C.R.S. have been met.

E. Nothing herein is intended to foreclose an insurer from requesting or obtaining medical records from a provider or to negate a contractual requirement that an injured party comply with a valid condition in the policy regarding eligibility for receipt of benefits.

F. Whenever an insurer requires that an injured party submit an application for benefits form, the insurer shall forward the form to the injured party upon notification of the injury.

G. Section 10-4-708(1), C.R.S., allows for the accumulation of claims for periods not exceeding one month and provides that benefits are not overdue if paid within fifteen days after the end of a defined period of accumulation. An insurer is permitted by this statute to pay a bill within 15 days after the end of a defined accumulation period only when more than one bill is received from the same provider during the accumulation period.

H. Section 10-3-1104 (1)(h)(III), C.R.S., requires the prompt investigation of claims. An insurer is required to promptly investigate a claim while it is accumulating claims.

Colo. Div. Of Ins. Amended Reg. 5-2-8 (eff. 11/01/97)

**NO TORT RECOVERY OF PIP PAID OR PAYABLE BENEFITS**

Stacking of PIP benefits in a tort liability case is not allowed in Colorado. Neither any person eligible for personal injury protection (PIP) benefits nor any PIP insurer has any right to recover PIP paid or payable benefits against an owner, user, or operator of a motor vehicle or against any person or organization legally responsible for the acts or omissions of such person, in any action for damages in tort. *See* C.R.S. § 10-4-713(1). The jury is instructed accordingly. C.J.I. (Civil) 3d § 11:21.

**EXCEPTION FOR ACCIDENTS INVOLVING COMMERCIAL VEHICLES**

If a commercial vehicle caused an accident with a private passenger motor vehicle or a public school vehicle designed to transport seven or more passengers, the insurer of the private passenger or school vehicle has a direct cause of action for all PIP benefits actually paid against the owner, user, or operator of the commercial vehicle or against any person or organization legally responsible for the acts or omissions of such owner, user, or operator. *See* C.R.S. § 10-4-713(2)(a).

The commercial vehicle exception to Colorado's prohibition against PIP subrogation does not apply to RTD cases. C.R.S. § 10-4-713(2)(b).

**PIP EXAMINATION PROGRAM: EFFECTIVE JANUARY 1, 1997**

Effective January 1, 1997, Colorado restricts the ability of PIP carriers to select IME examiners. The PIP examination program is the exclusive method for obtaining an independent medical examination from a health care practitioner other than a treating provider relating to a disputed PIP claim.

The PIP examination program is conducted under the supervision of the Colorado Commissioner of Insurance, which is to provide a group of licensed health care practitioners to serve as the PIP examination review panel. A health care practitioner participating in the PIP review panel shall be actively engaged in the practice of his or her profession and the majority of such practice and income shall not derive from witness fees and examination of persons not under the practitioner's care and treatment. It shall be the duty of the PIP examination review panel to perform the PIP examinations at the request of the commissioner. See C.R.S. § 10-4-706(6)(b).

Any insurer, insured, or injured person entitled to benefits has the right to obtain a PIP examination with the health care practitioner from the PIP examination review panel regarding each type of treatment involved in the disputed portion of the PIP claim. When submitting the request for a PIP examination, the requesting party shall specify the professional specialty of the health care practitioner who will perform the PIP examination. Where practical, such professional specialty shall be the same as that of the treating health care practitioner whose treatment and opinion are intended to be reviewed by the member of the PIP review panel; except that psychiatrists, psychologists and

neuropsychologists may review one another's treatment and opinions to the extent that the reviewing expert is qualified to address the specific issues which arise in a particular case. Nothing in this section should preclude a managed care organization from using its usual and customary review procedures. *See* C.R.S. § 10-4-706(6)(c).

Though a revolving selection process established by rule, the commissioner shall prepare a list of five health care practitioners qualified to perform the PIP examination, and submit it to the requesting party. Within five days of receipt, the requesting party shall strike two names from the first list and submit it to the opposing party. Within five days of receipt, the opposing party shall strike two names from the list. The opposing party shall immediately return the list to the commissioner. The insurer and insured or the injured person entitled to benefits may agree upon a health care practitioner to perform the PIP examination without using the revolving selection process. Upon the selection of the health care practitioner, the PIP examination shall proceed and the requesting party shall pay the cost of the examination. *See* C.R.S. § 10-4-706(6)(d).

The PIP health care practitioner shall determine whether the treatment that has been rendered to the insured or injured person entitled to the benefits is reasonable, necessary, and if such claimed injury or condition arises out of the use of a motor vehicle. *See* C.R.S. § 10-4-706(6)(e).

A health care practitioner who performs a PIP examination pursuant to this subsection shall be immune from civil liability in any action brought by any person based upon such practitioners findings, opinions and conclusions, absent a showing of malice or bad faith on the part of the examining health care practitioner. *See* C.R.S. § 10-4-706(6)(f).

In the event the findings, opinions and conclusions of the PIP review panel member are contrary to the statement of causation, diagnosis, prognosis, plan of treatment, opinions, or recommendations of the treating practitioner whose actions have been reviewed, any party dissatisfied with such findings, opinions and conclusions may seek and pay for a second PIP examination under the procedures set forth in paragraph (c) and (d) of this subsection. *See* C.R.S. § 10-4-706(6)(g).

In any arbitration or judicial proceeding commenced by the insurer, insured or injured person entitled to benefits, the findings, opinions, and conclusions of the PIP examination shall be presumed to be correct, but such presumption may be rebutted by a preponderance of the evidence. If there has been a second PIP examination pursuant to paragraph (g) of this subsection, the agreed upon findings, opinions, and conclusions of two of three health care practitioners shall be binding unless rebutted by clear and convincing evidence in any arbitration or judicial proceeding commenced by the insurer, the insured, or the injured person entitled to benefits. No civil proceeding, including but not limited to, a proceeding alleging any cause of action under section 10-4-708 or the tort of bad faith breach of the insurance contract, arising out of any action taken by the insurer that is consistent with the agreed upon findings, opinions, and conclusions of two of three health care practitioners shall be brought or maintained against the insurer;

except that the insured or injured person entitled to benefits may bring a civil proceeding alleging that clear and convincing evidence rebuts the findings, opinions, and conclusions of the two of the three health care practitioners.

If the insured or injured person entitled to benefits is successful, the no-fault insurer shall be obligated to pay the no-fault benefits that have been denied and that were the subject of such proceeding. *See* C.R.S. § 10-4-706(6)(h).

**RELEASES**

If there is both liability and a PIP claim, the release must specifically refer to releasing the PIP claim. *See Cingoranelli v. St. Paul Fire and Marine Ins. Co.*, 658 P.2d 863 (Colo. 1983).

In Colorado, third parties do not have a right of direct action against an opposing party's insurance carrier. Therefore, there is no need for the insurer to be listed on releases executed by third parties. Nor is there any harm in either naming Laidlaw's insurer as a releasee, or referring to Laidlaw's insurer in some other way, such as by listing the released parties as including "insurers.

# Connecticut

**Adjuster License:** Adjusters conducting business in the State of Connecticut are required to be licensed. See Conn. Gen. Stat. §38a-769. A distinction is drawn between resident and non-resident adjusters. The thrust of the distinction is that non-resident adjusters are required to hold a license in their respective state. There is no distinction drawn between casualty adjusters and property damage appraisers; all must hold a license.

**Bodily Injury:** Connecticut's financial responsibility law requires, at minimum, bodily injury limits of $20,000 per person/$40,000 per occurrence for private passenger motor vehicles, motor vehicles with a commercial registration, motorcycles, motor vehicles used to transport passengers for a hire, motor vehicles in livery service, and vanpool vehicles. See Conn. Gen. Stat. §14-112, §38a-335, and 38a-371, et seq.

**Property Damage:** Automobile liability policies are required to carry at least $10,000 in property damage coverage. First party collision and comprehensive coverages are not mandated. "Property damage" is defined in the Minimum Provisions Regulations as "injury to or destruction of tangible property, including loss of use thereof." Loss of use payments are made even if the claimant has not incurred expenses such as rental costs. Conn. Agencies Regs. § 38a-10-2(f) defines loss of use as "the amount representing the reasonable value to the claimant for the deprivation of the use of the claimant's vehicle during the period reasonably required to make repairs or replace the vehicle, regardless of whether the claimant has incurred expenses." State of Connecticut Insurance Department Bulletin CL 1-07. Loss of use of a motor vehicle is handled on a case by case basis and there is no set formula for determining loss of use.

**Employees and Workers' Compensation**

**Exclusivity Provision:** Workers' compensation remedy is generally exclusive, pursuant to Conn. Gen. Stat. §31- 284(a), unless employee can prove an intentional tort on the part of the employer. This exclusivity provision also bars claims by one employee against another, unless the co-employee's conduct was willful or malicious or arises out of the co-employee's operation of a motor vehicle. Conn. Gen. Stat. §31-293a.

**Employees and UM/UIM:** An employee may bring an uninsured/underinsured (UM/UIM) claim against his employer if a third-party tortfeasor is uninsured or underinsured and if the employee is injured in a vehicle owned by the employer. The UIM carrier is entitled to offsets and credits for all sums paid by or on behalf of the tortfeasor or any third party as well as workers' compensation benefits paid to the claimant, including future benefits that may be owed if the policy so provides.

**Uninsured/Underinsured Motorist Coverage**

**Limits:** Conn. Gen. Stat. §38a-334, et seq. mandates that insurance policies provide uninsured/underinsured motorist coverage for private passenger motor vehicles, motor vehicles with a commercial registration, motorcycles, motor vehicles used to transport passengers for a hire, motor vehicles in livery service, and vanpool vehicles. The minimum limit of UM/UIM coverage is $20,000 per person and $40,000 per occurrence. UM/UIM coverage is mandatory and cannot be rejected. An insurer must provide UM/UIM motorist limits equal to the limits of liability coverage unless it is changed in writing by any named insured. No such written request for a lesser amount shall be effective unless any named insured has signed an informed consent form that shall contain: (A) an explanation of uninsured and underinsured motorist insurance approved by the commissioner; (B) a list of uninsured and underinsured motorist coverage options available from the insurer; and (C) the premium cost for each of the coverage options available from the insurer. The informed consent form must contain a heading in twelve-point type stating: "When you sign this form, you are choosing a reduced premium, but you are also choosing not to purchase certain valuable coverage which protects you and your family. If you are uncertain about how this decision will affect you, you should get advice from your insurance agent or another qualified adviser." Conn. Gen. Stat. §38a-336(a)(2).

**Self-Insureds:** An entity may elect to self-insure by filing with the Insurance Commissioner and complying with the obligations imposed by Conn. Gen. Stat. 38a-371(c), including minimum security requirements, which are substantially equivalent to those afforded by a policy of insurance that would comply with that section. Self-insurers have the same obligations as commercial insurers with regard to UM/UIM laws.

**Stacking:** Connecticut allows for the stacking of UM/UIM coverage in situations involving separate and distinct policies that are applicable to a given claim but does not permit it where a number of vehicles are insured under one policy and are separately described, even if individual premiums are charged for each vehicle. Issues of primary/excess UM/UIM coverage are addressed in Conn. Gen. Stat. §38a-336(d). The UIM carrier is entitled to offsets and credits for all sums paid by or on behalf of the tortfeasor or any third party as well as workers' compensation benefits paid to the claimant, including future benefits that may be owed.

**Conversion Coverage:** Policyholders may elect to purchase UIM conversion coverage. Conversion coverage is pure "add-on" coverage available for an additional premium. When purchased, the UIM coverage limit will not be reduced on account of any payment by or on behalf of the tortfeasor or any third party.

**Tort Threshold:** There is no tort threshold in Connecticut.

**Subrogation**

**Property Damage:** Subrogation is available for any property damage claim paid. The statute of limitations is two years for a subrogation claim. It has been our experience that these claims are typically resolved prior to trial, often by arbitration.

**PIP/BRB Benefits:** There is no subrogation for PIP/BRB benefits in Connecticut.

**UM/UIM Benefits:** An insurer has no right of subrogation against an underinsured tortfeasor. It does, however, have subrogation rights against an uninsured tortfeasor.

**Worker's Compensation Benefits:** An employer (or insurer) that has paid compensation to an employee may bring a direct action against a third party tortfeasor to recover the amount paid or which it might be obligated to pay, or may intervene in the employee's suit against the third party. Conn. Gen. Stat. §31-293. A third party which caused injury to the employee, and which is sued by the employer, cannot counterclaim against the employer for indemnity absent a contractual provision to the contrary. An employer who seeks to intervene in an action brought by an employee has 30 days from receiving notice of the plaintiff's lawsuit to do so. Conn. Gen. Stat. §31-293(a). Intervention is not required; an employer can simply provide notice of its claim for reimbursement within the requisite time period.

**General Tort Rules**

**Statutes of Limitations:** Personal injury claims premised on negligence are governed by a two-year statute of limitations.

No insurer doing business in Connecticut may limit the time within which any suit may be brought against it or any demand for arbitration on a claim may be made on the uninsured or underinsured motorist provision of an automobile liability insurance policy to a period of less than three years from the date of accident; however, in the case of an underinsured motorist claim, the insured may toll any applicable limitation period by notifying such insurer in writing, prior to the expiration of the applicable limitation period of a potential for an underinsured motorist claim and by commencing suit or demanding arbitration under the terms of the policy no more than one hundred eighty (180) days from the date of exhaustion of the limits of liability of all available automobile liability bodily injury bonds or policies. Conn. Gen. Stat. §38a-336(g)(1). Notwithstanding the provisions of Conn. Gen. Stat. §38a-336(g)(1), in the case of an uninsured motorist claim, if the motor vehicle of a tortfeasor is an uninsured motor vehicle because the automobile liability insurance company of such tortfeasor becomes insolvent or denies coverage, no insurance company doing business in this state may limit the time within which any suit may be brought against it or any demand for arbitration on a claim may be made on the uninsured motorist provisions of an automobile liability insurance policy to a period of less than one

year from the date of receipt by the insured of written notice of such insolvency of, or denial of coverage by, such automobile liability insurance company. Conn. Gen. Stat. §38a-336(g)(2).

**Minors and Settlement of Claims:** Connecticut law requires Probate Court approval of any settlement involving a minor claimant equal to or greater than $10,000. Customarily, the cost of Probate Court approval is borne by the claimant's attorney. In the event that the claimant is unrepresented, the cost is usually borne by the insurer. Probate Court approval is not required for matters which proceed to judgment in the Superior Court. Conn. Gen. Stat. § 45a-63.

**Personal Injury Protection (PIP):** As of January 1, 1994, or upon renewal of a motor vehicle insurance policy PIP coverage is no longer mandated. An insured can still elect to purchase this coverage if they so choose.

**Collateral Source Set-Offs:** Conn. Gen. Stat. §52-225a provides for a reduction in economic damages in personal injury and wrongful death actions for collateral source payments. "Economic damages" means compensation determined by the trier of fact for pecuniary losses including, but not limited to, the cost of reasonable and necessary medical care, rehabilitative services, custodial care and loss of earnings or earning capacity excluding any noneconomic damages. See Conn. Gen. Stat. §52-572h(a)(1). Collateral source payments are primarily payments made for medical expenses by a health insurance policy.

The allocation of collateral source set-offs is made post-verdict by the court. There is no reduction for a collateral source for which a right of subrogation exists, such as ERISA-based health plans and Medicare. Social security disability benefits are not considered collateral sources. There is a split in authority as to whether disability insurance benefits are a collateral source. The majority view is that disability benefits are a collateral source and can be taken as a set-off to economic damages. The statute further entitles a plaintiff to a credit against any reduction in damages for the amount of the premiums paid to secure the benefit at issue.

In 2016, the Connecticut Supreme Court held that if there is a right of subrogation for *any* collateral source benefit, the court cannot order a collateral source reduction of any amount, even if other collateral source payments do not enjoy a right of reimbursement. Marciano v. Jiminez, 324 Conn. 70, 77 (2016).

**Negligence:** Connecticut is a modified comparative negligence state. A plaintiff's recovery is barred if her proportionate share of negligence is greater than the combined negligence of all persons and parties to whom negligence is apportioned. In other words, if the plaintiff is more than 50% at fault, she cannot recover any damages. If the plaintiff's negligence is less than 50%, her damages are reduced by the percentage of her negligence.

**Seat Belt:** A plaintiff's failure to wear a seat belt cannot be considered as contributory negligence and is not admissible in evidence.

**Spousal immunity:** Spousal immunity has been abolished in Connecticut.

**Joint and Several Liability:** The doctrine of joint and several liability has been abolished in negligence actions. Conn. Gen. Stat. §52-572h. Partial reallocation of any portion of an award that is unrecoverable is permitted pursuant to Conn. Gen. Stat. §52-572h(g), which states that:

> (1) Upon motion by the claimant to open the judgment filed, after good faith efforts by the claimant to collect from a liable defendant, not later than one year after judgment becomes final through lapse of time or through exhaustion of appeal, whichever occurs later, the court shall determine whether all or part of a defendant's proportionate share of the recoverable economic damages and recoverable noneconomic damages is uncollectible from that party, and shall reallocate such uncollectible amount among the other defendants in accordance with the provisions of this subsection.
>
> (2) The court shall order that the portion of such uncollectible amount which represents recoverable noneconomic damages be reallocated among the other defendants according to their

percentages of negligence, provided that the court shall not reallocate to any such defendant an amount greater than that defendant's percentage of negligence multiplied by such uncollectible amount.

(3) The court shall order that the portion of such uncollectible amount which represents recoverable economic damages be reallocated among the other defendants. The court shall reallocate to any such other defendant an amount equal to such uncollectible amount of recoverable economic damages multiplied by a fraction in which the numerator is such defendant's percentage of negligence and the denominator is the total of the percentages of negligence of all defendants, excluding any defendant whose liability is being reallocated.

(4) The defendant whose liability is reallocated is nonetheless subject to contribution pursuant to subsection (h) of this section and to any continuing liability to the claimant on the judgment.

**Apportionment:** As a general rule, in a negligence action to recover damages resulting from personal injury, wrongful death or damage to property occurring on or after October 1, 1987, if the damages are determined to be proximately caused by the negligence of more than one party, each party against whom recovery is allowed shall be liable to the claimant only for such party's proportionate share of the recoverable economic damages and the recoverable noneconomic damages. Conn. Gen. State. §52-572(c). However, the jury is not allowed to assess any percentage of negligence to a non-party, so if a defendant believes that there is a culpable person or entity that is not a party to the action, the defendant must file an apportionment complaint against that person or entity.

Conn. Gen. Stat. §52-102b outlines the procedure for filing an apportionment complaint against persons or entities that are not currently parties to an action. Conn. Gen. Stat. § 52-102b(a) allows a defendant to serve a writ, summons and complaint upon such person or entity in order that the jury may assess a percentage of the total negligence to the "apportionment defendant." The apportionment complaint must be served within one hundred twenty days of the return date specified in the plaintiff's original complaint.

Notwithstanding any applicable statute of limitation or repose, the plaintiff may, within 60 days of the return date of the apportionment, assert any claim against the apportionment defendant that arises out of the transaction or occurrence that is the subject matter of the original complaint. Conn. Gen. Stat. §52-102b(d). If the plaintiff does this, the apportionment defendant is a full defendant for all purposes. If the plaintiff fails to plead over against the apportionment defendant within this time period, then the apportionment defendant does not become a full defendant in the lawsuit. In this scenario, the apportionment defendant's name appears on the verdict form with all other full defendants and the jury is allowed to assess a percentage of the total negligence to the apportionment defendant, but the plaintiff is not allowed to collect any part of the judgment from the apportionment defendant. This creates the potential for a recovery of less than full damages by the plaintiff.

The apportionment defendant has all remedies available to an original defendant, including the right to assert defenses, setoffs or counterclaims against any party. If the apportionment complaint is served within the specified time period, no statute of limitation or repose shall be a defense or bar to such claim for apportionment. If the action against the defendant who instituted the apportionment complaint is subject to any time-based defense or bar, the apportionment defendant may plead such a defense or bar to any claim brought by the plaintiff directly against the apportionment defendant.

A person who is immune from liability cannot be made an apportionment defendant, nor shall such person's liability be considered for apportionment purposes pursuant to Conn. Gen. Stat. §52-572h. If a defendant believes that the negligence of any person or entity who is not made a party to the action was a proximate cause of the plaintiff's injuries or damage and the plaintiff has previously settled or released such tortfeasor, the defendant may cause the other tortfeasor's liability to be included in the jury's apportionment analysis by filing a notice specifically identifying the tortfeasor by name and last known address and noting that the plaintiff's claims against the tortfeasor have been settled or released. The notice must also set forth the factual basis of the defendant's claim that the tortfeasor's negligence was a proximate cause of the plaintiff's

injuries or damages. No such notice is required if the settled or released tortfeasor was previously a party to the action. Conn. Gen. Stat. §52-102b(c).

**Permissive Use:** An owner of a vehicle may be found liable for the negligent and reckless operation of that vehicle and is presumed to have given the user permission to operate the vehicle. Connecticut General Statutes §52-183 states: "In any civil action brought against the owner of a motor vehicle to recover damages for the negligent or reckless operation of the motor vehicle, the operator, if he is other than the owner of the motor vehicle, shall be presumed to be the agent and servant of the owner of the motor vehicle and operating it in the course of his employment. The defendant shall have the burden of rebutting the presumption." The owner's burden in rebutting the presumption is met with proof of facts that fairly put in issue the question of agency. When such facts have been proven, the burden of proving that the automobile was operated by one who was an agent of the owner rests on the plaintiff. Skut v. Boardman, 137 Conn. 675, 81 A.2d 110 (1951). The presumption is not "ousted simply by the introduction of any evidence to the contrary." Engram v. Kraft, 83 Conn. App. 782, 786, 851 A.2d 363 (2004).

**Family Car Doctrine:** Connecticut has also created a family car doctrine – a presumption that a family member operating a vehicle is doing so as the agent of the owner. Specifically, Connecticut General Statutes §52-182 provides that "[p]roof that the operator of a motor vehicle or a motorboat, as defined in Section 15-127, was the husband, wife, father, mother, son or daughter of the owner shall raise a presumption that such motor vehicle or motorboat was being operated as a family car or boat within the scope of a general authority from the owner, and shall impose upon the defendant the burden of rebutting such presumption." In these situations, the burden shifts to defendant to rebut the presumption. Dionne v. Markie, 38 Conn. App. 852, 663 A.2d 420 (1995).

**Negligent Entrustment:** Connecticut has recognized liability for the negligent entrustment of an automobile since the Supreme Court's decision in Greeley v. Cunningham, 116 Conn. 515, 518 (1933) (stating that "[i]t is…coming to be generally held that the owner may be liable for injury resulting from the operation of an automobile he loans to another, when he knows or ought reasonably to know that the one to whom he entrusts it is so incompetent to operate it, by reason of inexperience or other cause, that the owner ought reasonably to anticipate the likelihood that in its operation injury will be done to others"). "The essential elements of the tort of negligent entrustment of an automobile [are] that the entrustor knows or ought reasonably to know that one to whom he entrusts it is so incompetent to operate it upon the highways that the former ought to reasonably anticipate the likelihood of injury to others by reason of that incompetence, and such incompetence does result in injury . . . Liability cannot be imposed on a defendant under a theory of negligent entrustment simply because the defendant permitted another person to operate the motor vehicle . . . Liability can only be imposed if (1) there is actual or constructive knowledge that the person to whom the automobile is loaned is incompetent to operate the motor vehicle and (2) the injury resulted from that incompetence . . . The Greeley court, and its progeny, recognized that a principal feature of a cause of action for negligent entrustment is the knowledge of the entrustor with respect to the dangerous propensities and incompetency of the entrustee." (Internal quotation marks omitted). Crespo v. Gomez, 2013 Conn. Super. LEXIS 736, 1-3 (Conn. Super. Ct. Apr. 4, 2013).

**Punitive Damages:** Common law punitive damages are limited to the amount of plaintiff's actual litigation expenses, including attorney's fees. Connecticut law also permits the imposition of exemplary damages under certain circumstances. In tort actions, punitive damages may be awarded when evidence shows a reckless indifference to the rights of others or an intentional and wanton violation of those rights. Actual intent to do harm need not be proven for a punitive damage award to be upheld. The trier of fact may award double or treble damages if the injured party has specifically pleaded that another party has deliberately or with reckless disregard operated a motor vehicle in violation of the following statutes if such violation was a substantial factor in causing the injury, death or damage:

Conn. Gen. Stat. §14-218a (Traveling unreasonably fast)

Conn. Gen. Stat. §14-219 (Speeding)

Conn. Gen. Stat. §14-222 (Reckless driving)

Conn. Gen. Stat. §14-227a (Operation while under the influence of liquor or drug while having an elevated blood alcohol content)

Conn. Gen. Stat. §14-230 (failure to drive in the right-hand lane under the specified circumstances)

Conn. Gen. Stat. §14-234 (improper passing)

Conn. Gen. Stat. §14-237 (driving over or across a divided space, barrier or section on a highway)

Conn. Gen. Stat. §14-239 (driving the wrong way or failing to yield in a one-way street or rotary)

Conn. Gen. Stat. §14-240a (following too closely with intent to harass or intimidate)

Conn. Gen. Stat. §14-296aa (use of hand-held mobile telephones and mobile electronic devices)

The owner of a motor vehicle is not vicariously liable for punitive damages resulting from the driver's reckless operation of the vehicle nor is the owner of a rental or leased motor vehicle responsible for such damages unless the damages arose from such owner's operation of the motor vehicle. Conn. Gen. Stat. §14-295.

**Civil Procedure:** Connecticut is a motion driven system. The court will generally not act on its own to enter a default or nonsuit. If a party seeks certain relief, that party must file a motion with the court outlining the specific relief sought. Motions for default for failure to appear and failure to plead are automatically granted by the clerk of the court upon filing. Defaults entered for failure to appear or failure to plead are automatically opened upon the filing of an appearance or an answer to the complaint.

**Motions/Requests:** As used in the Connecticut Rules of Practice, the term "motion" means any application to the court for an order, which application is to be acted upon by the court or any judge thereof. The term "request" means any application to the court which shall be granted by the clerk by operation of the Rules of Practice, unless timely objection is filed.

There are three basic motions or requests that attack the pleadings of an opposing party. They are: motion to dismiss, request to revise, and motion to strike.

A motion to dismiss attacks the jurisdiction of the court. It may be used to assert (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, and (5) insufficiency of service of process. A motion to dismiss must be filed within 30 days of the party's appearance or any defects are waived. However, a motion to dismiss which challenges the subject matter jurisdiction of the court may be raised at any time and cannot be waived.

A request to revise seeks to obtain a more complete statement of the facts and/or allegations contained in a party's pleading. It may also be used to delete unnecessary, repetitious, scandalous, impertinent, immaterial or improper allegations or to separate causes of action which are improperly combined.

A motion to strike challenges the legal sufficiency of a claim in a complaint, counterclaim or cross claim. It may also be used to challenge the sufficiency of the answer to any of the aforementioned pleadings.

A motion for summary judgment may be filed when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law.

**Discovery**

**Surveillance:** The Connecticut Rules of Practice require that a defendant identify all surveillance materials intended to be introduced at trial in its answers to the plaintiff's interrogatories. However, the defendant does not have to produce the actual surveillance material until thirty days after the plaintiff's deposition or sixty days prior to trial, whichever occurs first. If surveillance is taken during the sixty days before trial, it must be produced to opposing counsel immediately.

**Independent Medical Examinations:** Under the Connecticut Rules of Practice, a defendant may serve a request that the plaintiff submit to a physical or mental examination at the expense of the requesting party. The request shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made. The plaintiff must comply with said request unless he or she objects in writing within 10 days from the filing of the request. Under the rule, no plaintiff can be compelled to undergo a physical examination by any physician to whom he or she objects in writing. If the plaintiff files such an objection, the defendant is entitled to cross-examine the plaintiff on the objection at trial and may be entitled to argue to the jury that they can draw an adverse inference from such objection. A court may also grant a request to preclude plaintiff's expert testimony.

**Offer of Compromise:** Pursuant to Conn. Gen. Stat. §52-192a, in any civil action based upon contract or seeking money damages, a plaintiff may, not earlier than one hundred eighty days after service of process is made upon the defendant but not later than thirty days before trial, file with the court a written offer of compromise offering to settle the claim underlying the action for a specified sum. The defendant has thirty (30) days from the date of the offer within which to accept the offer and stipulate to a judgment in favor of the plaintiff. Absent acceptance within that time period, the offer is deemed rejected.

If the offer is not accepted and the plaintiff receives a net judgment for an amount equal to or greater than the amount set forth in the offer, the plaintiff is awarded pre-judgment interest at a rate of 8% per year. Interest is computed from the time the complaint was filed if the offer of compromise is filed within 18 months of the return date. If the offer of compromise is filed more than 18 months after the return date, the interest is computed from the date of the offer of compromise. Additionally, the court may also award attorney's fees of up to $350.00.

Pursuant to Conn. Gen. Stat. §52-193, the defendant may also file an offer of compromise. The plaintiff has 60 days to respond. If the plaintiff does not accept the offer and recovers a net verdict less than the amount of the offer of compromise, he cannot recover any costs accruing after the filing of the offer and must pay the defendant's costs accruing after that date. The defendant can also recover attorney's fees of up to $350.

**Statutes of Particular Interest**

**Sec. 38a-336: Uninsured and underinsured motorist coverage.**

(a) (1) (A) Each automobile liability insurance policy shall provide insurance, herein called uninsured and underinsured motorist coverage, in accordance with the regulations adopted pursuant to section 38a-334, with limits for bodily injury or death not less than those specified in subsection (a) of section 14-112, for the protection of persons insured thereunder who are legally entitled to recover damages because of bodily injury, including death resulting therefrom, from owners or operators of uninsured motor vehicles and underinsured motor vehicles and insured motor vehicles, the insurer of which becomes insolvent prior to payment of such damages.

(B) Each insurer licensed to write automobile liability insurance in this state shall provide uninsured and underinsured motorist coverage with limits requested by any named insured upon payment of the appropriate premium, provided each such insurer shall offer such coverage with limits that are twice the limits of the bodily injury coverage of the policy issued to the named insured. The insured's selection of uninsured and underinsured motorist coverage shall apply to all subsequent renewals of coverage and to all policies or endorsements that extend, change, supersede or replace an existing policy issued to the named insured, unless changed in writing by any named insured.

(C) No insurer shall be required to provide uninsured and underinsured motorist coverage to (i) a named insured or relatives residing in the named insured's household when occupying, or struck as a pedestrian by, an uninsured or underinsured motor vehicle or a motorcycle that is owned by the named insured, except as provided in subparagraph (D) of this subdivision, or (ii) any insured occupying an uninsured or underinsured motor vehicle or motorcycle that is owned by such insured.

(D) For each automobile liability insurance policy issued or renewed on or after October 1, 2014, an insurer shall not deny uninsured motorist coverage to a named insured or any relative residing in the named insured's household solely on the basis that the named insured or such relative was struck as a pedestrian by a motor vehicle or motorcycle, during the theft of such motor vehicle or motorcycle, that is owned by the named insured and listed as a covered motor vehicle on the named insured's policy.

(2) Notwithstanding any provision of this section, each automobile liability insurance policy issued or renewed on and after January 1, 1994, shall provide uninsured and underinsured motorist coverage with limits for bodily injury and death equal to those purchased to protect against loss resulting from the liability imposed by law unless any named insured requests in writing a lesser amount, but not less than the limits specified in subsection (a) of section 14-112. Such written request shall apply to all subsequent renewals of coverage and to all policies or endorsements that extend, change, supersede or replace an existing policy issued to the named insured, unless changed in writing by any named insured. No such written request for a lesser amount shall be effective unless any named insured has signed an informed consent form that shall contain: (A) An explanation of uninsured and underinsured motorist insurance approved by the commissioner; (B) a list of uninsured and underinsured motorist coverage options available from the insurer; and (C) the premium cost for each of the coverage options available from the insurer. Such informed consent form shall contain a heading in twelve-point type and shall state: "WHEN YOU SIGN THIS FORM, YOU ARE CHOOSING A REDUCED PREMIUM, BUT YOU ARE ALSO CHOOSING NOT TO PURCHASE CERTAIN VALUABLE COVERAGE WHICH PROTECTS YOU AND YOUR FAMILY. IF YOU ARE UNCERTAIN ABOUT HOW THIS DECISION WILL AFFECT YOU, YOU SHOULD GET ADVICE FROM YOUR INSURANCE AGENT OR ANOTHER QUALIFIED ADVISER."

(b) An insurance company shall be obligated to make payment to its insured up to the limits of the policy's uninsured and underinsured motorist coverage after the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident have been exhausted by payment of judgments or settlements, but in no event shall the total amount of recovery from all policies, including any amount recovered under the insured's uninsured and underinsured motorist coverage, exceed the limits of the insured's uninsured and underinsured motorist coverage. In no event shall there be any reduction of uninsured or underinsured motorist coverage limits or benefits payable (1) for amounts received by the insured for Social Security disability benefits paid or payable pursuant to the Social Security Act, 42 USC Section 301, et seq., or (2) with respect to an automobile liability insurance policy issued or renewed on or after October 1, 2015, (A) for amounts paid by or on behalf of any tortfeasor for bodily injury to anyone other than individuals insured under the policy against which the claim is made, or (B) for amounts paid by or on behalf of any tortfeasor for property damage. The limitation on the total amount of recovery from all policies shall not apply to underinsured motorist conversion coverage purchased pursuant to section 38a-336a.

(c) Each automobile liability insurance policy issued on or after October 1, 1971, that contains a provision for binding arbitration shall include a provision for final determination of insurance coverage in such arbitration proceeding. With respect to any claim submitted to arbitration on or after October 1, 1983, the arbitration proceeding shall be conducted by a single arbitrator if the amount in demand is forty thousand dollars or less or by a panel of three arbitrators if the amount in demand is more than forty thousand dollars.

(d) Regardless of the number of policies issued, vehicles or premiums shown on a policy, premiums paid, persons covered, vehicles involved in an accident, or claims made, in no event shall the limit of liability for uninsured and underinsured motorist coverage applicable to two or more motor vehicles covered under the same or separate policies be added together to determine the limit of liability for such coverage available to an injured person or persons for any one accident. If a person insured for uninsured and underinsured motorist coverage is an occupant of a nonowned vehicle covered by a policy also providing uninsured and underinsured motorist coverage, the coverage of the occupied vehicle shall be primary and any coverage for which such person is a named insured shall be secondary. All other applicable policies shall be excess. The total amount of uninsured and underinsured motorist coverage recoverable is limited to the highest amount recoverable under the primary policy, the secondary policy or any one of the excess policies. The amount paid under the excess

policies shall be apportioned in accordance with the proportion that the limits of each excess policy bear to the total limits of the excess policies. If any person insured for uninsured and underinsured motorist coverage is an occupant of an owned vehicle, the uninsured and underinsured motorist coverage afforded by the policy covering the vehicle occupied at the time of the accident shall be the only uninsured and underinsured motorist coverage available.

(e) For the purposes of this section, an "underinsured motor vehicle" means a motor vehicle with respect to which the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of liability under the uninsured motorist portion of the policy against which claim is made under subsection (b) of this section.

(f) Notwithstanding subsection (a) of section 31-284, an employee of a named insured injured while occupying a covered motor vehicle in the course of employment shall be covered by such insured's otherwise applicable uninsured and underinsured motorist coverage.

(g) (1) No insurance company doing business in this state may limit the time within which any suit may be brought against it or any demand for arbitration on a claim may be made on the uninsured or underinsured motorist provisions of an automobile liability insurance policy to a period of less than three years from the date of accident, provided, in the case of an underinsured motorist claim the insured may toll any applicable limitation period (A) by notifying such insurer prior to the expiration of the applicable limitation period, in writing, of any claim which the insured may have for underinsured motorist benefits and (B) by commencing suit or demanding arbitration under the terms of the policy not more than one hundred eighty days from the date of exhaustion of the limits of liability under all automobile bodily injury liability bonds or automobile insurance policies applicable at the time of the accident by settlements or final judgments after any appeals.

(2) Notwithstanding the provisions of subdivision (1) of this subsection, in the case of an uninsured motorist claim, if the motor vehicle of a tortfeasor is an uninsured motor vehicle because the automobile liability insurance company of such tortfeasor becomes insolvent or denies coverage, no insurance company doing business in this state may limit the time within which any suit may be brought against it or any demand for arbitration on a claim may be made on the uninsured motorist provisions of an automobile liability insurance policy to a period of less than one year from the date of receipt by the insured of written notice of such insolvency of, or denial of coverage by, such automobile liability insurance company.

**Sec. 52-572h: Negligence actions. Doctrines applicable. Liability of multiple tortfeasors for damages.**

(a) For the purposes of this section: (1) "Economic damages" means compensation determined by the trier of fact for pecuniary losses including, but not limited to, the cost of reasonable and necessary medical care, rehabilitative services, custodial care and loss of earnings or earning capacity excluding any noneconomic damages; (2) "noneconomic damages" means compensation determined by the trier of fact for all nonpecuniary losses including, but not limited to, physical pain and suffering and mental and emotional suffering; (3) "recoverable economic damages" means the economic damages reduced by any applicable findings including but not limited to set-offs, credits, comparative negligence, additur and remittitur, and any reduction provided by section 52-225a; (4) "recoverable noneconomic damages" means the noneconomic damages reduced by any applicable findings including but not limited to set-offs, credits, comparative negligence, additur and remittitur.

(b) In causes of action based on negligence, contributory negligence shall not bar recovery in an action by any person or the person's legal representative to recover damages resulting from personal injury, wrongful death or damage to property if the negligence was not greater than the combined negligence of the person or persons against whom recovery is sought including settled or released persons under subsection (n) of this section. The economic or noneconomic damages allowed shall be diminished in the proportion of the percentage of negligence attributable to the person recovering which percentage shall be determined pursuant to subsection (f) of this section.

(c) In a negligence action to recover damages resulting from personal injury, wrongful death or damage to property occurring on or after October 1, 1987, if the damages are determined to be proximately caused by the

negligence of more than one party, each party against whom recovery is allowed shall be liable to the claimant only for such party's proportionate share of the recoverable economic damages and the recoverable noneconomic damages except as provided in subsection (g) of this section.

(d) The proportionate share of damages for which each party is liable is calculated by multiplying the recoverable economic damages and the recoverable noneconomic damages by a fraction in which the numerator is the party's percentage of negligence, which percentage shall be determined pursuant to subsection (f) of this section, and the denominator is the total of the percentages of negligence, which percentages shall be determined pursuant to subsection (f) of this section, to be attributable to all parties whose negligent actions were a proximate cause of the injury, death or damage to property including settled or released persons under subsection (n) of this section. Any percentage of negligence attributable to the claimant shall not be included in the denominator of the fraction.

(e) In any action to which this section is applicable, the instructions to the jury given by the court shall include an explanation of the effect on awards and liabilities of the percentage of negligence found by the jury to be attributable to each party.

(f) The jury or, if there is no jury, the court shall specify: (1) The amount of economic damages; (2) the amount of noneconomic damages; (3) any findings of fact necessary for the court to specify recoverable economic damages and recoverable noneconomic damages; (4) the percentage of negligence that proximately caused the injury, death or damage to property in relation to one hundred per cent, that is attributable to each party whose negligent actions were a proximate cause of the injury, death or damage to property including settled or released persons under subsection (n) of this section; and (5) the percentage of such negligence attributable to the claimant.

(g) (1) Upon motion by the claimant to open the judgment filed, after good faith efforts by the claimant to collect from a liable defendant, not later than one year after judgment becomes final through lapse of time or through exhaustion of appeal, whichever occurs later, the court shall determine whether all or part of a defendant's proportionate share of the recoverable economic damages and recoverable noneconomic damages is uncollectible from that party, and shall reallocate such uncollectible amount among the other defendants in accordance with the provisions of this subsection. (2) The court shall order that the portion of such uncollectible amount which represents recoverable noneconomic damages be reallocated among the other defendants according to their percentages of negligence, provided that the court shall not reallocate to any such defendant an amount greater than that defendant's percentage of negligence multiplied by such uncollectible amount. (3) The court shall order that the portion of such uncollectible amount which represents recoverable economic damages be reallocated among the other defendants. The court shall reallocate to any such other defendant an amount equal to such uncollectible amount of recoverable economic damages multiplied by a fraction in which the numerator is such defendant's percentage of negligence and the denominator is the total of the percentages of negligence of all defendants, excluding any defendant whose liability is being reallocated. (4) The defendant whose liability is reallocated is nonetheless subject to contribution pursuant to subsection (h) of this section and to any continuing liability to the claimant on the judgment.

(h) (1) A right of contribution exists in parties who, pursuant to subsection (g) of this section are required to pay more than their proportionate share of such judgment. The total recovery by a party seeking contribution shall be limited to the amount paid by such party in excess of such party's proportionate share of such judgment.

(2) An action for contribution shall be brought within two years after the party seeking contribution has made the final payment in excess of such party's proportionate share of the claim.

(i) This section shall not limit or impair any right of subrogation arising from any other relationship.

(j) This section shall not impair any right to indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnitee is for indemnity and not contribution, and the indemnitor is not entitled to contribution from the indemnitee for any portion of such indemnity obligation.

(k) This section shall not apply to breaches of trust or of other fiduciary obligation.

(*l*) The legal doctrines of last clear chance and assumption of risk in actions to which this section is applicable are abolished.

(m) The family car doctrine shall not be applied to impute contributory or comparative negligence pursuant to this section to the owner of any motor vehicle or motor boat.

(n) A release, settlement or similar agreement entered into by a claimant and a person discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the total award of damages is reduced by the amount of the released person's percentage of negligence determined in accordance with subsection (f) of this section.

(*o*) Except as provided in subsection (b) of this section, there shall be no apportionment of liability or damages between parties liable for negligence and parties liable on any basis other than negligence including, but not limited to, intentional, wanton or reckless misconduct, strict liability or liability pursuant to any cause of action created by statute, except that liability may be apportioned among parties liable for negligence in any cause of action created by statute based on negligence including, but not limited to, an action for wrongful death pursuant to section 52-555or an action for injuries caused by a motor vehicle owned by the state pursuant to section 52-556.

**Sec. 52-555: Actions for injuries resulting in death.**

(a) In any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses, provided no action shall be brought to recover such damages and disbursements but within two years from the date of death, and except that no such action may be brought more than five years from the date of the act or omission complained of.

(b) Notwithstanding the provisions of subsection (a) of this section, an action may be brought under this section at any time after the date of the act or omission complained of if the party legally at fault for such injuries resulting in death has been convicted or found not guilty by reason of mental disease or defect of a violation of section 53a-54a, 53a-54b, 53a-54c, 53a-54d, 53a-55 or 53a-55a with respect to such death.

**Sec. 52-200a: Defendant's insurance liability policy limits and insurer's duty to indemnify subject to discovery.**

In any civil action founded upon negligence, both the defendant's insurance liability policy limits and whether or not the insurer has disclaimed its duty to indemnify shall be subject to discovery upon written motion of the plaintiff. Any such motion and disclosure shall be excluded from the file submitted to the jury.

**Sec. 14-218a: Traveling unreasonably fast. Establishment of speed limits.**

(a) No person shall operate a motor vehicle upon any public highway of the state, or road of any specially chartered municipal association or any district organized under the provisions of chapter 105,1 a purpose of which is the construction and maintenance of roads and sidewalks, or on any parking area as defined in section 14-212, or upon a private road on which a speed limit has been established in accordance with this subsection, or upon any school property, at a rate of speed greater than is reasonable, having regard to the width, traffic and use of highway, road or parking area, the intersection of streets and weather conditions. The Office of the State Traffic Administration may determine speed limits which are reasonable and safe on any state highway, bridge or parkway built or maintained by the state, and differing limits may be established for different types of vehicles, and may erect or cause to be erected signs indicating such speed limits. The traffic authority of any town, city or borough may establish speed limits on streets, highways and bridges or in any parking area for ten cars or more or on any private road wholly within the municipality under its jurisdiction; provided such limit on streets, highways, bridges and parking areas for ten cars or more shall become effective only after application

for approval thereof has been submitted in writing to the Office of the State Traffic Administration and a certificate of such approval has been forwarded by the office to the traffic authority; and provided such signs giving notice of such speed limits shall have been erected as the Office of the State Traffic Administration directs, provided the erection of such signs on any private road shall be at the expense of the owner of such road. The presence of such signs adjacent to or on the highway or parking area for ten cars or more shall be prima facie evidence that they have been so placed under the direction of and with the approval of the Office of the State Traffic Administration. Approval of such speed limits may be revoked by the Office of the State Traffic Administration at any time if said office deems such revocation to be in the interest of public safety and welfare, and thereupon such speed limits shall cease to be effective and any signs that have been erected shall be removed. Any speed in excess of such limits, other than speeding as provided for in section 14-219, shall be prima facie evidence that such speed is not reasonable, but the fact that the speed of a vehicle is lower than such limits shall not relieve the operator from the duty to decrease speed when a special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.

(b) The Office of the State Traffic Administration shall establish a speed limit of sixty-five miles per hour on any multiple lane, limited access highways that are suitable for a speed limit of sixty-five miles per hour, taking into consideration relevant factors including design, population of area and traffic flow.

(c) Any person who operates a motor vehicle at a greater rate of speed than is reasonable, other than speeding, as provided for in section 14-219, shall commit the infraction of traveling unreasonably fast.

**Sec. 14-219: Speeding.**

(a) No person shall operate any motor vehicle (1) upon any highway, road or any parking area for ten cars or more, at such a rate of speed as to endanger the life of any occupant of such motor vehicle, but not the life of any other person than such an occupant; (2) at a rate of speed greater than fifty-five miles per hour upon any highway other than a highway specified in subsection (b) of section 14-218a for which a speed limit has been established in accordance with the provisions of said subsection; (3) at a rate of speed greater than sixty-five miles per hour upon any highway specified in subsection (b) of section 14-218a for which a speed limit has been established in accordance with the provisions of said subsection; or (4) if such person is under eighteen years of age, upon any highway or road for which a speed limit of less than sixty-five miles per hour has been established in accordance with subsection (a) of section 14-218a, at a rate of speed more than twenty miles per hour above such speed limit.

(b) Any person who operates a motor vehicle (1) on a multiple lane, limited access highway other than a highway specified in subsection (b) of section 14-218a for which a speed limit has been established in accordance with the provisions of said subsection at a rate of speed greater than fifty-five miles per hour but not greater than seventy miles per hour, (2) on a multiple lane, limited access highway specified in subsection (b) of section 14-218a for which a speed limit has been established in accordance with the provisions of said subsection at a rate of speed greater than sixty-five miles per hour but not greater than seventy miles per hour, (3) on any other highway at a rate of speed greater than fifty-five miles per hour but not greater than sixty miles per hour, or (4) if such person is under eighteen years of age, upon any highway or road for which a speed limit of less than sixty-five miles per hour has been established in accordance with subsection (a) of section 14-218a, at a rate of speed more than twenty miles per hour above such speed limit, shall commit an infraction, provided any such person operating a truck, as defined in section 14-260n, shall have committed a violation and shall be fined not less than one hundred dollars nor more than one hundred fifty dollars.

(c) Any person who violates any provision of subdivision (1) of subsection (a) of this section or who operates a motor vehicle (1) on a multiple lane, limited access highway at a rate of speed greater than seventy miles per hour but not greater than eighty-five miles per hour, or (2) on any other highway at a rate of speed greater than sixty miles per hour but not greater than eighty-five miles per hour, shall be fined not less than one hundred dollars nor more than one hundred fifty dollars, provided any such person operating a motor vehicle described in subsection (a) of section 14-163c shall be fined not less than one hundred fifty dollars nor more than two hundred dollars.

(d) No person shall be subject to prosecution for a violation of both subsection (a) of this section and subsection (a) of section 14-222 because of the same offense.

(e) Notwithstanding any provision of the general statutes to the contrary, any person who violates subdivision (1) of subsection (a) of this section, subdivision (1) or (2) of subsection (b) of this section while operating a truck, as defined in section 14-260n, or subdivision (1) of subsection (c) of this section while operating a motor vehicle or a truck, as defined in section 14-260n, shall follow the procedures set forth in section 51-164n.

**Sec. 14-222: Reckless driving.**

(a) No person shall operate any motor vehicle upon any public highway of the state, or any road of any specially chartered municipal association or of any district organized under the provisions of chapter 105,1 a purpose of which is the construction and maintenance of roads and sidewalks, or in any parking area for ten cars or more or upon any private road on which a speed limit has been established in accordance with the provisions of section 14-218a or upon any school property recklessly, having regard to the width, traffic and use of such highway, road, school property or parking area, the intersection of streets and the weather conditions. The operation of a motor vehicle upon any such highway, road or parking area for ten cars or more at such a rate of speed as to endanger the life of any person other than the operator of such motor vehicle, or the operation, downgrade, upon any highway, of any motor vehicle with a commercial registration with the clutch or gears disengaged, or the operation knowingly of a motor vehicle with defective mechanism, shall constitute a violation of the provisions of this section. The operation of a motor vehicle upon any such highway, road or parking area for ten cars or more at a rate of speed greater than eighty-five miles per hour shall constitute a violation of the provisions of this section.

(b) Any person who violates any provision of this section shall be fined not less than one hundred dollars nor more than three hundred dollars or imprisoned not more than thirty days or be both fined and imprisoned for the first offense and for each subsequent offense shall be fined not more than six hundred dollars or imprisoned not more than one year or be both fined and imprisoned.

**Sec. 14-230: Driving in right-hand lane.**

(a) Upon all highways, each vehicle, other than a vehicle described in subsection (c) of this section, shall be driven upon the right, except (1) when overtaking and passing another vehicle proceeding in the same direction, (2) when overtaking and passing pedestrians, parked or standing vehicles, animals, bicycles, electric bicycles, mopeds, scooters, electric foot scooters, vehicles moving at a slow speed, as defined in section 14-220, or obstructions on the right side of the highway, (3) when the right side of a highway is closed to traffic while under construction or repair, (4) on a highway divided into three or more marked lanes for traffic, or (5) on a highway designated and signposted for one-way traffic.

(b) Except as provided in subsection (c) of this section, any vehicle proceeding at less than the normal speed of traffic shall be driven in the right-hand lane available for traffic, or as close as practicable to the right-hand curb or edge of the highway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway.

(c) Any vehicle which exceeds the maximum width limitations specified in subdivision (1) of subsection (a) of section 14-262 and operates on an interstate highway with a special permit issued by the Commissioner of Transportation under the provisions of section 14-270, shall be driven in the extreme right lane of such highway, except (1) when such special permit authorizes operation in a traffic lane other than the extreme right lane, (2) when overtaking and passing parked vehicles, animals or obstructions on the right side of such highway, (3) when the right side of such highway is closed to traffic while under construction or repair, or (4) at such locations where access to or egress from such highway is provided on the left.

(d) Violation of any provision of this section shall be an infraction.

**Sec. 14-240a: Vehicles to be driven a reasonable distance apart. Intent to harass or intimidate.**

(a) No person operating a motor vehicle shall follow another vehicle more closely than is reasonable and prudent, having regard for the speed of such vehicles, the traffic upon and the condition of the roadway or highway and weather conditions, with the intent to harass or intimidate the operator of the preceding motor vehicle.

(b) Any person who violates the provisions of this section shall be fined not less than one hundred dollars nor more than three hundred dollars or imprisoned not more than thirty days or be both fined and imprisoned for the first offense and for each subsequent offense shall be fined not more than six hundred dollars or imprisoned not more than one year or be both fined and imprisoned.

**Sec. 14-289g: Protective headgear for motorcycle or motor-driven cycle operators and passengers under eighteen years of age. Regulations. Penalty.**

(a) No person under eighteen years of age may (1) operate a motorcycle or a motor-driven cycle, as defined in section 14-1, or (2) be a passenger on a motorcycle or motor-driven cycle, unless such operator or passenger is wearing protective headgear of a type which conforms to the minimum specifications established in 49 CFR 571.218, as amended from time to time. Any person who violates this section shall have committed an infraction and shall be fined not less than ninety dollars.

(b) As used in this section, the term "motorcycle" shall not include "autocycle".

*Note: There is no protective headgear requirement for persons over the age of 18.

# Delaware

**Liability Coverage:** Mandatory: $15,000 / $30,000 / $5,000 under Financial Responsibility Act (21 Del.C. §2902).

**No-Fault:** Mandatory: $15,000/$30,000 (21 Del.C. §2118).

No Verbal Threshold:

(a) Any amount payable or paid under no-fault cannot be introduced into evidence against tortfeasor.

(b) Workmen's compensation is offset. No double recovery.

(c) PIP policies can be stacked if policies permit, but most policies do not.

**Uninsured/Underinsured Coverage:** NOT MANDATORY.

UM coverage must be offered to policyholder. Policyholder does not have to accept but must reject in writing. Insurance Company must also offer the policyholder the option to purchase additional UM coverage up to $l00,000/$300,000 or $300,000 single limit but not to exceed the limits for bodily injury liability coverage set forth in basic policy (18 Del.C. §3902).

UM coverage can be stacked if policy permits.

**Statute of Limitations:**

(1) For personal injury, wrongful death, and property damage - 2 years from the date of the accident.

10 Del.C. §8107; 8119)

(2) For PIP Claims - 3 years from the date of the accident.

(3) For UM Claims - 3 years from the date the insurance company rejects the claim.

**Notification of Statute of Limitations:** YES: If claim made against insurance company, carrier must notify claimant of the statute of limitations (18 Del.C. §3914).

**Negligence / Comparative Negligence:** Comparative negligence of Plaintiff shall not bar a claim unless the negligence of the Plaintiff exceeds that of the Defendant (51 percent). Damages are reduced in proportion to negligence of Plaintiff (10 Del.C. §8132).

**Punitive Damages:** Covered by insurance unless excluded by the policy. No limitation on amount of punitive damages except that they must bear a relationship to compensatory damages.

**Joint and Several Liability:** Yes. Delaware has a joint tortfeasor statute that permits the release of one joint tortfeasor. 10 Del.C. Chapter 63.

**Workmen's Compensation Liens:** Workmen's compensation carrier has a lien on any recovery to injured party. Compensation carrier can initiate action against the tortfeasor if tortfeasor has not brought action within 260 days of the accident. (19 Del.C. §2363)

**Minor Settlements:** Settlement of a minor's claim requires court approval. 12 Del.C. §3926. Superior Court or Court of Common Pleas can approve settlement. Upon entry of order approving settlement, jurisdiction of the matter is transferred to the Court of Chancery for administration. 12 Del.C. §3901(k).

No age for which a child can be found to be negligent. Factors are the nature of the tort, age and maturity of the child and the understanding of the wrongdoing.

**Alcohol:** Griving under the influence defined is .08 percent or more. 21 Del.C. §4177. Mandatory loss of license, 21 Del. C. §4177A.

**Dram Shop:** There is no dram shop law in Delaware.

**Interspousal Immunity:** Interspousal Immunity no longer exists in Delaware (Beattie v. Beattie, 630 A.2d 1096 (Del. 1993).

**Interfamily Immunity:** An unemancipated child can sue parents for automobile negligence up to limits of insurance policy. Williams v. Williams, 369 A.2d 669 (Del. 1976).

**Seat Belt Defense:** No seat belt defense. Mandatory seat belt requirement. However, lack of use of seat belt cannot be used as a defense to either liability or damages. (21 Del.C. Ch. 48)

**Wrongful Death:** Wrongful death statute is for the benefit of the wife, husband, parent and child of a deceased person. Survivors are entitled to the pecuniary benefits that they would have received from continued life of the deceased including loss of contributions for support and mental anguish. (10 Del.C. §3724).

**Permissive Driver Rule:** 21 *Del. C.* §2902 (b)(1) requires that any motor vehicle liability policy "[i]nsure the person named therein and any other person, as insured, using any . . . [insured] motor vehicle . . . with the express or implied permission of such named insured, against loss from the liability imposed by law for damages. . . ."

In *O'Neal v. State Farm Mut. Auto. Ins. Co.*, 977 A.2d 326 (Del. 2009), the Delaware Supreme Court adopted the minor deviation rule, which the Superior Court, Delaware' trial court, has followed since 1981.

> Under [the minor deviation rule], if the permittee's use is not "such a gross, substantial, or major violation, even though it may have amounted to a deviation, protection is still afforded to the [permittee] under the omnibus clause." Where a major deviation occurs, "it is frequently said that the permission is no longer effective or is annulled, because it would be presumed that the original insured would not have given permission had the use for the deviation been requested." (citations omitted)

The Supreme Court agreed with the South Dakota Supreme Court's description of the minor deviation rule and quoted that court as follows:

> This is the most reasonable approach to the permission problem in that it furthers the public policy of compensating victims, recognizes that permittees are engaged in various activities and may stray from the exact letter of their permission, and it attempts to be fair to the insurer in that it will not expose the insurer to all possible liability arising from use of the vehicle with the initial permission of the insured. (citation omitted)

The Supreme Court in *O'Neal* held that the factors essential to determining whether a permittee's use exceeded his initial permission, that is, whether the alleged deviation was "minor" or "major", are Who, What, When, Where, Why, and How:

- *Who* is the alleged permittee and did he have explicit or implicit permission to use the vehicle?

- *What* vehicle is the alleged permittee allowed to use?

- *Why* did the owner explicitly or implicitly grant permission?

- *Where* did the permittee use the vehicle and what was the relationship of his route to his permitted purpose?

- *When* did the permittee use the vehicle? Was his permission limited by time of day or by day of the week?

- *How* did the permittee use the vehicle? Did he obey traffic laws and otherwise operate the vehicle in a reasonable manner?

# Florida

**Bodily Injury:**

Minimum limit required (mandatory): $10,000.00. See Fla. Stat. §§ 627.7275 & 324.022.

Is there a tort threshold to be reached before a BI claim can be made? Yes. See Fla. Stat. § 627.737(2). In any action in tort brought against the owner, registrant, operator or occupant of a motor vehicle with respect to which security has been provided as required (by statute) or against any person or organization legally responsible for his acts or omissions, a plaintiff may recover damages in tort for pain, suffering, mental anguish, and inconvenience because of bodily injury, sickness, or disease arising out of the ownership, maintenance, operation, or use of such motor vehicle only in the event that the injury or disease consists in whole or in part of:

a. Significant and important loss of an important bodily function;

b. Permanent injury within a reasonable degree of medical probability, other

c. than scarring or disfigurement.

d. Death.

Can collateral sources be used as an offset? Yes. See Fla. Stat. § 768.76 which provides in pertinent part: In any action to which this part applies in which liability is admitted or is determined by the trier of fact and in which damages are awarded to compensate the claimant for losses sustained, the court shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources; however, there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists.

Is Florida a No-Fault state? Yes, Florida is a No-Fault State. See Fla. Stat. §§ 627.730-.7405. The purpose of the No-Fault Law is to provide for medical, surgical, funeral and disability insurance benefits without regard to fault, and to require motor vehicle insurance securing such benefits, for motor vehicle required to be registered in this state and, with respect to motor vehicle accidents, a limitation on the right to claim damages for pain, suffering, mental anguish, and inconvenience. See Fla. Stat. § 627. 731.

**Property Damage:**

Minimum limit required (mandatory): $10,000.00. See Fla. Stat. §§ 627.7275 & 324.022. See also Fla. Stat. § 324.151 for required provisions in motor vehicle liability policies.

Salvage - how it must be handled? Generally, the vehicle salvage value should be deducted from settlement amount paid if person chooses to keep the vehicle. However, this is governed by the terms of the contract.

Loss of use - how it must be handled: Generally, a person is entitled to loss of use from the date of the accident to the date of repair of the vehicle. However, this is governed by the terms of the contract.

Can there be loss of use on a totaled vehicle? Generally, yes, from the time of the accident until the time the vehicle is declared a total loss. However, this is governed by the terms of the contract.

Can Tax, Title and License Fees be recovered? Generally, no. However, this is governed by the terms of the contract.

Can diminished value be recovered? Generally, yes. However, this is governed by the terms of the contract.

**PIP Coverage:**

Minimum Limit required (mandatory): $10,000.00. See Fla. Stat. § 627.736.

What does PIP cover in this state?

a. Medicals: 80% See Fla. Stat. § 627.736(1)(a).

b. Lost Wages: 60% See Fla. Stat. § 627.736(1)(b).

c. Death Benefits: Up to $5,000.00 per individual. See Fla. Stat. § 627.736(1)(c).

Is there a threshold to be met for PIP? Yes, Fla. Stat. § 627.737(2) provides:

(2) In any action of tort brought against the owner, registrant, operator, or occupant of a motor vehicle with respect to which security has been provided as required by ss. 627.730 - 627.7405, or against any person or organization legally responsible for her or his acts or omissions, a plaintiff may recover damages in tort for pain, suffering, mental anguish, and inconvenience because of bodily injury, sickness, or disease arising out of the ownership, maintenance, operation, or use of such motor vehicle **only in the event that the injury or disease consists in whole or in part of:**

a. Significant and permanent loss of an important bodily function.

b. Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.

c. Significant and permanent scarring or disfigurement.

d. Death.

Does coverage have to be rejected in writing? Not applicable (coverage is mandatory). See Fla. Stat. § 627.736(1).

Is PIP subrogable? Generally no. However, an insurer has the right of reimbursement per Fla. Stat. § 627.7405 against the owner or the insurer of the owner of a commercial motor vehicle, if the benefits paid result from such person having been an occupant of the commercial motor vehicle or having been struck by the commercial motor vehicle.

Can Workers' Compensation claimant receive PIP benefits? Yes, PIP is primary (See Fla. Stat. § 627.736(4)) but need not duplicate workers' compensation. See Fla. Stat. §§ 440.11, 627.7405; see also *Tucker Transp. Co. Inc. v. State Farm Mut. Auto. Ins. Co.*, 883 So. 2d 357 (Fla. 1st DCA 2004) (holding that exclusive remedy provision of workers' compensation statutes did not make employer immune from suit by automobile insurer seeking reimbursement of personal injury protection (PIP) benefits paid to an employee who was injured while driving employer's commercial motor vehicle).

Can PIP benefits offset a BI claim? Yes. See Fla. Stat. § 768.76 which provides in pertinent part: In any action to which this part applies in which liability is admitted or is determined by the trier of fact and in which damages are awarded to compensate the claimant for losses sustained, the court shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources; however, there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists.

Can PIP policies be stacked? Not based on number of vehicles on same policy. However, multiple policies may be stacked.

Is there a statute of limitations for PIP? Yes. Five years from the date the insured receives a written rejection of the claim. Notice of a claim should be provided as soon as practicable after the claim arises subject to the terms of the policy. See Fla. Stat. § 95.11(2)(b).

**Med Pay:**

Minimum Limit required: Coverage available in varying amounts - not required.

What does Med-Pay cover in Florida**?** PIP is required to cover 80% of medical bills. Med-Pay covers the remainder not covered by PIP. However, specific coverage is governed by the terms of the contract.

Is there a threshold to be met? Generally, no. However, this is governed by the terms of the contract.

Does Med-Pay coverage have to be rejected in writing? Generally, No. However, this is governed by the terms of the contract.

Is Med-Pay subrogable? Although no court has decided this issue since Med-Pay came under the No-Fault Act, subrogation has not been expressly prohibited as PIP benefits have been. Therefore, it is believed subrogation would be governed by the insurance contract terms. However, an insurer has the right of reimbursement per Fla. Stat. § 627.7405 against the owner or the insurer of the owner of a commercial motor vehicle, if the benefits paid result from such person having been an occupant of the commercial motor vehicle or having been struck by the commercial motor vehicle.

Can Workers' Compensation claimant receive Med-Pay benefits? Yes, See Fla. Stat. §§ 440.11, 627.7405*;* see also *Tucker Transp. Co. Inc. v. State Farm Mut. Auto. Ins. Co.*, 883 So. 2d 357 (Fla. 1st DCA 2004) (holding that exclusive remedy provision of workers' compensation statutes did not make employer immune from suit by automobile insurer seeking reimbursement of personal injury protection (PIP) benefits paid to an employee who was injured while driving employer's commercial motor vehicle).

Can Med-Pay benefits offset a BI claim? Yes. See Fla. Stat. § 768.76 which provides in pertinent part: In any action to which this part applies in which liability is admitted or is determined by the trier of fact and in which damages are awarded to compensate the claimant for losses sustained, the court shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources; however, there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists.

Is there a statute of limitations on Med-Pay Benefits? If so, what is it? There is no statute of limitations to apply for benefits. However, an action for denial of benefits is governed by a five-year statute of limitations that accrues on the date of the denial. See Fla. Stat. § 95.11(2)(b).

**UM Coverage:**

Minimum Limits Required - UM: UM coverage must be equal to BI coverage unless the insured named in the policy selects lower limits. Fla. Stat. § 627.727(1) provides in pertinent part: No motor vehicle liability insurance policy which provides bodily injury liability coverage shall be delivered or issued for delivery in this state with respect to any specifically insured or identified motor vehicle registered or principally garaged in this state unless uninsured motor vehicle coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom. However, the coverage required under this section is not applicable when, or to the extent that, an insured named in the policy makes a written rejection of the coverage on behalf of all insureds under the policy.

Can it be rejected? Yes. See above statute.

Must it be rejected in writing? Yes. See above statute.

What is the Statute of Limitations for UM/BI, UM/PD? Per Fla. Stat. § 95.11(2)(b), the Statute of Limitations for any action on a contract is 5 years. However, per Fla. Stat. § 95.11(3)(a) the statute of limitations for any action founded on negligence is 4 years.

Can a Laidlaw employee successfully make a UM/BI Claim? (Against what coverage: his own or Company's?) An employee may bring a claim for UM benefits under his own and the company's policy subject to the exceptions of the policies. The two UM carriers will pro-rate based upon available coverage. See Fla. Stat. § 627.727 as excerpted below.

Is UM subrogable? Yes. See Fla. Stat. § 627.727(6). Therefore, UM coverage is not a collateral source. *Economy Fire & Casualty Co. v. Obenland,* 629 So. 2d 265, 267 (Fla. 2d DCA 1993) (holding that the insured could recover under uninsured motorist insurance, while still bringing its cause of action against the tortfeasor).

Can UM be stacked? Yes. See Fla. Stat. § 627.727 which provides in pertinent part: The coverage described under this section shall be over and above, but shall not duplicate, the benefits available to an insured under any workers' compensation law, personal injury protection benefits, disability benefits law, or similar law; under any automobile medical expense coverage; under any motor vehicle liability insurance coverage; or from the owner or operator of the uninsured motor vehicle or any other person or organization jointly or severally liable together with such owner or operator for the accident; and such coverage shall cover the difference, if any, between the sum of such benefits and the damages sustained, up to the maximum amount of such coverage provided under this section.

**Pure Comparative Negligence/Fault:**

Type of comparative negligence in Florida: Pure Comparative Negligence/Fault. See Fla. Stat. § 768.81.

Definition of Pure Comparative Negligence: Plaintiffs own negligence does not bar recovery; however, recovery of plaintiff is offset by percentage of negligence attributable to plaintiff's actions. See Fla. Stat. § 768.81.

Can Negligence of claimant driver be imputed to claimant passenger(s)**?** Generally, no. The negligence of the driver of an automobile is not in general imputable to a passenger who has no authority or control over the car or the driver." *Bessett v. Hackett,* 66 So. 2d 694, 698 (Fla.1953). Nevertheless, an exception to the general rule that a guest riding in an automobile is entitled to trust the vigilance and skill of the driver arises where the passenger knows, or by the exercise of ordinary and reasonable care should know, from the circumstances of the occasion, that the driver is not exercising that degree of care in the operation of the vehicle compatible with the safety of his passenger. In such case it become the duty of the guest to make some reasonable attempt through suggestion, warning, protest or other means suitable to the occasion, to control the conduct of the driver. However, before the duty to warn, protest, or take other such action suitable to the circumstances of the case, arises, it is necessary that the occupant should know or have reason to know that it is reasonably essential to his own safety to attempt to warn or to control the conduct of the driver, and there must be sufficient time and opportunity for the guest to give warning or make protest before the happening of the accident; for a guest in an automobile may know at a particular time what the driver is doing, yet have no reason to realize that it is necessary that he intervene for his own safety. *Id.* at 698-99.

In this context, there is no exception to the general rule for Joint Ventures: *See Halenda v. Habitat for Humanity Int., Inc.*, 125 F. Supp. 1361 (S.D. Fla. 2000) (holding that under Florida law, joint enterprise doctrine may not be applied to impute to passenger the negligence of driver in accident for purpose of holding passenger liable to third-parties for that negligence); see also *Kane v. Portwood,* 573 So.2d 980, 983 (Fla. 2d DCA 1991) (holding that although "the joint enterprise doctrine has been used to make a passenger liable, as a defendant, to third parties for the negligence of their driver, [t]his application has seldom been employed and has not been

utilized in Florida, [and] [t]his opinion should not be interpreted as approving such a variety of joint enterprise.").

**Statute of Limitations:** See Fla. Stat. § 95.11:

- BI: 4 years. See Fla. Stat. § 95.11(3)(a) which provides that actions founded on negligence have a four year statute of limitation.
- PD: 4 years. See Fla. Stat. § 95.11(3)(a) which provides that actions founded on negligence have a four year statute of limitation.
- Wrongful Death: 2 years. See Fla. Stat. § 95.11(4)(d).
- Must the adjuster notify parties of the statute? There is no statutory obligation to do so.
- Licensing requirements: See Fla. Stat. §§ 626.112, 626.171.

**Punitive Damages:**

Can Punitive Damages be covered by insurance? Punitive damages are generally not insurable. However, coverage is governed by the terms of the contract.

Can Punitive Damages be plead? Punitive damages cannot initially be plead. A showing on the record and an evidentiary hearing prior to amending a complaint to seek punitive damages are required. Fla. Stat. § 768.72.

Can Punitive Damages be recovered*?* Yes. See Fla. Stat. §§ 768.72-737.

Limits on Punitive Damages: Fla. Stat. § 768.73(1) provides:

(1)(a) Except as provided in paragraphs (b) and (c), an award of punitive damages may not exceed the greater of:

> 1. Three times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or
>
> 2. The sum of $500,000.

(b) Where the fact finder determines that the wrongful conduct proven under this section was motivated solely by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant, it may award an amount of punitive damages not to exceed the greater of:

> 1. Four times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or
>
> 2. The sum of $2 million.

(c) Where the fact finder determines that at the time of injury the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there shall be no cap on punitive damages.

(See Fla. Stat. §§ 768.73-737 regarding all punitive damage limitations and exceptions.)

What constitutes Punitive Damages? Fla. Stat. §§ 768.72(2)-(3) provide:

(2) A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. As used in this section, the term:

> (a) "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.
>
> (b) "Gross negligence" means that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

(3) In the case of an employer, principal, corporation, or other legal entity, punitive damages may be imposed for the conduct of an employee or agent only if the conduct of the employee or agent meets the criteria specified in subsection (2) and:

> (a) The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;
>
> (b) The officers, directors, or managers of the employer, principal, corporation, or other legal entity knowingly condoned, ratified, or consented to such conduct; or
>
> (c) The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.

**Joint and Several Exposures:** Florida abolished the doctrine of joint and several liability effective April 26, 2006, in section 768.81(3), Fla. Stat., and adopted instead a system of apportioning fault between multiple tortfeasors.

**Workers Compensation:**

*Is Workers' Compensation subrogable in Florida?* Yes. See Fla. Stat. §440.39. Workers' Compensation benefits are not a collateral source and thus not subject to set-off. See Fla. Stat. §768.76(2)(b).

**Any limitations?** Reduced by lack of adequate insurance coverage in relation to full value, attorney's fees and costs paid in securing recovery in tort action and the comparative negligence of claimant only. See Fla. Stat. § 440.39(3)(a); *see Casualty Ins. Co. v. Manfredo*, 542 So.2d 1365, 1366-67 (Fla 3rd DCA 1989), *aff'd* 560 So.2d 1162 (Fla. 1990) (setting forth formula of lien recovery); *see also Cooper Transp., Inc. v. Mincey*, 459 So. 2d 339 (Fla. 3d DCA 1984) (holding that insurer was entitled to recover from the judgment obtained by employee from third-party tortfeasor, after attorney fees and costs incurred in obtaining the settlement had been deducted, 100 percent of what it had paid, reduced by employee's comparative negligence).

How must Workers' Compensation Lien be proved up and the worker's compensation carrier's lien interest protected by the injured worker/plaintiff and tortfeasor? Fla. Stat. § 440.39(3)(a) provides in pertinent part: Upon suit being filed, the employer or the insurance carrier, as the case may be, may file in the suit a notice of payment of compensation and medical benefits to the employee or his or her dependents, which notice shall constitute a lien upon any judgment or settlement recovered to the extent that the court may determine to be their pro rata share for compensation and medical benefits paid or to be paid under the provisions of this law, less their pro rata share of all court costs expended by the plaintiff in the prosecution of the suit including reasonable attorney's fees for the plaintiff's attorney.

Written notice of subrogation rights must be provided to the tortfeasor if no suit has been filed, but, if suit has been filed, the injured worker/plaintiff is obligated to notify the workers' compensation insurance carrier,

as the injured worker/plaintiff files suit on his/her behalf and for the use and benefit of the carrier. See Fla. Stat. § 440.39(3).

Does Workers' Compensation carrier have right of First Recovery? No. Recovery is governed by equitable subrogation/distribution. See Fla. Stat. § 440.39(3)(a).

Can Workers' Compensation claimant collect No-Fault (PIP/Med-Pay) benefits? Yes a Workers' Compensation claimant can collect PIP benefits but there can be no duplication of recovery. See Fla. Stat. §§ 440.11, 627.7405; *see also Tucker Transp. Co. Inc. v. State Farm Mut. Auto. Ins. Co.*, 883 So. 2d 357 (Fla. 1st DCA 2004) (holding that exclusive remedy provision of workers' compensation statutes did not make employer immune from suit by automobile insurer seeking reimbursement of personal injury protection (PIP) benefits paid to an employee who was injured while driving employer's commercial motor vehicle).

Further, a workers' compensation carrier shall not benefit from uninsured motorist coverage. Fla. Stat. § 627.727(1) provides in pertinent part: Such coverage shall not inure directly or indirectly to the benefit of any workers' compensation or disability benefits carrier or any person or organization qualifying as a self-insurer under any workers' compensation or disability benefits law or similar law. UM/UIM is first party coverage and to extent injured worker only has UM/UIM claim due to lack of insurance coverage or inadequate insurance coverage of tortfeasor, workers' compensation carrier has no lien rights under statute. Lien attaches only to tort claims and not first party claims. *See Volk v. Gallopo*, 585 So.2d 1163, 1166 (Fla. 4th DCA 1991).

**Minor Settlements:** Minor Settlements – When court approval is required:

**1**. After an action is filed — After an action has been commenced by or on behalf of a ward no settlement shall be effective unless approved by the court having jurisdiction of the action. As a result, regardless of the amount of the settlement once an action has been commenced court approval will be necessary. Fla. Stat. § 744.387(3)(a).

**2**. Settlement by parents/natural guardians — When the amount involved in any settlement does not exceed Fifteen Thousand Dollars ($15,000) the natural guardian of a minor child is authorized to consummate a settlement of any claim or cause of action without court authority. Fla. Stat. § 744.301(2).

**3**. Guardian of the property — When the amount of a net settlement or judgment to a ward exceeds Fifteen Thousand Dollars ($15,000) the court shall require the appointment of a guardian for the property. The guardian of a property should be distinguished from a guardian ad litem. A guardian of the property will actually be a depository for the funds paid pursuant to settlement or judgment. See Fla. Stat. § 744.387(b).

**4**. Guardian ad Litem - In any case where the gross settlement of the claim of a minor exceeds Fifteen Thousand Dollars ($15,000) the court may, prior to the approval of a settlement of the minor's claim, appoint a guardian ad litem to represent the minor's interest. In any case in which the gross settlement involving a minor equals or exceeds Fifty Thousand Dollars ($50,000) the court shall, prior to approval of the settlement of the minor's claim appoint a guardian ad litem. Fla. Stat. § 744.3025(1).

**5**. Who is the natural guardian - The mother and father jointly are natural guardians of their own children and of their adopted children, during minority. If one parent dies, the surviving parent remains the sole natural guardian even if he or she remarries. If the marriage between the parents is dissolved, the natural guardianship belongs to the parent to whom custody of the child is awarded. If the parents are given joint custody, then both continue as natural guardians. If the marriage is dissolved and neither the father nor the mother is given custody of the child, neither shall act as natural guardian of the child. The mother of a child born out of wedlock is the natural guardian of the child and is entitled to primary residential care and custody of the child unless a court of competent jurisdiction enters an order stating otherwise. Fla. Stat. § 744.301(1).

The only potential source of confusion in the statute is that it clearly speaks in terms of "net settlement" for a legal guardianship and "gross settlement" for a guardian ad litem.

However, when discussing a parent's right to settle a claim on behalf of a child for an amount which does not exceed Fifteen Thousand Dollars ($15,000) the statute does not speak in terms of net or gross. Instead, it speaks in terms of "the amounts received in the aggregate." See Fla. Stat. § 744.301(2).

Therefore, a potential source of confusion exists for settlements between Fifteen and Fifty Thousand Dollars. Any settlement in excess of Fifty Thousand Dollars requires the appointment of a guardian ad litem and thus the involvement of the court. Until the statutes are further clarified, we believe that any settlement involving a minor child, where the gross amount exceeds Fifteen Thousand Dollars should require court approval.

The requirements for minor settlements are set forth below:

| | **Approval Required?** | **Appointment of Guardian Ad Litem Required for Court Approval?** | **Appointment of Guardian of Property Required for Distribution of Proceeds?** |
|---|---|---|---|
| Case in Suit | Yes | Depends on amount of settlement – see below | Depends on amount of settlement – see below |
| Case not in Suit – Gross stlmt. less than $15,000 | No | No | No |
| Case not in Suit – Gross stlmt. greater than $15,000 and less than $50,000 | Yes | No – but court may require at its discretion | If net settlement proceeds exceed $15,000 – yes<br><br>If not – no |
| Cast not in Suit – Gross stlmt. greater than $50,000 | Yes | Yes | If net settlement proceeds exceed $15,000 – yes<br><br>If not – no |

At what age can negligence be attributed to a minor? No negligence is attributable to a minor under the age of six. *See City of Jacksonville v. Stokes*, 74 So. 2d 278, 279 (Fla. 1954) (holding that the child involved and any other child under six years of age is conclusively presumed to be incapable of committing contributory negligence.); *see also Swindell v. Hellcamp*, 242 So. 2d 708, 710 (Fla. 1970). The standard of conduct imposed upon a child is only to exercise such care and prudence as could be reasonably expected of a child of its age and intelligence under like circumstances.

**Alcohol:**

Legal limit of intoxication:.08 blood alcohol content. See Fla. Stat. § 363.193.

Can the server of alcohol, i.e., restaurant, individual, be held liable (Dram Shop)? Yes, but only if willfully and unlawfully selling or furnishing alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any/all alcoholic beverages. See Fla. Stat. § 768.125.

Legal Age: To drink and consume alcohol: 21 years. See Fla. Stat. § 562.11.

**Inter-Family Immunity:** The doctrine exists in Florida; however, it is waived to the extent of liability coverage. *Ard v. Ard,* 414 So. 2d 1066, 1067 (Fla. 1982) (holding that if the parent is without liability insurance then parental immunity is not waived and the child cannot sue the parent). However, for purposes of

assessing comparative fault, the Florida Supreme Court in *Y.H. Investments, Inc. v. Godales*, 690 So. 2d 1273 (Fla. 1997) held that name of parent of minor child plaintiff alleged to be at fault may be included on jury verdict form in personal injury case, provided that there is sufficient evidence of fault, and irrespective of whether parent is immune from suit by child.

**Inter-Spousal Immunity:** The common law doctrine of inter-spousal immunity has been abrogated by the Florida Supreme Court in *Waite v. Waite*, 618 So. 2d 1360 (Fla. 1993) (holding that the doctrine of interspousal immunity does not remain a part of Florida's common law). The only statutory reference to the doctrine includes an exception in an action for the intentional tort of battery. See Fla. Stat. § 741.235 (added in 1985 before the Supreme Court's abrogation of the doctrine) which provides: The common-law doctrine of interspousal tort immunity is hereby abrogated with regard to the intentional tort of battery, and the ability of a person to sue another person for the intentional tort of battery shall not be affected by any marital relationship between the persons.

**Seat Belt Defense:** Yes. *See Ridley v. Safety Kleen Corporation*, 693 So. 2d 934 (Fla. 1996) (holding that failure to wear seat belt should be properly raised as affirmative defense of comparative negligence).

**Wrongful Death:** The Florida Wrongful Death Act is found in Fla. Stat. §§ 768.16-26. When the death of a person is caused by the wrongful act, negligence, default or breach of a contract or warranty of any person including those occurring on navigable waters and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or water craft that would have been liable in damages if death had not ensured is liable for damages as specified in the Florida Wrongful Death Act not withstanding the death of the person injured, although death was caused under circumstances constituting a felony. Fla. Stat. § 768.19.

The damages recoverable under the Florida Wrongful Death Act are listed in Fla. Stat. § 768.21 as follows: All potential beneficiaries of a recovery for wrongful death, including the decedent's estate, shall be identified in the complaint, and their relationships to the decedent shall be alleged. Damages may be awarded as follows:

**(1)** Each survivor may recover the value of lost support and services from the date of the decedent's injury to her or his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority, in the case of healthy minor children, may be considered.

**(2)** The surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury.

**(3)** Minor children of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury. For the purposes of this subsection, if both spouses die within 30 days of one another as a result of the same wrongful act or series of acts arising out of the same incident, each spouse is considered to have been predeceased by the other.

**(4)** Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors.

**(5)** Medical or funeral expenses due to the decedent's injury or death may be recovered by a survivor who has paid them.

**(6)** The decedent's personal representative may recover for the decedent's estate the following:

a. Loss of earnings of the deceased from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest. Loss of the prospective net accumulations of an estate, which might reasonably have been expected but for the wrongful death, reduced to present money value, may also be recovered:

   1. If the decedent's survivors include a surviving spouse or lineal descendants; or

   2. If the decedent is not a minor child as defined in s. 768.18(2), there are no lost support and services recoverable under subsection (1), and there is a surviving parent.

b. Medical or funeral expenses due to the decedent's injury or death that have become a charge against her or his estate or that were paid by or on behalf of decedent, excluding amounts recoverable under subsection (5).

c. Evidence of remarriage of the decedent's spouse is admissible.

**(7)** All awards for the decedent's estate are subject to the claims of creditors who have complied with the requirements of probate law concerning claims.

**(8)** The damages specified in subsection (3) shall not be recoverable by adult children and the damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for medical negligence as defined by s. 766.106(1).

**Permissive Use:** Florida imposes, under the common law dangerous instrumentality doctrine, strict vicarious liability upon the owner of a motor vehicle who voluntarily entrusts it to another. *Hertz Corp. v. Jackson*, 617 So. 2d 1051, 1053-54 (Fla. 1993); *Lewis v. Enterprise Leasing Co.*, 912 So. 2d 349, 351 (Fla. 3d DCA 2005) (finding "Florida is the only state which imposes strict liability against innocent motor vehicle owners who entrust their vehicles to another"). This doctrine creates a non-delegable duty upon an owner who gives authority to another to operate the owner's vehicle to ensure that the vehicle is operated safely. *See Susco Car Rental System of Florida v. Leonard*, 112 So. 2d 832, 836 (Fla. 1959); *Jackson*, 617 So. 2d at 1053. Knowledge and consent of the owner are essential elements and must be proven before the owner can be subjected to liability for damages proximately caused by the driver's negligence. *Tribbitt v. Crown Contractors, Inc.*, 513 So. 2d 1084, 1086 (Fla. 1st DCA 1987).

If there is a breach of custody amounting to a species of conversion or theft then there is no owner liability and an owner will be relieved of responsibility for the negligence of the driver to whom the owner did not grant consent to operate the vehicle. *Susco*, 112 So. 2d at 835-36. The rationale is that "once a vehicle has been the subject of a theft or conversion, the owner's initial consent has been vitiated and the vehicle is no longer on public highways 'by authority of' the owner." *Hertz,* 617 So. 2d at1053. The issue then becomes whether a vehicle has been the subject of a conversion or theft and this is a factual determination based on the distinct circumstances of each individual case. *Ming v. Interamerican Car Rental, Inc.*, 913 So. 2d 650, 654 (Fla. 5th DCA 2005) (citing *Hertz*, 617 So. 2d at1054).

The Florida Supreme Court has also recognized a limited exception to the strict vicarious liability imposed under the dangerous instrumentality doctrine. *Castillos v. Bickley*, 363 So. 2d 792, 793 (Fla. 1978). If an owner leaves a vehicle with a repair service, the owner is not liable for injuries caused by the negligence of an employee of the repair service with whom the vehicle has been left, so long as the owner does not exercise control over the injury-causing operation of the vehicle during the servicing, service-related testing, or transport of the vehicle, and is not otherwise negligent. *Michalek v. Shumate*, 524 So. 2d 426, 427 (Fla. 1988) (citing *Castillo*, 363 So. 2d at 793).

Pursuant to section 324.021(9)(b), Florida Statutes (2009), an owner, defined as a natural person, is vicariously liable for the operation of a vehicle by a permissive user only up to $100,000 per person and up to $300,000 per incident for bodily injury and up to $50,000 for property damage. § 324.021(9)(b)(3). If the permissive

user of the vehicle is uninsured or has insurance with limits less than $500,000, combined property and bodily injury coverage, the owner shall be liable for an additional $500,000 in economic damages. *Id.* Any amount recovered from the owner for economic damages shall be reduced by the amount recovered from the permissive user. Nothing in the statute shall affect the liability of the owner for his or her own negligence. *Id.* The statutory limits do not apply to an owner of a vehicle used for commercial activity in the owner's ordinary course and scope of employment. *See id.* § 324.021(9)(c)(1).

# Georgia

**Bodily Injury:** Motor vehicle liability policies issued or delivered in state must conform to the limits requirements of O.C.G.A. § 33-7-11(a)(1)(A), requiring minimum uninsured motorist coverage of $25,000 per person in any one accident for bodily injury or death; $50,000 for bodily injury or death to two or more persons in any one accident; and $25,000 for property damage.

**Property Damage:** The mandatory minimum coverage for property damage is $25,000. O.C.G.A. § 33-7- 11 (a) (1)(A).

**Minor Settlements:** The natural guardian of a minor may settle a minor's claim without being appointed conservator and without court approval if the proposed gross settlement of the claim is $15,000 or less. If the proposed gross settlement of the minor's claim is more than $15,000, the settlement must be submitted for approval to the applicable probate court. If legal action has been initiated and the proposed gross settlement is more than $15,000, the settlement must be submitted for approval to the Court in which the action is pending.

If the proposed gross settlement is more than $15,000, but the gross settlement is reduced by factors such as attorney's fees, expenses of litigation and medical expenses then the natural guardian may seek approval of the proposed settlement from the appropriate court without becoming the conservator of the minor. O.C.G.A.§ 29-3-3.

**Medical Payments:** Medical Payment benefits are an optional form of insurance coverage available in motor vehicle policies similar to "no fault" coverage. A UM insurer which pays such benefits may be entitled to a set-off against any subsequent verdict in an amount equal to the payments under a policy issued by it. *See* O.C.G.A. § 33-7-11(i) (providing that automobile policy "may contain provisions which exclude any liability of the insurer for personal or bodily injury or death for which the insured has been compensated pursuant to 'medical payments coverage,' as that term is defined in paragraph 1 of Code Section 33-34-2[.]"); *see also State Farm Mut. Auto. Ins. v. Hall*, 309 Ga. App. 271 (2011) (discussing 2008 amendment to statute). In *Hall*, the injured plaintiff's UM carrier (State Farm) sought to set-off from its UM coverage obligation pre-trial payments it made to its insured under the policy for medical expenses, citing language in its policy permitting such a set off. *Id.* at 271-72 ("At issue, is whether State Farm may reduce its contractual obligation to pay available UM benefits to Hall in light of its payment of her medical expenses in the amount of $46,794.96 under the medical payments coverage of her State Farm policy."). The court of appeals refused to allow set off in *Hall* because the set off provision in the State Farm policy conflicted with the plain language of the version of O.C.G.A. § 33-7-11(i) in place at the time of the accident and the trial, whereas set off would be permitted under the 2008 amendment to the statute expressly permitting set off (cited above), *Id.* at 272-73; *but see, Appling v. State Farm Fire & Casualty Insurance Company*, 348 Ga. App 369 (2019). In *Appling*, the UIM carrier (State Farm) moved for satisfaction of judgment following payment of a tort judgment reduced by pretrial payments for insured's medical expenses, and the trial court granted the motion. The court of appeals allowed the set off and noted that the UM policy stated that State Farm "will not pay under [UM coverage] any damages ... that have already been paid as expenses under Medical Payments Coverage of this policy, the medical payments coverage of any other policy, or other similar vehicle insurance." The court of appeals held that the insured was bound by those plain and unambiguous terms, and the insured could not expect to be entitled to a double recovery from State Farm for the same loss. Thus, State Farm did not have to pay the insured damages for medical expenses under insured's UM coverage when those damages duplicated payments that State Farm had already made under insured's medical payments coverage.

This optional motor vehicle coverage is to be distinguished from Medical Payments coverage in homeowners' insurance or other premises polices, which coverage often specifically excludes medical payments for personal

or bodily injury arising from ownership, maintenance or use of a motor vehicle. *See generally Nalley v. Nationwide Mut. Fire Ins. Co.*, 221 Ga. App. 537 (1996) (discussing coverage and usual exclusions).

**Uninsured/Underinsured Motorist Coverage:** UM / UIM coverage must be provided in every automobile policy issued in Georgia unless the policyholder rejects it in writing. Policy limits must be at least equivalent to the insured's personal coverage and can be adjusted downward at the request of the insured, but in any event UM coverage (if provided) must include at least $25,000 for property damage, and $25,000 per person / $50,000 per accident personal injury. O.C.G.A. § 33-7-11. Georgia now recognizes two types of UM coverage, reduced limits and added on limits. *See* O.C.G.A. § 33-7-11(b)(1)(D)(ii)(I).

Reduced limits - In the event that a tortfeasor's vehicle has liability insurance, but the insurance is *lower* than the limits of the UM policy, then the UM's "exposure" is limited to the difference between limits of the two policies. (*i.e.*, subject vehicle had $50k limit, UM policy has $100k limit, UM carrier's exposure is $100k-$50k = $50k). *See* Jenkins and Miller, *Georgia Automobile Insurance Law*, § 39:5 ("'Reduced' or 'reduction' underinsured motorist coverage is available to an injured insured only to the extent the insured's UM coverage is greater than the at-fault driver's liability coverage. Under the 'reduced' rule, the UM coverage supplements the at-fault motorist's liability coverage but only to the extent that the UM coverage exceeds such liability coverage.").

Added on limits - An insured can, however, purchase "added on" or "excess" uninsured motorist coverage as provided under O.C.G.A. § 33-7-11(b)(1)(D)(ii)(1). Under the added on underinsured motorist coverage option, benefits are provided up to the limits of the injured claimant's coverage for the amount that the claimant's actual losses exceed the liability coverage on the tortfeasor's motor vehicle, regardless of whether the available liability coverage on the tortfeasor's motor vehicle is equal to or greater than the claimant's uninsured motor vehicle coverage. This is in contrast to the "traditional" reduced limits uninsured coverage in the example above, where benefits to the injured claimant are payable only when the claimant's uninsured coverage limit is greater than the liability coverage on the tortfeasor's motor vehicle. *See* Jenkins and Miller, *Georgia Automobile Insurance Law*, § 39:5 ("Under the 'added on' UM coverage rule, there is no reduction or set-off of UM coverage by the amount of the tortfeasor's liability coverage. In other words, the 'added on' method supplements the at-fault motorist's liability coverage to the full extent of the injured insured's UM coverage."); *Carter v. Progressive Mountain Ins.*, 320 Ga. App. 271, 275 (2013).

A motor vehicle may also be considered "uninsured" if the owner or operator is unknown; however in such a case the insured may not pursue a UM claim unless (1) there was actual physical contact between the UM's vehicle and that of the insured, or (2) a non-insured witness can corroborate the events leading to the claim. O.C.G.A. § 33-7-11(6)(2). The insured may bring suit against the "John Doe" defendant and the UM carrier is permitted to defend in the name of the unknown driver.

Bad Faith Claims - An insurer may not, in bad faith, refuse to pay a covered UM claim. *Chandler v. Liberty Mut. Fire Ins. Co.*, 333 Ga. App. 595 (2015) (Insureds brought action against automobile insurer to recover UM benefits following settlement of claims against tortfeasor.) If the insurer providing UM coverage refuses to pay an insured for any covered loss within 60 days after a demand has been made by the insured and a finding has been made that such refusal was made in bad faith, the insurer is liable to the insured, in addition to any recovery under the statute governing UM coverage, for not more than 25% of the recovery and all reasonable attorney's fees for the prosecution of the case. O.C.G.A. § 33-11-7(j). The question of bad faith, the amount of the penalty, if any, and the reasonable attorney's fees, if any, must be determined in a separate action filed by the insured against the insurer after a judgment has been rendered against the UM in the original tort action. O.C.G.A. § 33-11-7(j). The trial court has the discretion, if it finds the jury verdict fixing attorney's fees to be greatly excessive or inadequate, to review and amend the portion of the verdict fixing attorney's fees without the necessity of disapproving the entire verdict. O.C.G.A. 33-11-7(j). A UM insurer's exposure to sums in excess of its policy limits is confined to the penalty and attorney's fees provisions of the statute—the several other statutory provisions for recovery of additional damages have no

application to UM insurers. *McCall v. Allstate Ins. Co.*, 251 Ga. 869 (1984).

**Statutes of Limitations:** An action for bodily injury arising from a tort must be brought within two (2) years after the right of action accrues. O.C.G.A. § 9-3-33. This two year limitation also applies to wrongful death actions. *See Miles v. Ashland Chemical Co.,* 261 Ga. 726 (1991). O.C.G.A. § 9-3-92 provides that the time between the death of a person and representation being taken upon his estate shall not be counted against his estate. In a wrongful death action under O.C.G.A. § 51-4-5(a), the suit is on behalf of the decedent's next of kin, not the estate. The statute of limitations is not tolled because O.C.G.A. § 9-3-92 does not and cannot have application to a case where the decedent's estate is in no wise interested or concerned. *Metropolitan Atlanta Rapid Transit Authority v. Maloof*, 304 Ga. App. 824 (2010). An action under O.C.G.A. §§ 9-2-41 and 51-4-5(b) for the recovery of the funeral, medical, and other necessary expenses resulting from the injury and death of the decedent would be on behalf of the decedent's estate. Thus, while the estate is unrepresented, the statute of limitations would be tolled because O.C.G.A. § 9-3-92 would apply to such a case where the decedent's estate is interested or concerned. *Walden v. John D. Archbold Memorial Hosp., Inc.*, 197 Ga. App. 275 (1990) (disapproved of on other grounds by, *First Christ Holiness Church, Inc. v. Owens Temple First Christ Holiness Church, Inc.* 282 Ga. 883 (2008)). Similarly, a decedent's federal claims against defendants under 42 U.S.C.A. § 1983 become claims of the decedent's estate on the date of his death. Because these claims cannot be brought until administrators are appointed to represent his estate, the statute of limitations on these claims is tolled between date of the decedent's death and the date representatives of the estate are appointed. *Camps v. City of Warner Robbins*, 822 F. Supp. 724 (M.D. Ga. 1993).

A loss of consortium claim is subject to a four (4) year statute of limitations.

An action for recovery of personal property damage or for damages for the destruction of personal property must be brought within four (4) years after the right of action accrues. O.C.G.A. § 9-3-32.

The Georgia Supreme Court has held that when a plaintiff's bodily injury develops over an extended period of time, his cause of action does not accrue (and the statute of limitations does not begin to run) until he discovers, or through the exercise of reasonable diligence should have discovered, the nature of his injury and the causal connection between the injury and the alleged negligent conduct of the defendant. *Corporation of Mercer University v. National Gypsum Co.*, 258 Ga. 365 (1988).

There is no "discovery" rule in property damage cases generally. *Corporation of Mercer University v. National Gypsum*, 258 Ga. at 367 (limiting the discovery rule "to cases of bodily injury which develop over an extend period of time," and limiting continuing tort theory to personal injury cases: "This case involves property damage only, there is no personal injury involved. The applicable statute of limitations in this case is OCGA § 9-3-30 which provides that the action must be brought within four years after the right of action accrues. … An action under OCGA 9-3-30 must be brought within four years of substantial completion.").

Cases involving negligent construction or a design defect must be brought by the owner of the property within four years of substantial completion, *Stamschror v. Allstate Ins. Co.*, 267 Ga. App. 692 (2004) ("A cause of action brought by the owner of real property for negligent construction, design or installation of that real property accrues on the date of substantial completion of the project, not upon discovery of the negligence."); *see also Colormatch Exteriors, Inc. v. Hickey*, 275 Ga. 249 (2002) (statute of limitations begins to run on subsequent owner on the date of purchase, not date of substantial completion). The date of substantial completion does not apply to a non-owner whose property is first damaged by a manufacturing or design defect on the real property of another, as the limitations period begins when the property of the plaintiff is first damaged. *Travis Pruitt & Assoc. v. Bowling*, 238 Ga. App. 225 (1999) ("This rationale does not apply when the defect is in property owned by someone other than the plaintiff. [Plaintiff/neighbor] could not have successfully maintained a cause of action against Pruitt for negligent design or construction of neighboring property before there was any damage to her own property.").

Minors and persons who are legally incompetent because of mental retardation or mental illness, who are such when the cause of action accrues, shall be entitled to the same time after their disability is removed to bring an action as is prescribed for other persons. O.C.G.A. § 9-3-90. For minors, the tolling of the statute does not end until their 18th birthday (age of majority).

The limitation period for a tort action arising from a traffic violation is tolled until the prosecution for the violation is no longer pending. O.C.G.A. § 9-3-33; *Williams v. Durden*, 347 Ga. App. 363 (2018). In *Williams*, plaintiff and defendant were involved in an automobile accident and defendant received a traffic citation for following too closely, and the citation listed 11/18/14 as the date for contesting the citation in court. On 10/27/14, defendant paid the citation, which resulted in bond forfeiture on 11/18/14, the court date set in the citation. Plaintiff filed a personal injury lawsuit against defendant on 11/10/16, and defendant moved for summary judgment contending the lawsuit was barred by the applicable two-year statute of limitation. Defendant further contended that even if the statute of limitation was tolled by O.C.G.A. § 9-3-99 based on the prosecution being terminated when defendant paid the citation on 10/27/14, such limitation period began to run on that date and expired two years later, before plaintiff filed the lawsuit. The court of appeals held that plaintiff's lawsuit was tolled by O.C.G.A. § 9-3-99 until defendant's prosecution for the traffic violation was no longer pending, and certified records produced by plaintiff showed that the disposition date of defendant's traffic citation was 11/18/14. Therefore, although defendant paid the traffic citation on 10/27/14, the prosecution of defendant for the traffic citation remained pending until 11/18/14, when a municipal court judge forfeited defendant's bond and disposed of the case. *See* O.C.G.A. § 40-13-1 (uniform traffic citation "shall serve as ... the record of the disposition of the matter by the court before which the accused is brought"); *Beneke v. Parker*, 293 Ga. App. 186, 187, 667 S.E.2d 97 (2008) (noting that the "traffic citation was not resolved until ... the bond forfeiture"), rev'd in part on other grounds, 285 Ga. 733, 684 S.E.2d 243 (2009). Accordingly, there was evidence that plaintiff's personal injury action was tolled by O.C.G.A. § 9-3-99 until 11/18/14 and plaintiff's lawsuit thus was timely.

**Punitive Damages:** Punitive damages may be awarded only when it is proved by clear and convincing evidence that the defendant's actions demonstrated such willful misconduct, malice, fraud, wantonness, oppression or entire want of care as to raise a presumption of conscious indifference to the consequences. O.C.G.A. § 51-12- 5.1. Procedurally, the Complaint must specifically ask for punitive damages. If such damages are claimed, the trier of fact must make a special finding from the evidence produced at trial whether an award of punitive damages will be made. If it is found that punitive damages are to be awarded, the trial resumes to receive evidence relevant to a decision regarding the amount of damages sufficient to deter, penalize or punish. The issues of liability for punitive damages and the amount to be awarded must be bifurcated.

In cases where the defendant acted (or failed to act) with specific intent to cause harm, or while under the influence of alcohol or drugs, there is no limitation on punitive damages. Otherwise, there is a cap on punitive damages of $250,000, regardless of the number of defendants. *See Bagley v. Shortt,* 261 Ga. 762 (1991).

With respect to cases involving claims of products liability, the statute prohibits multiple awards of punitive damages arising from the same act or omission, regardless of the number of causes of action that may arise. In other words, a corporation may be punished only one time in Georgia for acts or omissions that result in a products liability action. While plaintiffs only get "one shot" against corporations in products liability cases, punitive damages in those cases are uncapped. However, the statute allocates 75 % of the punitive damages award to the state treasury. O.C.G.A. § 51-12-5.1(e)(2).

Punitive damages cannot be recovered in wrongful death actions, because the wrongful death award itself is considered to be in the nature of a civil penalty against the defendant. On the other hand, punitive damages can be recovered in tort actions that survive the death (such as an action for pain and suffering) under the Georgia survival statute. O.C.G.A. § 9-2-41.

**Joint & Several Liability:** Georgia adopted in 2005 a statute providing for apportionment of fault as among joint and several tortfeasors as part of its Tort Reform Act of 2005, O.C.G.A. § 51-12-33 mandates apportionment of damages as follows: "(a) Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault."

The Georgia Supreme Court clarified that apportionment is required whether or not the plaintiff is responsible in part for the injury or damages claimed. *McReynolds v. Krebs*, 290 Ga. 850, 852 (2012) ("Damages are apportioned among tortfeasors according to their percentages of fault, regardless of whether the total amount of damages was first reduced under subsection (a) [of the statute] to account for the plaintiff's share of liability. Accordingly, we hold that in applying OCGA § 51-12-33, the trier of fact must apportion its award of damages among the persons who are liable according to the percentage of fault of each person even if the plaintiff is not at fault for the injury or damages claimed."). The Georgia Court of Appeals construed the Georgia Supreme Court's decision in *McReynolds* to hold that the revised "O.C.G.A. § 51–12–33 supplanted claims for common-law contribution and apportionment." *Dist. Owners Ass'n, Inc. v. AMEC Envtl. & Infrastructure, Inc.,* 322 Ga. App. 713, 718, 747 S.E.2d 10 (2013). Based on the text of O.C.G.A. § 51–12–33, *McReynolds,* and *District Owners,* Georgia law has abrogated joint and several liability and contribution. Instead, the trier of fact assesses "the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit." O.C.G.A. § 51–12–33(c). The trier of fact takes nonparties into consideration when plaintiff has entered into a settlement agreement with them, or when "a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault." O.C.G.A. § 51–12–33(d). The trier of fact assesses "percentages of fault of nonparties ... only in the determination of the percentage of fault of named parties." O.C.G.A. § 51–12–33(f)(1).

A right of contribution among joint tortfeasors remains under the statute when the trier of fact has not apportioned damages in reaching its verdict, including when a joint tortfeasor enters into a settlement. *Zurich American Inc. Co. v. Heard*, 321 Ga. App. 325, 740 S.E.2d 429, 432-33 (2013) ("We first consider whether claims for contribution between joint tortfeasors who have settled with the plaintiff still exist flowing the enactment of the apportionment statute, OCGA § 51-12-33. … Based upon the plain language of subsection (b), joint liability and the right of contribution no longer exists when damages have been apportioned by the *trier of fact* under this subsection. Based upon this plain language, it cannot be interpreted to abolish the right of contribution between settling tortfeasors when there has been no apportionment of damages by a trier of fact.") (emphasis in original).

Non-parties who contribute to an injury, including those settling with a plaintiff pre-trial, can also be assigned a percentage of fault by the fact finder. O.C.G.A. § 51-12-33(d). A defendant seeking apportionment to a non-party must give notice not later than 120 prior to trial of its intention to seek such apportionment, and must introduce competent evidence that the non-party contributed to the alleged injury or damages. O.C.G.A. § 51-12-33(c), (d); *see also Union Carbide Corp. v. Fields*, 315 Ga. App. 554, 558-59 (2012) (applying statutes).

The apportionment statute does not apply to vicariously liable defendants, such as an employer sued under a *respondeat superior* theory. *PN Express, Inc. v. Zegel*, 304 Ga. App. 672, 680 (2010). In *Zegel*, the Court of Appeals noted that the plaintiff's action against PN Express was entirely based on notions of derivative liability, which was statutory employment and respondeat superior. *Id.* Generally, where a party's liability is solely vicarious, that party and the actively-negligent tortfeasor are regarded as a single tortfeasor. *Id.* Thus, where a defendant employer's liability is entirely dependent on principles of vicarious liability, such as respondeat superior, then "[u]nless additional and independent acts of negligence over and above those alleged against the servant or employee are alleged against the employer, a verdict exonerating the employee

also exonerates the employer." *Id.*

**Worker's Compensation:** In order to be entitled to workers' compensation benefits, an employee must suffer an injury by accident arising out of and in course and scope of his employment. O.C.G.A. § 34-9-1. There must be some actual physical injury resulting from an incident before a psychological injury can be compensable. A purely mental injury resulting from a purely mental trauma is not compensable. *Abernathy v. City of Albany,* 269 Ga. 88 (1998).

Worker's compensation is generally the exclusive remedy that an employee has against his employer for a work related injury if the employer is subject to the act. O.C.G.A. § 34-9-11(a). The exclusive remedy doctrine in Georgia does not prevent the employee-plaintiff from filing an action for an intentional tort, for the employer's failure to provide workers' compensation insurance, for fraud in the procurement of an award or settlement, for property damage for negligent inspection by the insurer acting in a role other than that as workers' compensation insurer, for professional negligence, or for delay in providing medical care.

Medical and indemnity benefits paid by a workers' compensation carrier to a workers' compensation claimant are subject to subrogation in an action against a third party tortfeasor. Under the Workers' Compensation Act, O.C.G.A. § 34–9–1 et seq., if an employer pays workers' compensation benefits to an employee who was injured while acting in the course and scope of his employment, and the employee sues a third party for causing the injuries, the employer can intervene in the suit and seek to enforce a subrogation lien against any recovery obtained by the employee from the third party. O.C.G.A. § 34–9–11.1(b). *Best Buy Co. Inc. v. McKinney*, 334 Ga. App. 42 (2015); *City of Warner Robbins v. Baker,* 255 Ga. App. 601 (2002). A "recovery" to which the lien can attach includes the proceeds of any settlement between the employee and third party. *Georgia Elec. Membership Corp. v. Garnto,* 266 Ga. App. 452, 453, 597 S.E.2d 527 (2004). But the lien is limited to the recovery of the amount of disability benefits, death benefits, and medical expenses paid under [the Act] and shall only be recoverable if the injured employee has been *fully and completely compensated,* taking into consideration both the benefits received under [the Act] and the amount of the recovery in the third-party claim, for all economic and noneconomic losses incurred as a result of the injury.

(Emphasis supplied.) OCGA § 34–9–11.1(b). In other words, a precondition to the enforcement of the lien is that the employee have been fully and completely compensated for his losses, a determination that "is made by comparing the sum of the workers' compensation benefits paid by the [employer] and the amount of the employee's recovery in the third-party action, to all economic and noneconomic losses caused by the injury." *Georgia Elec. Membership Corp.,* 266 Ga. App. at 453, 597 S.E.2d 527.

In a third party action where the employee plaintiff sues the third party tortfeasor (and where the employer has been found not to be negligent), the workers' compensation carrier is entitled to a right of subrogation where it is first shown that the employee plaintiff has received full and complete compensation for his or her injury whether through a judgment or settlement with the tortfeasor. O.C.G.A. § 34-9-11.1(b). The case law clarifies that in order to perfect this right, the workers' compensation carrier must intervene, triggering a determination by the trial court (and not a jury) whether the injured employee has been made whole. *Canal Ins. Co. v. Liberty Mutual Ins. Co.*, 256 Ga. App. 866, 871-72 (2002) ("Even when the [subrogation] lien is asserted against the recovery, this must be done in the trial court. The trial court and not a jury must determine if the employee has been fully and completed compensated by workers' compensation benefits and by a recovery from a third-party tortfeasor."); *Austell Healthcare v. Scott*, 308 Ga. App. 393, 397 (2011) ("If an employer has intervened in an employee's lawsuit against a third-party tortfeasor, after the employee has obtained a verdict in his favor *or* settled the case, it is the trial court's duty to consider evidence and determine whether the employee has been fully and completely compensated.") (emphasis in original).

**Bad Faith:** An insurer's failure to pay a covered first party claim within 60 days of a proper demand by its insured, where the refusal was made in bad faith, can result in extra-contractual liability to the insured including the full amount of "the loss," the greater of 50% of policy limits or $5000, and attorneys' fees

associated with pursuing a claim against the insurer. O.C.G.A. § 33-4-6. There is no claim under this statute if there is a bona fide dispute as to policy coverage; as to liability on the underlying claim; or where there is a "doubtful issue of law" such as a matter of first impression.

A similar bad faith provision for property damage claims made under a motor vehicle policy is promulgated in O.C.G.A. § 33-4-7. (covering "loss because of injury to or destruction of property"); *see also King v. Atlanta Casualty, Incs. Co.*, 279 Ga. App. 554 (2006) (discussing and applying statute) (statute indicates it applies to "claimant[s] potentially entitled to recover against the insured", *i.e.*, a third party). The statute likewise specifically states the penalty for such bad faith: "Any insurer who breaches this duty may be liable to pay the claimant, in addition to the loss, not more than 50 percent of the liability of the insured for the loss or $ 5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of the action." O.C.G.A. § 33-4-7(a).

In the third-party context, insurance carriers face extra-contractual liability for a negligent failure to settle a case within policy limits (it does not have to be a "bad faith" failure to settle).

Insurers and insureds should pay special attention upon receipt of a third party demand for payment with an arbitrary time limit. These demands are designed to create the possibility of extra-contractual liability and are sometimes call "*Holt*" demands, referring to the case of *Southern General Ins. Co. v. Holt* 200 Ga. App. 759, affd in part and rev'd in part, 262 Ga. 267 (1991).

Pursuant to O.C.G.A. § 9-11-67.1, prior to the filing of a lawsuit, any offer to settle a tort claim for personal injury, bodily injury, or death arising from the use of a motor vehicle and prepared by or with the assistance of an attorney on behalf of a claimant shall be in writing and contain the following material terms: (1) The time period within which such offer must be accepted, which shall be not less than 30 days from receipt of the offer; (2) Amount of monetary payment; (3) The party or parties the claimant or claimants will release if such offer is accepted; (4) The type of release, if any, the claimant or claimants will provide to each releasee; and (5) The claims to be released.

If a *Holt* demand expires, plaintiffs counsel may then refuse to later settle for policy limits and seek an extra-contractual recovery from an insurance carrier.

If a *Holt* demand expires and the case proceeds to trial, the insurer may be liable to its insured for the entire verdict and punitive damages. It is not uncommon for an insured defendant in this situation to assign their "bad faith" claim to the plaintiff as part of a post-judgment settlement.

An improper refusal to defend can trigger "bad faith" penalties under O.C.G.A. § 33-4-6, which includes exposure not only for the policy holder's defense costs and attorney's fees, but also a penalty up to 50% of the insurer's liability for the loss. Bad faith for purposes of O.C.G.A. § 33-4-6 is any frivolous and unfounded refusal in law or in fact to pay according to the terms of the policy. *See King v. Atlanta Casualty Ins. Co.*, 279 Ga. App. 554, 631 S.E.2d 786 (2006); *see also Fortson v. Cotton States Mut. Ins. Co.*, 168 Ga. App. 155, 308 S.E.2d 382 (1983).

Where there has been such an entire want of care amounting to a conscious indifference to the consequences, this may constitute tortious conduct making punitive damages authorized in any action for negligence or intentional tort of bad faith. *See* O.C.G.A. § 51-12-5.1*; Thomas v. Atlanta Cas. Co.*, 253 Ga. App. 199, 558 S.E.2d 199 (2001). To be entitled to an award of punitive damages, the plaintiff must recover some type of compensatory damages caused by either the negligence or bad faith of the insurer. *Thomas, supra; Southern Gen. Ins. Co. v. Holt*, 262 Ga. 267, 416 S.E.2d 274 (1992). A verdict in excess of the policy limits has been held by Georgia courts to constitute pecuniary damages necessary to support an award of punitive damages. *Thomas, supra; Southern Gen., supra.*

In *Holt, supra*, the claimant sued the insured for personal injuries arising from a motor vehicle accident in which the insured was clearly liable. The claimant originally made a $30,000 settlement demand on October 7, 1987, informing the insurer of her $1,926 in medical expenses and $5,184 in lost wages, along with the fact that it was possible she might have to undergo a $7,500 nerve block procedure. This settlement demand was withdrawn on October 13, 1987 when the claimant was hospitalized and told she might have a ruptured disk. On October 19, 1987, the claimant informed the insurer that she definitely had a ruptured disk and requested that the insurer apprise her of the insured's policy limits. The insurer refused to do so in a letter dated October 28, 1987, but the insurer requested that the claimant send it more medical information.

The *Holt* claimant made another settlement demand for the insured's policy limits on November 2, 1987, informing the insurer that her medical expenses at that point were roughly $10,000 and that her lost wages were over $5,000. This demand letter, or *Holt* letter as it is now known, contained a contingency that the insured's settlement demand must be accepted by the insurer within ten days. The claimant then sent correspondence to the insurer again on November 9 and 10, 1987 reiterating her demand and providing further medical information. She then sent another letter on November 12, 1987 extending her settlement demand through November 17, 1987 and providing even further medical information. In response, the insurer did not communicate with the claimant during this period of time regarding her settlement demand nor did it seek an extension of time in which to respond. Further, the insurer did not inform the insured of the settlement demand, the extent of the claimant's injuries, or the fact that the claimant had offered to settle the case within the insured's policy limits.

On November 18, 1987, the *Holt* claimant informed the insurer by letter that the time limit for responding to her settlement demand had expired and that she would no longer consider settling the case. The insurer offered to settle the case for policy limits on November 20, 1987, but this offer was rejected. Ultimately, this type of time limit demand was upheld, even though an unconditional offer of the limits was made just two days after it expired. This should give you an idea of how the Georgia courts will enforce this type of liability against insurers, even with just a slight delay.

After an excess verdict, the insured assigned to the claimant her claim for compensatory damages arising from the insurer's alleged negligent and bad faith failure to settle the case for the policy limits. The insured retained her claim for punitive damages against the insurer. The court affirmed that such a cause of action exists under Georgia law, and set forth the following guiding principles in this regard:

In deciding whether to accept an offer to settle a claim within policy limits, the insurer "must accord the interest of its insured the same faithful consideration it gives its own interest. . . ." "[I]t is for the jury to decide whether the insurer has or has not so acted."

*Holt*, 409 S.E.2d at 856.

The court found that the insurer's failure to communicate with either the claimant or the insured during the period of the time demand was evidence to be considered by the jury in determining whether the insurer acted negligently or in bad faith. The insurer argued that it had no duty to respond to the claimant within the arbitrary time limit, to which the court responded:

> . . . an insurer need not be governed by such time limit. Rather, the issue is whether the insurer acted in good faith or bad faith, and that is to be determined by the circumstances of each case.

*Holt*, 409 S.E.2d at 856.

The reasonableness of the length of the time limit is typically a question for the jury and involves the jury's determination of whether the insurer had sufficient time to evaluate and process the settlement demand. In doing this, the jury should balance the need for the insurer to follow its internal procedures with the insurer's

duty to protect the interest of the insured.

The law imposes upon the insurer the duty to exercise diligence, intelligence, good faith, and honest and conscientious fidelity to the common interest of the insured as well as itself in determining whether to accept or reject an offer of settlement. While the insurer may properly give consideration to its own interest, it must in good faith give at least equal consideration to the interest of the insured, and if it fails to do so, it acts in bad faith.

*Holt*, 409 S.E. 2d 857 (emphasis added).

In other words, when the insurer begins to act more in its own interests than the insured's, it will be evidence of bad faith (rising above the negligence standard).

In *Holt*, the insurer further contended that the claimant was the cause of her own injuries due to her refusal to accept the insurer's offer to settle the case for policy limits that was made two days after the expiration of the time limit. However, the court rejected this argument, and additionally noted:

At best, the insurer's "acceptance" of an expired offer may constitute evidence that the insurer, realizing its error, attempted to minimize the damages it may have caused its insured.

*Holt*, 409 S.E.2d at 859.

**Alcohol:** The minimum legal drinking age in Georgia is 21. O.C.G.A. § 3-3-23.

A DUI offense can be charged as a "per se" offense, sometimes called Driving With an Unlawful Alcohol Concentration ("DWUAC"). *See generally* O.C.G.A. § 40-6-391. This charge is based strictly on the driver's Blood Alcohol Concentration level ("BAC"). The BAC to qualify for a per se violation in Georgia is 0.08 for most drivers; 0.04 for operators under a Commercial Driver's License; and 0.02 for drivers under age 21. ).

A DUI offense can also be charged as "DUI-less safe", based upon combination of alcohol and unsafe driving. No BAC level is required for a charge of DUI-less safe, just adequate proof of "(1) driving, (2) under the influence of alcohol, (3) to the extent that it was less safe for the person to drive", which can be proven through circumstantial evidence of alcohol impairment. *See Hinton v. State*, 319 Ga. App. 673, 675 (2013). Evidence regarding BAC level is permitted in a civil or criminal case involving allegations of DUI-less safe, however, and may give rise to certain inferences. *See* O.C.G.A. § 40-6-392(b)(1) ("If there was at that time [of chemical analysis] an alcohol concentration of 0.05 grams or less, the trier of fact in its discretion may infer therefrom that the person was not under the influence of alcohol[.]); § 40-6-392(b)(2) ("If there was at that time [of chemical analysis] an alcohol concentration in excess of 0.05 grams but less than 0.08 grams, such fact shall not give rise to any inference that the person was or was not under the influence of alcohol, . . . but such fact may be considered by the trier of fact with other competent evidence in determining whether the person was under the influence of alcohol[.]"). Though a conviction for DUI-less safe does not require proof that a person actually committed an unsafe act while driving, the commission of a traffic violation can constitute evidence that a person is impaired. *See Yglesia v. State*, 288 Ga. App. 217, 218 (2007) (and cases cited therein).

Refusal to submit to state administered chemical test following arrest, or test results above the "per se" threshold, can result in an administrative driver's license suspension for one year exclusive of criminal sanctions. *See generally*, O.C.G.A. § 40-6-391 *et. seq.*

Although Georgia law normally caps punitive damages at $250,000, the cap is removed against "active" tortfeasors who acted or failed to act while under the influence of alcohol.

"[I]n Georgia, employers or principals may be vicariously liable for punitive damages arising from the acts or omissions of their employees or agents if such tortious conduct is committed in the course of the employer's or principal's business, within the scope of the servant's or agent's employment, and is sufficient to authorize a recovery of punitive damages under O.C.G.A. § 51–12–5.1." *Johnson v. Allen*, 272 Ga. App. 861, 613 S.E.2d 657 (2005); *Fowler v. Smith,* 237 Ga. App. 841, 843(2), 516 S.E.2d 845 (1999); *Sightler v. Transus, Inc.,* 208 Ga. App. 173, 430 S.E.2d 81 (1993). Further, if there is an absence of evidence supporting DUI claims of the insured driver, arguably punitive damages should not get to a jury. "Punitive damages are not recoverable where the driver at fault simply violated a rule of the road." *Miller v. Crumbley*, 249 Ga. App. 403, 405(3), 548 S.E.2d 657 (2001), quoting *Carter v. Spells*, 229 Ga. App. 441, 442, 494 S.E.2d 279 (1997); accord *Fowler v. Smith*, 237 Ga. App. 841, 843(2), 516 S.E.2d 845 (1999); *see also Coker v. Culter*, 208 Ga. App. 651, 431 S.E.2d 443 (1993) (punitive damages not warranted even though defendant was speeding on wet roads, had consumed some alcohol, and behaved abominably after collision).

Georgia has adopted a Dram Shop Act, O.C.G.A. § 51-1-40. Generally one who provides alcohol to other parties is not liable for the harm caused by those parties. However if a provider gives alcohol to a minor whom he knows is about to drive, or to any noticeably intoxicated person whom he knows is about to drive, then there may be liability to any third parties injured in a subsequent traffic accident with the intoxicated driver. With respect to adult drivers, a central issue is the host/server's knowledge at the time of providing the alcohol that the intoxicated person intends to drive soon. *See Delta Airlines, Inc. v. Townsend*, 279 Ga. 511 (2005) (airline not liable for serving alcohol to intoxicated passenger because airline crew does not have knowledge of intention by passenger to drive a motor vehicle soon after arrival at airport: "Because patrons of land-based establishments serving alcohol generally have direct and immediate access to their vehicles, liability should attach to an owner who knew or should have known that a departing intoxicated customer would shortly be driving. The proximate connection between the consumption of alcohol be an airline passenger during a flight and his subsequent act of drunk driving is much more remote and attenuated."); *Shin v. Estate of Camacho*, 302 Ga. App. 243, 245-46 (2010) (no liability where host recognized driver's intoxicated state but did not serve him additional drinks: "[T]here is no evidence in the record that, when [driver] was in a state of noticeable intoxication [host] knowingly furnished alcoholic beverage to him. Although it is undisputed that [driver] consumed two glasses of soju after the fight, it is also undisputed that [host] did not personally serve [driver] the soju, did not see [driver] consume the soju, and did not have any other reason to know that [driver] consumed any additional alcoholic beverages after that point when he first became noticeably intoxicated.").

Punitive damages in tort actions are generally governed by O.C.G.A. § 51-12-5.1. Subsection (f) of the statute relates to cases in which a defendant acted or failed to act while under the influence of alcohol. It provides that if "the defendant acted or failed to act while under the influence of alcohol ... there shall be no limitation regarding the amount which may be awarded as punitive damages against an *active tort-feasor*." *Capp v. Carlito's Mexican Bar & Grill #1, Inc.* 288 Ga. App. 779 (2007) (Emphasis supplied.) A court construed the statute to mean that "such damages shall not be the liability of any defendant other than an active tort-feasor," that is, the defendant acting under the influence of alcohol. *Id.* The court of appeals noted that its interpretation of the statute was supported by the legislature's declared purposes in creating this subsection "to provide for removing the limitation on punitive damages for tort cases involving the influence of intoxicating or toxic agents *on* the defendant" and "to eliminate ... liability [for punitive damages] of third parties as joint tortfeasors." (Emphasis supplied.) Ga. L. 1997, p. 837; *see also Corrugated Replacements, Inc. v. Johnson*, 340 Ga. App. 364 (2017) (party who was derivatively liable to plaintiff was not liable for punitive damages due to the intoxication of the active tortfeasor).

The Georgia Supreme Court ruled liability may attach to a seller of alcohol to a clearly intoxicated person even where the alcohol is not intended to be consumed on the premises. *Flores v. Exprezit! Stores 98-Georgia, LLC*, 289 Ga. 466 (2011) ("We granted certiorari . . . to determine whether Georgia's dram shop act, OCGA § 51-1-40, applies when a convenience store sells closed or packaged containers of alcohol not intended for consumption on the premises to a noticeably intoxicated adult. We hold that it does[.]").

**Intra-Family** & **Spousal Immunity: Georgia** still follows the traditional policy with respect to intra-family tort immunity. *See Robeson v. International Indemnity Co.,* 248 Ga. 306 (1981). Thus "interspousal tort immunity doctrine" bars actions between spouses with respect to personal torts committed by one spouse against the other. *Larkin v. Larkin,* 268 Ga. App. 127 (2004). The doctrine provides that during marriage neither spouse has the right of action against the other for tortious personal injury. *See* O.C.G.A. § 51-11-6; *Barrett v. Carter,* 248 Ga. 389 (1981). The bar does not apply to wrongful death actions.

With respect to a parent, or person in loco parentis to a minor child, generally the parent is immune to suit for the tortious injury to his minor child. This doctrine of parental immunity also applies to foster parents, and to noncustodial parents who are exercising parental duties, such as paying child support. *Newsome v. Department of Human Resources,* 199 Ga. App. 419 (1991).

There are some exceptions to this general rule. A child who has reached majority or a minor who has been emancipated may sue the parent for a tort. *See Hollingsworth v. Hollingsworth,* 165 Ga. App. 319 (1983). Also any willful tort committed upon a minor child allows the child to bring suit against the parent. *'Fright v. 'Fright,* 85 Ga. App. 721 (1952).

**Seat Belt Defense:** Georgia law forbids the use of a "seat belt defense." Evidence a vehicle occupant was not wearing a seat belt may not be introduced at trial and may not be used "to diminish any recovery for damages arising out of the ownership, maintenance, occupancy, or operation of a motor vehicle.." O.C.G.A. § 40-8-76.1.

**Rental Coverage:** Rental companies must determine if the renter has liability insurance of his/her own, or sell liability insurance to the renter, or provide liability insurance for the benefit of the renter or possibly the driver. *See Alamo Rent a Car Inc. v. Hamilton,* 216 Ga. App. 659 (1995). The driver's liability coverage is primary if that is agreed to in the contract of the parties. O.C.G.A. 40-9-102; *See Zurich American Ins. Co. v. General Car and Truck Leasing System, Inc.,* 258 Ga. App. 733 (2002). In such situations the rental agency coverage is "excess" in the absence of some other agreement. However it is not clear under Georgia law whether that means the rental owner would have an obligation to provide minimum limits over and above the minimum limits provided by the rental driver's insurance. *See Jordan v. Spirit Rent a Car,* 252 Ga. App. 117 (2001). However, if the renter does not have any coverage, and if the rental agency did not sell spot insurance to the renter, the rental vehicle owner's insurance may become primary. *See Rabinovitz v. Accent Rent a Car,* 213 Ga. App. 786 (1994). Further, if the renter defrauds the rental agency by representing that he has insurance, and he does not, the rental company's coverage could still be held to be primary. O.C.G.A. § 40-9-102.

**Releases:** A quirk of Georgia law provides that if an insurer settles a claim without advance written consent of its insured, and fails to disclose the lack of consent in the release, then the release could be unenforceable. O.C.G.A. § 33-7-12(a). However if the insurer *discloses* the lack of consent, the release is effective to prevent the third party is barred from renewing or continuing to pursue recovery against the insured. O.C.G.A. § 33-7-12(b).

**Wrongful Death:** There are be two separate and distinct causes of action. One is by the statutory representative for the "full value of the life of the deceased," which includes the economic value of the life and the intangible value of the life, as determined by the enlightened conscience of a jury. O.C.G.A. § 51-4-1, et seq. The other is for the deceased's conscious pain and suffering, if any, before death, and for funeral and burial expenses. O.C.G.A. § 9-2-41. These claims may be brought together or separately, but on the defendant's motion, joinder is mandatory for all claims that derive from personal injuries a single individual sustains. O.C.G.A. § 9-11-19(a).

**"No Fault":** Georgia is not a "no fault" state.

**Liens:** Georgia law permits potential liens on causes of action and on future settlements to be asserted

under the proper circumstances by hospitals, healthcare providers, Medicare, Medicaid, Social Security Disability, workers compensation carriers and attorneys. Lienholders are sometimes permitted to intervene in ongoing litigation in order to protect their interests. Care should be taken in negotiating any settlement to protect the insured and the insurer from potential liens. This is a complicated area of the law.

**Permissive Use in Georgia:** Georgia courts adopted the "minor deviation" rule which means that a permittee's slight or inconsequential deviation from the permission granted by the named insured will not annul coverage. *Ditinger v. American Liberty Ins. Co.,* 117 Ga. App. 512 (1968). Even after Georgia enacted compulsory liability insurance laws, O.C.G.A § 33-34-1 et seq., Georgia courts have held that the liberal "first instance permission" rule does not apply to interpretation of automobile insurance contracts. *Williams v. Ga. Farm Bureau Mut. Ins. Co.,* 213 Ga. App. 128, 130 (1994); Cf. *Nat'l Servs. Indus. v. Transamerica Ins. Co.,* 206 Ga. App. 337, 340 (1992) (first instance permission rule applied to self-insurers in absence of insurance liability contract).

Under Georgia law, when a second permittee uses a car via another person who did have permission to use the car, this is a permissive use under the insurance policy as long as "the use falls within the scope of the permission." *Hamrick v. American Cas. Co. of Reading, Penn.,* 245 Fed. App. 891 (11th Cir. 2007) (quoting *Prudential Property Cas. Ins. Co. v. Walker,* 219 Ga. App. 84 (1995)). This is commonly referred to as the "second permittee" doctrine. Georgia uses a two-part test to determine whether the second permittee's use falls within the scope of permission: (1) Whether the owner's permission to the first permittee included the use to which the second permittee put the car; and (2) whether the scope of the permission the second permittee received from the first permittee exceeded the scope of permission given the first permittee by the owner. *Prudential Property Cas. Ins. Co. v. Walker,* 219 Ga. App. 84 (1995).

Thus, Georgia courts have held that if the first permittee receives unlimited permission from the owner to

use the owner's vehicle, the user can give permission to another person to use the vehicle and such use may also be unlimited. See *Federated Mut. Ins. Co. v. Lawson,* 217 Ga. App. 695 (1995) (dealership's broad permission to first permittee to 'use' the car would extend to fraternity brother of first permittee who was driving the car at time of accident with permission from first permittee). Case law is somewhat convoluted but typically holds that if the vehicle was to be used for a limited purpose, liability for the use may be limited. See *Prudential Property Cas. Ins. Co. v. Walker*, 219 Ga. App. 84 (1995) (no coverage in accident caused by second permittee where father lent car to son for purpose of transporting belongings back to college, and son lent car to second permittee so she could drive to Florida for personal matter); *Allstate Ins. Co. v. Wood,* 211 Ga. App. 662 (1994) (second permittee was covered as a permissive user where the named insured gave permission to her boyfriend's daughter to use the car for socializing, boyfriend's daughter gave second permittee permission to drive the car for socializing, and then second permittee caused an automobile accident while driving the car); *Select Ins. Co. v. Register,* 192 Ga. App. 145 (1989) (no coverage where insured company assigned company truck to employee to drive between work and home. Employee then used the truck on a personal errand, met some friends and drank alcohol for several hours, then drove the company truck into another vehicle).

Under Georgia compulsory insurance liability law, liability insurance is required not only for the benefit of the insured, but to ensure compensation of innocent victims of negligent motorists. *Woody v. Georgia Farm Bureau Mut. Ins. Co.* 250 Ga. App. 454 (2001); *Cotton States Mut. Ins. Co. v. Neese,* 254 Ga. 335 (1985); *Anderson v. Southeastern Fidelity Ins. Co.* 251 Ga. 556 (1983). Thus, Georgia courts have ruled exclusionary clauses as invalid where the exclusion would deprive an innocent injured plaintiff of the benefit of insurance coverage for injuries caused by a tortfeasor. *See Stepho v. Allstate Ins. Co.,* 259 Ga. 475 (1989) (household member exclusion invalid where injured son had no other insurance coverage); *Cotton States Mut. Ins. Co. v. Neese,* 254 Ga. 335 (1985) (fleeing from apprehension exclusion invalid where injured motorist had no other insurance and insured driver fled after accident); *see also State Farm Mut. Auto. Ins. Co. v. Drawdy,* 217 Ga. App. 236 (1995)

(lack of notice to insurer exclusion enforceable because injured party had access to uninsured motorist coverage); *Auto-Owners Ins. Co. v. Jackson,* 211 Ga. App. 613 (1994) (intentional damage exclusion not void in light of available uninsured motorist coverage for injured party). When Georgia courts rule such clauses as invalid on public policy grounds, they only require the insurer to provide coverage up to the minimum limits of Georgia law ($25,000/$50,000) as set forth in O.C.G.A § 33-7-11(a)(1)(A). *Stepho,* 259 Ga. 475.

The above public policy analysis is not applied to named driver exclusions where such exclusions are clear, unambiguous and supported by consideration, however, regardless of compulsory insurance coverage laws. *Young v. Progressive Max Ins. Co.*, 2013 WL 2458426, *2 (M.D. Ga., June 6, 2013) (applying Georgia law: "Named driver exclusions are enforceable under Georgia law as long as they are clear, unambiguous and supported by consideration, and do not violate public policy or compulsory insurance laws. These exclusions are enforceable without requiring an inquiry into the availability of other insurance to the injured party.") (internal quotations omitted), citing *Ison v. State Farm Fire & Cas. Co.*, 230 Ga. App. 554, 555 (1998) ("Georgia cases specifically construing named driver exclusions, however, have enforced the exclusions without requiring an inquiry into the availability of other insurance to the injured party. Perhaps this is because a named driver exclusion is analogous to there being no policy at all with respect to the named excluded driver; conversely, the other exclusions address behavior of the insured (or a permissive driver) who has a direct connection with an existing policy.").

An insurer may rightfully deny any coverage under a policy, including collision and comprehensive, while the insured automobile is being driven by an excluded driver. *Cox v. Southern Guar. Ins. Co.*, 254 Ga. App. 776 (2002). But an additional rule applies to excluding a driver from uninsured motorist coverage. In *Roberson v. 21st Century National Insurance Company,* a named driver excluded from coverage under the applicable policy sought to recover uninsured motorist coverage nonetheless. 327 Ga. App. 545 (2014). The driver was properly excluded in writing with consideration expressed in the policy. The court, however, held that the insured was entitled to UM coverage because the insurer failed to comply with the provisions of O.C.G.A. § 33-7-11(a)(3) which required that UM coverage be rejected specifically in writing. In *Roberson*, the named driver exclusion was bargained for, but it did not conform to the statute. Without a specific rejection of UM coverage for a driver, the insured is required to provide UM coverage in the amount required by statute.

Georgia law does not provide that an insurer of a vehicle must provide liability coverage for a thief driving the insured automobile. See *McCraney v. Fire & Casualty Ins. Co.,* 182 Ga. App. 895, 896 (1987); *Federated Mutual Insurance Company v. Lawson,* 217 Ga. App. 695 (1995).

NOTE THAT THE CASES AND STATUTES ARE PROVIDED BY WAY OF ILLUSTRATION. STATUTORY AND CASE LAW OFTEN CHANGES AND A PARTICULAR FACT SITUATION MAY BE GOVERNED IN ANY NUMBER OF WAYS. THE READER IS URGED TO CONTACT G. RANDALL MOODY AT DREW ECKL & FARNHAM LLP, 404.885.1400 FOR INFORMATION.

# Hawaii

**Bodily Injury:** Hawaii is a No-Fault State. The Hawaii Motor Vehicle Insurance Law requires proof of motor vehicle liability insurance or evidence of equivalent financial responsibility prior to registration of any vehicle. Haw. Rev. Stat. § 431:10C-104. The law makes exceptions for vehicles owned by or registered to an agency of the federal government or to any antique motor vehicle defined in Haw. Rev. Stat. § 249-1. *See* Haw. Rev. Stat. § 431:10C-104(d).

The minimum required limits of the policy are $20,000 per person, with an aggregate limit of $40,000 per accident, for all damages arising out accidental harm sustained by any one person. *See* Haw. Rev. Stat. § 431:10C-301.

A threshold of $5,000 applies to tort actions brought as a result of bodily injury, sickness or disease arising out of the ownership, operation, maintenance or use of a motor vehicle. Haw. Rev. Stat. § 431:10C-306.

The same restrictions apply to motorcycles with respect to coverage and the tort threshold. Haw Rev. Stat. §§ 431:10G-102, 431:10G-105, 431:10G-301.

**Property Damage:** The Motor Vehicle Insurance Law also requires liability coverage of at least $10,000 per accident for property damage. Haw. Rev. Stat. § 431:10C-301. While Hawaii is a no-fault state for injuries, it is not for property damage. The driver-at-fault in an accident is responsible for damages to vehicle and property. Hawaii has no statute providing for abandonment of salvage.

**Personal Injury Protection:** Hawaii is a no-fault state and, therefore, requires Personal Injury Protection ("PIP"). Haw. Rev. Stat. § 431:10C-303. PIP pays the insured, members of his household, guests and pedestrians up to $10,000 per person for medical expenses, lost wages and replacement services regardless of fault. Haw. Rev. Stat. § 431:10C-103.5.

PIP benefits shall be substantially comparable to the requirements for prepaid health care plans, as provided in Haw. Rev. Stat. Chapter 393. Rates for non-emergency services contained in the workers' compensation schedules apply. Haw. Rev. Stat. §§ 431:10C-103.6, 431:10C-308.5.

**Medical Payments:** Not required. Medical payments coverage beyond PIP benefits is completely optional. Lost wages benefits are not recoverable under this coverage part. Although no threshold applies to the ability to recover under medical payments coverage, it does not cover any expenses which are payable or which would have been payable, except for a deductible elected by the insured, under personal injury protection coverage.

Coverage need not be specifically rejected in writing, and medical payments benefits are not subject to subrogation. Persons entitled to workers' compensation benefits as a result of an accident may receive medical payments benefits, unless the injured person was employed by the named insured and was injured in the course of his or her employment by the named insured. In such cases, coverage is excluded. Medical payments benefits may not be considered in calculating amounts recoverable under bodily injury claims. Finally, medical payments benefits only cover expenses incurred within two years of the accident.

**Uninsured/Underinsured Motorist Coverage:** By statute, uninsured motorist ("UM") must be offered, but may be declined. Under Haw. Rev. Stat. § 431:10C-301, a minimum amount of uninsured motorist and under-insured motorist coverage must be provided unless the insured rejects the coverage in writing. The insurer must conspicuously display the coverage terms, including the premium amounts for said coverage and provide an opportunity for the named insured to reject the coverage in writing. The statute also provides for minimum coverage of $20,000.00 per person with an aggregate amount of $40,000.00 if coverage is not rejected by the named insured. *Id.* UM coverage may not exceed the amount of bodily injury coverage in the

policy. *Id.* Coverage follows the insured's person under *Dawes v. First Insurance Company of Hawaii, Ltd.*, 77 Haw. 117, 123, 883 P.2d 38, 44 (1994). *See also Mikelson v. United Services Automobile Association*, 107 Haw. 192, 111 P.3d 601 (2005). Thus, even a pedestrian may have a UM claim. *Dawes, supra.*

Similarly, purchase of underinsured motorist coverage is optional, but insurers must offer it.

**Negligence:** Hawaii has adopted a modified comparative fault rule. A plaintiff may recover when his negligence "was not greater than the total amount of negligence attributable to the person or persons against whom recovery is sought," but his damages are reduced by the percentage of his negligence. Haw. Rev. Stat. § 663-31. Thus, if a plaintiff is more than 50% responsible for his own injuries, his conduct will bar any recovery. *See Dorrance v Lee*, 90 Haw. 143, 976 P.2d 904 (1999). The comparative negligence statute applies as long as at least one defendant is found negligent. *See Ozaki v. AOAO Discovery Bay*, 87 Haw. 265, 954 P.2d 644 (1998) (Pursuant to Haw. Rev. Stat. § 663-31, it was determined that the plaintiff's negligence of 5% exceeded the combined negligence of the defendants which was 3% and the assailant's intentional criminal conduct which comprised 92% of the proportionate fault was not considered for purposes of the statute).

Hawaii has abolished the defense of assumption of risk in most situations. *Larsen v. Pacesetter Systems, Inc.*, 74 Haw. 1, 837 P.2d 1273 (1992) ("Where comparative negligence principles apply, assumption of risk that is a form of contributory negligence serves to reduce, rather than bar, plaintiff's recoveries.").

**Statute of Limitations:** Under Haw. Rev. Stat. § 431:10C-315, the statute of limitations does not run until two years after the last no-fault payment is made. Pursuant to Haw. Rev. Stat. § 657-13, the statute of limitations does not begin run against a minor until the minor's 18th birthday.

In general, actions in tort and actions in contract to recover for personal injuries must be brought within 2 years of the date of loss. Haw. Rev. Stat. § 657-7. In general other actions in contract must be brought within 6 years after the cause of action accrues. Haw. Rev. Stat. § 657-1.

**Licensing Requirements:** Insurance adjusters must be licensed in the State of Hawaii. Haw. Rev. Stat. § 431:9-201. Reciprocity may be available if the other state's requirements are the same or similar to those of the State of Hawaii. *Id.*

**Punitive Damages:** Punitive damages may be awarded only in cases where the wrongdoer 'has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations'; or where there has been 'some willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to the consequences. Kang v. Harrington, 59 Haw. 652, 587 P.2d 285 (1978). Punitive damages must be proven by clear and convincing evidence. *Masaki v. General Motors Corp.*, 71 Haw. 1, 6, 780 P.2d 566, *reconsideration denied*, 71 Haw. 664, 833 P.2d 899 (1989).

Punitive damages are routinely excluded by insurance policies. However, those exclusions may not prevent an award of punitive damages in insurance bad faith actions. *The Best Place, Inc. v. Penn America Insurance Company*, 82 Haw. 120, 920 P.2d 334 (1996).

**Joint and Several Liability:** Hawaii has partially abolished joint and several liability. Haw. Rev. Stat. § 663-10.9. However, joint and several liability does apply to motor vehicle accidents **except** where highway maintenance or design is involved and the tortfeasor did not have reasonable prior notice of defect and the individual tortfeasor's degree of negligence is less than 25%, otherwise liability for non-economic damages is limited to proportional degree of negligence. *Id.*

**Workers' Compensation:** The Workers' Compensation Act provides a right to sue a person other than the insured where the injury was caused under circumstances creating a legal liability in the third party. Haw. Rev. Stat.§ 386-8. Either the employee or the insurer may file an action against a third party. A settlement by agreement of the parties requires written consent of both the employer and the employee. *Id.*

**Settlement of Claims Of Minors:** The most effective way to ensure that a settlement in a case involving personal injury to a minor will withstand a subsequent challenge by the minor when he reaches the age of majority is to petition the court for approval of the settlement. Although this procedure is not compulsory in Hawaii, Plaintiffs' attorneys normally petition the court for approval of a settlement involving the claim of a minor. The court may appoint a guardian or guardian ad litem and/or hold an evidentiary hearing before approving the settlement. Because this procedure is available only for "any case before the court," court approval of the settlement of a minor claim not yet in litigation will requires the commencement of a "friendly suit" between the parties.

A child is not held to the same standard of care as an adult. Rather, the negligence of a child is "judged by the standard of behavior expected from a child of like age, intelligence, and experience." *Viveiros v. State*, 55 Haw. 677, 513 P.2d 487 (1973); *Fraga v. Hoffschlaeger Co.*, 26 Haw. 557, *aff'd*, 290 F.146 (1922); *Grace v. Kumalaa*, 47 Haw. 281, 386 P.2d 372 (1963).

**Unfair Practices:** Unfair methods of competition and unfair or deceptive acts or practices in the insurance industry are defined in Haw. Rev. Stat. § 431:13-103. Claims under the insurance statutes are invoked exclusively by the Insurance Commissioner pursuant to Haw. Rev. Stat. § 431:13-107; *Hunt v. First Insurance Co.*, 82 Haw. 363, 922 P.2d 976 (Haw. App. 1996).

While a private cause of action may not be available under the insurance statutes, a private action for bad faith may be maintained. *The Best Place, Inc. v. Penn America Insurance Company*, 82 Haw. 120, 920 P.2d 334 (1996). It is also unclear whether the insurance statutes preempt the more general unfair or deceptive practices statutes contained in Haw. Rev. Stat. Chapter 480. *Jenkins v. Commonwealth Land Title Insurance Company*, 95 F.3d 791 (9th Cir. 1996). Chapter 480 also allows private causes of action. Haw. Rev. Stat. § 480-2.

**Alcohol:** A driver is presumed to be driving under the influence (DUI) of alcohol if he has a blood alcohol content (BAC) of .08. Haw. Rev. Stat. § 291E-61(a)(4). The BAC limit for minors is zero. Haw. Rev. Stat. § 291E-64. The statute prohibits drivers under the age of 21 from operating a vehicle with any measurable amount of alcohol in their system. Id. Drivers arrested for DUI are deemed to have consented to submission to a breath or blood test. Haw. Rev. Stat. § 291E-11. A driver arrested on an DUI charge who refuses to submit to a such a test shall have his license suspended for a period of 180 days (3 years if the driver is under 21 years of age or has been convicted of DUI once previously, 5 years if the driver has been convicted of DUI twice and for life if the driver has been convicted of three or more DUI violations).

Hawaii has enacted a Dram Shop statute. Haw. Rev. Stat. § 281-78. .

**Legal Age:** The age of majority in Hawaii is 18. Haw. Rev. Stat. § 577-1. However, the minimum drinking age is 21. Haw. Rev. Stat. § 291E-64 .

**Inter-Family/Spousal Immunity:** Hawaii has abolished both inter-family and inter-spousal immunity doctrines. Family members and spouses are thus free to file claims against one another. *See Peters v. Peters*, 63 Haw. 653, 634 P.2d 586, *reconsideration denied*, 64 Haw. 688 (1981); *Campo v. Taboada*, 68 Haw. 505, 720 P.2d 181 (1986); Haw. Rev. Stat. § 572-28.

**Seat Belt Defense:** Not presently available even though Hawaii requires the use of seat belts. Haw. Rev. Stat. § 291-11.6.

**Wrongful Death:** The statute does not cap the amount of damages that the estate may recover. Haw. Rev. Stat. § 663-3. Such damages may be given as under the circumstances shall be deemed fair and just compensation, with reference to the pecuniary injury and loss of love and affection, including:

(1) Loss of society, companionship, comfort, consortium, or protection;

(2) Loss of marital care, attention, advice, or counsel;

(3) Loss of care, attention, advice, or counsel of a reciprocal beneficiary as defined in chapter 572C;

(4) Loss of filial care or attention; or

(5) Loss of parental care, training, guidance, or education, suffered as a result of the death of the person; by the surviving spouse, reciprocal beneficiary, children, father, mother, and by any person wholly or partly dependent upon the deceased person. The jury or court sitting without jury shall allocate the damages to the persons entitled thereto in its verdict or judgment, and any damages recovered under this section, except for reasonable expenses of last illness and burial, shall not constitute a part of the estate of the deceased.

*Id.*

An action to recover damages under the wrongful death statute shall be brought within 2 years of the date of death. Haw. Rev. Stat. § 663-3. The limitations period is tolled by Haw. Rev. Stat. § 657-13 during minority of surviving children.

**Liens:** Pursuant to Haw. Rev. Stat. § 507-4, hospitals and other health care providers are entitled to a lien subject to any common-law lien, on any judgment obtained by the claimant for personal injuries.

Whenever a party that had received PIP benefits obtains a tort recovery via judgment or settlement, the insurer is entitled to reimbursement for 50% of PIP benefits paid. Haw. Rev. Stat. § 431:10C-307.

**Rental Coverage:** Under Hawaii law, a U-drive motor vehicle insurance policy shall be primary, but a rental car company may shift primary responsibility for bodily injury and property damage to the renter's insurance policy as long as it provides the Plaintiff with information to serve a complaint on the renter or operator. Haw. Rev. Stat. § 431:10C-303.5. If the rental company is unable to provide sufficient information for the plaintiff to serve the renter or operator, the rental company's policy remains primary, but the rental company has the express right of subrogation against the renter and operator for any amount paid out. *Id.*; Haw. Rev. Stat. § 431:10C-301(a)(2).

**Permissive Use:** Under Hawaii law, coverage for permissive use is mandated by statute. AIG Hawai'i Insurance Co., Inc. v. Vicente, 78 Hawai'i 249, 891 P.2d 1041 (1995); Haw. Rev. Stat. §§ 287-25(2), 431:10C-301(a)(2). By statute, coverage is required for an operator who has the express or implied permission of the insured. 78 Hawai`i at 251, 891 P.2d at 1043.

Express permission must be of an affirmative character, directly and distinctly stated, clear and outspoken, and not merely implied or left to inference. State Farm Mut. Auto. Ins. Co. v. GTE Hawaiian Telephone Co., Inc., 81 Hawai'i 235, 245, 915 P.2d 1336, 1346 (Hawai'i 1996) (quoting 12 G. Couch, Cyclopedia of Insurance Law § 45:351 at 694 (2d ed. 1981)).

Implied permission may arise as a product of the present or past conduct of the insured, and the relationship between the parties, including the lack of any objection to the use by the permittee, which signifies acquiescence or consent of the insured, and is usually shown by such usage and practice of the parties over a sufficient period of time prior to the day on which the insured car was being used, as would indicate to a reasonable mind that the permittee had the right to assume permission under the particular circumstances. State Farm Mut. Auto. Ins. Co. v. GTE Hawaiian Telephone Co., Inc., 81 Hawai`i at 245, 915 P.2d at 1346. With a showing that the vehicle was placed in the hands of the operator by consent, a presumption arises that the particular use to which the vehicle was being put was within the scope of that consent as measured by the law. Id. (quoting Columbia Casualty Co. v. Hoohuli, 50 Haw. 212, 437 P.2d 99 (1968)). Overcoming this presumption requires evidence establishing that consent had been expressly withdrawn prior to the actual use, or that the actual use was so far afield from the purpose of the loan of the vehicle as to amount to, at best, a

temporary tortious conversion. Id. The term "temporary tortious conversion" is defined as being a "gross deviation" from the scope of permission afforded upon the putative permittee. Hoohuli, 50 Haw. at 220, 437 P.2d at 106.

# Idaho

**Bodily Injury:** Bodily injury coverage is required in Idaho. I.C. § 49-1229. The limits are $25,000/$50,000. I.C. §§ 49-1229 and 49-117(20). There are no thresholds, as the coverage must be for any bodily injury "caused by maintenance or use" of a motor vehicle. I.C. § 49-1229(1). The mandatory insurance requirements do not allow for collateral offsets except that the policy may provide for prorating with other valid, enforceable policies of insurance. See I.C. § 42-1212(8).

**Property Damage:** Property damage coverage is mandatory in Idaho. I.C. § 49-1229. The minimum limit for coverage is $15,000. I.C. § 49-1229 and 49-117(20). There is no statutory law indicating how salvage must be handled, how loss of use must be handled, whether there can be loss of use on a totaled vehicle or compensation for tax, title, and license fees. Case law limits loss of use damages to repairable, but not totally destroyed property, unless the property is income producing. Case law also allows recovery of diminished value of a vehicle which has been repaired.

**Personal Injury:** Because Idaho has no no-fault insurance requirements, personal injury coverage is not mandatory nor are there required minimum limits.

**Medical Payments:** Because Idaho has no no-fault insurance provisions, it has neither a minimum limit on medical payments coverage nor is such coverage mandatory.

**Uninsured/Underinsured Motorist:** The minimum limit for uninsured bodily injury coverage is $25,000/$50,000. I.C. §§ 41-2502 and 49-117(20). There are no minimums relating to uninsured property damage coverage. Idaho law requires that an insurer offer uninsured bodily injury coverage, which the insured can reject in writing. I.C. § 41-2502. Idaho law does not require underinsured motorist property damage coverage, nor any form of underinsured motorist coverage. In Idaho, the insurer is subrogated for payments on uninsured or underinsured motorist coverage. See I.C. § 41-2505.

**Negligence:** Idaho has adopted a modified comparative negligence statute following the "Wisconsin" or "individual" rule where a plaintiff can recover only from an individual defendant more negligent than he or she. In single party cases, the plaintiff can recover only if plaintiff's negligence is less than the defendant. I.C. § 6-801. In Idaho, the negligence of a driver will not be imputed to the passenger, absent joint venture, but under the individual rule adopted in Idaho, the negligence of the driver will reduce recovery by a passenger against any defendant. Any defendant will be liable only for their percentage share of negligence causing the injury absent joint and several liability. See below. A jury can assess negligence to a non-party if such negligence is proven at trial.

**Presentation of Medical Expenses at Trial/Collateral Sources:** In Idaho, a plaintiff is allowed to present the amount actually invoiced by his or her medical providers to the jury, with any write-offs or reductions occurring post-verdict by the Court. Idaho's statute on prohibiting double recoveries from collateral sources provides: "Evidence of payment by collateral sources is admissible to the court after the finder of fact has rendered an award. Such award shall be reduced by the court to the extent the award includes compensation for damages, which have been compensated independently from collateral sources." I.C. § 6-1606. Per the Idaho Supreme Court that statute requires "the jury be provided with the medical providers' bills that are subject to the write-offs, absent any write-offs. If a verdict is rendered that includes those amounts, '[s]uch award shall be reduced by the court.'" *Eldridge v. West*, ___ Idaho ___, 458 P.3d 172, 183 (2019). The Idaho Supreme Court ruled it is only possible to give effect to the statute "by submitting the bills as they exist, prior to the write-offs, to the factfinder." *Id.* Any applicable reductions will occur after the verdict is rendered and outside the presence of the jury.

**Statutes of Limitations:** The statute of limitations for bringing a suit for personal injury is two years in Idaho. I.C. § 5-219 (4). The limitation period for property damage is three years. I.C. § 5-218. These limitation periods are tolled during minority, but only up to a total of six years. I.C. § 5-230. An adjuster is not required by statute to advise the claimant of the limitation period, but case law estops the defense if the claimant reasonably believes from representation that the limitation period will not be raised as a defense.

**Punitive Damages:** In Idaho, there is no prohibition against coverage of punitive damages by insurance, and by case law, punitive damages are covered unless specifically excluded in the policy. Under Idaho law, punitive damages cannot be pled in a complaint. Rather, the party seeking punitive damages must bring a subsequent motion and hearing in which that claimant bears the burden of showing a reasonable likelihood of recovering punitive damages at trial. I.C. § 6-1604. I.C. § 6-1604(3) which now provides that "[n]o judgment for punitive damages shall exceed the greater of two hundred fifty thousand dollars ($250,000) or an amount which is three (3) times the compensatory damages contained in such judgment. If a case is tried to a jury, the jury shall not be informed of this limitation." I.C. § 6-1604(3).

**Joint and Several Liability:** Joint and several liability has been abolished in Idaho, except where the tortfeasors are in a master servant relationship, were acting pursuant to a plan, and committed an intentional or reckless tort, where a statute regarding hazardous waste is violated or where the cause of action arises from the manufacture of medical devices or pharmaceutical products. I.C. § 6-803.

**Workers' Compensation:** Worker's compensation payments are subrogable. I.C. § 72-223. The insurer, surety, or employer may initiate suit or suit against the third party may be brought by the employee. Each must pay a proportionate share of costs and attorney fees. The surety has the right to first reimbursement from the recovery. Because Idaho is not a no-fault state, our law does not address whether a worker's compensation claimant can collect no-fault benefits. Nor does Idaho law address whether a worker's compensation claimant can make a successful uninsured or underinsured motorist bodily injury claim.

**Settlements with Minors:** Idaho law requires court approval of all settlements with minors. I.C. § 15-5-409a. There is no specific age in Idaho law where negligence can be attributed to a minor, but minority is a factor to be considered in whether a person acted negligently.

**Bad Faith Issues:** Idaho does recognize the tort of bad faith in the insurance context. Where an insurer intentionally or unreasonably delays or refuses to pay a legitimate claim, that insurer can be liable for bad faith conduct. It is not bad faith to deny a fairly debatable claim. Violation of the Fair Claims Practices Act is evidence of bad faith.

**Alcohol Issues:** In Idaho, the legal limit of intoxication is .08 percent alcohol concentration. I.C. § 18-8004. However, it is unlawful for a driver of a commercial vehicle to drive if alcohol concentration is between .04 and .08, and unlawful for a person under aged 21 to drive if alcohol concentration is between .02 and .08. There are no varying degrees of intoxication. A server of alcohol may be held liable under limited circumstances. Idaho's dram shop law, I.C. § 23-808, prohibits an action against the furnisher of alcohol, except in cases of service to someone under age or obviously intoxicated. Under Idaho's dram shop law, the claimant must give written notice of the claim to the defendant within 180 days of the accident and the notice of claim requirement is a condition precedent to filing suit.

**Legal Age:** The legal age in Idaho is age eighteen. I.C. § 32-101.

**Interfamily/Spousal Immunity:** Idaho does not recognize interfamily or spousal immunity, but our case law upholds the family exclusion in liability or homeowner's policies.

**Seatbelt Defense:** Idaho forbids the use of the seatbelt defense. I.C. § 49-673(8).

**Wrongful Death:** Under Idaho's wrongful death statute the heirs of the decedent (defined in I.C. § 15-1-201 as those who could inherit by intestate succession), and the decedent's spouse, children, stepchildren, parents, and when partly or wholly dependent upon the decedent for support or services, any blood relatives and adoptive brothers and sisters, may bring an action for damages. I.C. § 5-311. Pain and suffering and similar personal elements of damages are considered to abate upon the death of the decedent. Medical and funeral expenses for which the surviving heir is obligated are recoverable in an action for wrongful death. *Wyland v. Twin Falls Canal Co.*, 48 Idaho 789, 285 P. 676 (1930). While survivors may recover for loss of society, companionship, comfort, protection, guidance, advice, intellectual training, etc., grief and anguish suffered by survivors is not actionable. *Hepp v. Ader*, 64 Idaho 240, 130 P.2d 859 (1942); *Checketts v. Bowman*, 70 Idaho 463, 220 P.2d 682 (1950). Damages for wrongful death do not include loss of inheritance, loss of net accumulation and loss of earnings because these damages are too speculative for purposes of ascertaining the pecuniary loss to the beneficiary. *Pfau v. Comair Holdings, Inc.*, 135 Idaho 152, 15 P.3d 1160 (2000). With respect to a parent's recovery for a minor child, damages may "include contributions which the parents might reasonably have expected to receive from the earnings of the deceased during minority and/or the comfort, society and companionship that the deceased would have afforded to the parents." *Volk v. Baldazo*, 103 Idaho 570, 651 P.2d 11 (1982).

**Cap-On Noneconomic Damages:** Noneconomic damages (pain and suffering, disfigurement, general damages) are currently capped at $372,865.27. The cap increases annually on July 1st, equivalent to the percentage increase of the average state wage for worker's compensation cases. The cap is disregarded or does not apply if the defendant is found to have acted willfully or recklessly or if the defendant's conduct amounts to a felony under state or federal law. I.C. § 6-1603.

**Permissive Use:** Under Idaho Law, the owner of a vehicle is liable for injury or damage caused by a user of that vehicle if the user was operating the vehicle with the owner's express or implied permission. Idaho Code § 49-2417(1), Motor Vehicles: Owner's Tort Liability for Negligence of Another – Subrogation:

> "Every owner of a motor vehicle is liable and responsible for the death of or injury to a person or property resulting from negligence in the operation of his motor vehicle, in the business of the owner or otherwise, by any person using or operating the vehicle with the permission, express or implied, of the owner, and the negligence of the person shall be imputed to the owner for all purposes of civil damages."

For purposes of determining coverage under an automobile liability policy, and whether the permissive user was acting within the "scope of the permission granted," Idaho has adopted the "liberal" or "initial permission" rule. *Oregon Mut. Ins. Co. v. Farm Bureau Mut. Ins. Co. of Idaho*, 218 P.3d 391 (Idaho 2009). Under the "liberal" or "initial permission" rule, the permissive user of the vehicle will be considered to be within the scope of the owner's permission "unless the use so far exceeds the initial permission that the permittee is akin to a thief or convertor." *Id.* at 398. The owner's liability for imputed negligence (excluding instances of principal/agent or master/servant) is limited to the amount set forth under "proof of financial responsibility" in Idaho Code § 49-117, or the limits of liability insurance maintained by the owner, whichever is greater (Idaho Code § 49-2417(2)). The current amount set forth under "proof of financial responsibility" in Idaho Code §49-117 is $15,000.00 for property damage, $25,000.00 for bodily injury or death per person, and $50,000.00 for bodily injury or death per accident. Idaho Code § 49-117(20).

# Illinois

**Bodily Injury:** Illinois has the following mandatory liability insurance in the following minimum amounts for personal injury:

a) $20,000 – Injury or death of one person in an accident;

b) $40,000 – injury or death of more than one person in an accident.

*See* 625 ILCS 5/7-203; *State Farm Mut. Auto. Ins. Co. v. Enterprise Leasing Co. of Chicago*, 899 N.E.2d 408, 412 (Ill. App. 1st Dist. 2008).

Most courts in Illinois have defined "bodily injury" to mean "bodily injury to a person." When "bodily injury" is defined to mean "bodily injury, sickness, or disease…including death resulting from any of these," courts have limited its application to "actual physical injury." *Commercial Union Ins. Co. v. Image Control Property Management, Inc.*, 918 F.Supp. 1165, 1171 (N.D. Ill. 1996). In general, Illinois courts are reluctant to extend the term "bodily injury" beyond its ordinary meaning. Consequently, injuries solely for mental distress or mental anguish do not qualify for "bodily injury" coverage.

**Property Damage:** Property damage is defined as "physical injury to tangible property" or "loss of use of tangible property." *Essex Ins. Co. v. Wright*, 862 N.E.2d 1194, 1196 (Ill. App. 1st Dist. 2007). In general, the term "property damage" differentiates between damage to tangible property that constitutes property damage, which may be covered, and intangible property losses such as economic interests, which may not be construed as property damage and therefore may not be covered. *Hartford Accident & Indemnity Co. v. Case Found. Co.*, 294 N.E.2d 7, 14 (Ill. App. 1st Dist. 1973).

Illinois applies the "economic loss rule" with limited exceptions. *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443, 448 (1982). Under the economic loss rule, a plaintiff cannot recover purely economic losses under tort theories. Recognized in Illinois as the Moorman doctrine, the economic loss rule precludes recovery for losses that result from failed expectations regarding the product, such as due to deterioration or component part failure resulting in only economic loss, such as profits. *Id.* at 450. This is true regardless of whether the plaintiff can recover under an action in contract. *Anderson Elec. v. Ledbetter Erection Corp.*, 503 N.E.2d 246, 249 (1986).

Illinois has established a mandatory minimum property damage insurance coverage of $15,000. 625 ILCS 5/7-203.

**Negligence:** Illinois has adopted a modified comparative fault rule. Under this scheme, the plaintiff's contributory negligence is a factor that reduces damages by the percentage of the plaintiff's own fault that proximately causes the injuries. *Casey v. Baseden*, 490 N.E.2d 4 (1986). A plaintiff who is more than 50% at fault in causing his or her own injuries is barred from recovering any award of damages. *Fetzer v. Wood*, 569 N.E.2d 1237, 1240 (Ill. App. 2d Dist. 1991).

**Uninsured/Underinsured Motorist:** The law in Illinois requires that insurers provide uninsured motorist coverage in an amount equal to the insured's bodily injury liability limits. Any named insured or applicant may reject uninsured motorist coverage in excess of such limits or, by written request, purchase limits of coverage which are less than the bodily injury limits. 215 ILCS 5/143a-2.

Every automobile insurance policy is required to compensate an insured in the event of injury by an uninsured motorist to the same extent the insured would have been compensated if the motorist had coverage in compliance with the financial responsibility law. (See Bodily Injury Section above). This requirement of the law may not be whittled away by an unduly restrictive definition in an insurance policy.

Uninsured coverage may be reduced by the amount of workers' compensation awarded to the insured. *See Sulser v. Country Mut. Ins. Co.*, 591 N.E.2d 427, 428 (1992).

Underinsured motorist coverage is intended only to assure compensation for an insured's injuries in an amount equal to his policy limit for the coverage; it is not intended to allow the insured to recover amounts from the insurer over and above the coverage provided by the underinsured motorist policy. Any benefit due under the terms of the underinsured motorist policy is reduced by the amount recovered from the tortfeasor. *Id.*

**Statute of Limitations**: In Illinois, every action commences by the filing of a complaint, unless otherwise expressly provided by statute. 735 ILCS 5/2-201. The filing of the complaint tolls the statute of limitations on the cause of action alleged even though summons is not served. *Kohlhaas v. Morse*, 183 N.E.2d 16, 19 (Ill. App. 4th Dist. 1962). To prevent plaintiffs from filing suit at the end of the statutory period and delaying summons thereby nullifying the time limit as any protection, the Illinois Supreme Court adopted its Rule 4 which states: "If the plaintiff fails to show reasonable diligence to obtain service, the action as a whole or as to any unserved defendant may be dismissed on the application of any defendant or on court's own motion." The commencement of an action in a court that lacks jurisdiction will not toll the statute of limitations unless the court lacking subject matter jurisdiction has authority to transfer the action to a court of competent jurisdiction. *Star-Kist Foods, Inc. v. Chiacgo, Rock Island & Pacific* R.R., 586 F.Supp. 252, 254 (N.D. Ill. 1984).

The statute of limitations provides that causes of action will accrue when the injured party knew, or should reasonably have known that it has been injured and this injury was wrongfully caused. *Knox College v. Celotex Corp.*, 430 N.E.2d 976 (1981). Under the equitable estoppel doctrine, the defendant is prevented from employing a limitations-period defense when the plaintiff reasonably relied on the defendant's words or conduct in delaying its complaint. *Swann & Weiskopf, Ltd. V. Meed Associates, Inc.*, 911 N.E.2d 395, 401 (Ill. App. 1st Dist. 1999).

**Third Party Actions:** Regardless of whether the third-party complaint is filed in the primary action or as an independent action, the generally applicable statute of limitations for personal injury is two years. The code of civil procedure provides that no action for contribution among joint tortfeasors shall be commenced with respect to any payment made in excess of a party's pro rata share more than two years after the party seeking contribution had made such payment toward discharge of its liability. *Caballero v. Rockford Punch Press & Mfg. Co., Inc.*, 614 N.E.2d 362, 364 (Ill. App. 1st Dist. 1993).

Several of the most common statutes of limitations:

a) Wrongful death and survival action: two years

b) Action in negligence for personal injury: two years

c) Action in negligence for property damage: five years

d) Actions against a municipality: one year

e) Action for breach of a written contract: ten years

**Joint Tortfeasor Contribution Act:** The Joint Tortfeasor Contribution Act (740 ILCS 100/0.01, *et seq.*) states that there is a right of contribution when two or more persons are subject to liability in tort arising from the same injury to a person or property. Contribution involves a sharing of payment of a damage award and it is available to all parties who are subject to liability. The pro rata share of each tortfeasor is determined in accordance with the relative culpability.

The Joint Tortfeasor Contribution Act provides for a reduction in recovery in favor of a defendant when the plaintiff has settled with another at-fault party. This provision is subject to a good-faith finding. The amount of the award is offset by the amount of the settlement.

**Joint and Several Liability:** In Illinois, all defendants are jointly and severally liable for plaintiff's past and future medical and medically related expenses regardless of the percentage of fault attributable to each defendant. As to all other damages awarded by a jury, a defendant whose fault is found to be less than twenty-five percent of the total fault attributable to the plaintiff, defendants, and third-party defendants will be responsible only for the percentage of damages attributable to his or her fault. However, a defendant whose fault is found to be more than twenty-five percent of the total fault attributable to the plaintiff, defendants, and third-party defendants can be held responsible for all damages attributed to all the defendants and third-party defendants. 735 ILCS 5/2-1117.

**Workers' Compensation:** The courts of the state of Illinois have held that the purpose of the Workers' Compensation Act is to provide financial protection for injured employees who might otherwise have to bear the loss of earnings themselves as a substitute for the common law system of master-servant liability. *Laffoon v. Bell & Zoller Coal Co.*, 359 N.E.2d 125, 128-129 (1976). The Act is intended to provide financial protection for the injured worker who, under the statutory rights, may receive an award without having to show negligence on the part of the employer or freedom from contributory negligence. The courts have made the following statements regarding the Act:

a) The Act substitutes for the common law rights and liabilities of employers and employees regarding work-related injuries or deaths;

b) The Act deprives employers of common law defenses against injured employees but provides fixed liability;

c) The Act deprives employees of the right to sue their employer in tort but provides that recovery for work related injuries is automatic and without regard to fault;

d) The Act provides protection to employees by providing them with prompt and equitable compensation for injuries.

The Workers' Compensation Act also establishes the Industrial Commission of the State of Illinois, which provides a forum for a quick and economical determination of any dispute that had arisen between an insured employee and the employer. The Commission is also charged with furthering industrial safety, assuring that all industries under the Act are either qualified as self-insurers or have insured their responsibility as required by Illinois law, assuring that the employers and insurance companies make payments to injured workers, and encouraging employers to rehabilitate employees who are injured to the extent that they cannot resume their former occupation.

The reach of the Act goes even beyond the employer to the insurance carrier in order to protect the injured worker. The insurance carrier may be made a party to proceedings when the employer is a party and an award may be entered jointly against the employer and the insurance carrier. *People ex rel. Baylor v. Highway Ins. Co.*, 316 N.E.2d 633, 639 (1974). Furthermore, the insurance carrier is subject to the same restrictions as the employer. The Commission has express authority relative to all aspects of workers' compensation insurance and can assess penalties against an insurer for willful violation of its orders and can initiate a suit to collect these penalties.

**Minor Settlements:** When a settlement is reached on behalf of a minor and the net settlement proceeds exceed $10,000, the procedures for the appointment of a guardian pursuant to the Probate Act must be followed. Upon the petition of a representative of the plaintiff, the court must review and approve the settlement and disbursement, including attorneys' fees and costs. The court must determine that the settlement is fair and reasonable and the disbursements are proper and to safeguard the minor's debts. If the

settlement payouts do not commence until after the minor reaches majority, then there is no need to open a minor's probate estate.

The general rule is that liens attach to a recovery for a minor even though the minor could not contract for the services to create the underlying debt. *In re Enloe's Estate*, 441 N.E.2d 868 (Ill. App. 4th Dist. 1982).

**Bad Faith:** Generally, an insurer that is found to have erroneously declined to defend is liable only to the amount of the limits of liability of the policy and the cost of defense, even if the judgment is in excess of that amount. *Aetna Casualty & Surety Co. v. Coronet Ins. Co.*, 358 N.E.2d 914 (Ill. App. 5th Dist. 1976). However, if the insurer is found not only to have wrongfully declined to defend but also acted in bad faith, then further consequences may adhere. A wrongful failure to defend that is found to be vexatious and unreasonable can give rise to liability for attorney's fees, costs, and certain penalties as provided by section 155 of the Illinois Insurance code, 215 ILCS 5/1, *et seq.*

**Alcohol/Intoxication:** According to the Dramshop Act, a person injured by an intoxicated person has a right of action against any person licensed in the State of Illinois to sell alcoholic liquor, who, by selling or giving alcoholic liquor causes the intoxication of such person. The Dramshop act creates liability for three general classes of individuals:

a) Those who are licensed to sell alcoholic beverages;

b) Those who pay for facilities knowing the facility will be used for underage drinking; and

c) Those who own or rent property with knowledge that alcoholic beverages will be sold on the property.

The limit for injury to a person is $45,000 for causes of action arising on or after July 1, 1998, plus consumer price index increases. 235 ILCS 5/6-21. The limit for property damage is identical to the limit for injury to a person. One plaintiff who sustains injury cannot recover an amount equal to the statutory limit for his or her injuries and an additional amount equal to the statutory limit for property damage, thus stacking his or her total recovery to double statutory limit. The statutory limit for recovery for one person includes any property damage claim and any claim for injury to the person. *Rinkenberger v. Cook*, 548 N.E.2d 133 (Ill. App. 4th Dist. 1989).

**Spousal Immunity:** In 1987, the Illinois legislature abolished spousal immunity completely. Since then, a spouse has the right to sue the other spouse for any tort committed during the marriage. *Safeco Ins. Co. v. Seck*, 587 N.E.2d 1251 (Ill. App. 2d Dist. 1992). The purpose of abolishing the immunity is to ensure the legal rights, entitlement, and powers of married women and men, rather than to ensure compensation for injured parties. *Id.* In interspousal tort action there is, of course, the possibility of collusion. Many insurers have responded to this threat by including family exclusion clauses in their policies. The courts of the state have held that such clauses do not violate the public policy behind the abolition of interspousal tort immunity.

**Seatbelt Defense:** The courts of this state have rejected the seatbelt defense. Therefore, currently in Illinois evidence of failure of a motorist to wear a seatbelt is not allowed with respect to either the question of liability or damages. *Clarkson v. Wright*, 483 N.E.2d 268, 270 (1985); codified in 625 ILCS 5/12-603.1(c) ("Failure to wear a seat safety belt in violation of this Section shall not be considered evidence of negligence, shall not limit the liability of an insurer, and shall not diminish any recovery for damages arising out of the ownership, maintenance or operation of a motor vehicle."). However, as later Illinois appellate courts as well as the Seventh Circuit have noted, the *Clarkson* rule only applies to the driver himself. *Bachman v. Gen. Motors Corp.*, 776 N.E.2d 262, 297 (Ill. App. 4th Dist. 2002) ("That section does not preclude all seat-belt evidence, but only evidence of nonuse in determining whether the person was negligent in failing to utilize the vehicle's seat-belt system."); *see also DePaepe v. Gen. Motors Corp.*, 33 F.3d 737, 746 (7th Cir. 1994) ("[T]he Illinois seat belt statute is directed to the contention that a plaintiff was himself negligent in failing to utilize the vehicle's restraint system."); *see also Bonney v. CRST Malone, Inc.*, No. 06-CV-345-WDS, 2007 WL 1500206 (S.D. Ill. May 21, 2007) (holding that evidence related to the use of seat belts by non-driving minors in the car may be

relevant to determine the extent to which that fact may have contributed to the plaintiff's injuries and damages).

**Healthcare Services Liens:** In Illinois, healthcare liens are governed by the Healthcare Services Lien Act. This Act for the first time made uniform the requirements for creating and recovering on lien claims. The requisites for the creation of a lien under this Act are the rendering of any service in the treatment, care, or maintenance of an injured person (except services rendered under the provisions of the Workers' Compensation act or the Workers' Occupational Diseases Act) and the service of notice of a lien in according with the provisions of the Act. The total amount of all healthcare liens cannot exceed 40% of the total amount recovered by settlement, judgment, verdict, and award.

Medicare liens are akin to super liens with first right to reimbursement. Medicare liens do not require notice to be binding. The courts of this state have held that the collateral source rule applies to restrict defendants from introducing evidence of the amount paid by Medicare but does allow defendants to challenge that the total amount billed does not reflect a reasonable amount. *Wills v. Foster*, 892 N.E.2d 1018, 1033 (2008). In determining what is reasonable, defendants are free to cross-examine any witnesses that a plaintiff might call to establish reasonableness, and the defense is also free to call its own witnesses to testify that the billed amounts do not reflect the reasonable value of the services rendered. *Id.* "Defendants may not, however, introduce evidence that the plaintiff's bills were settled for a lesser amount because to do so would undermine the collateral source rule." *Id.*

Health insurance of self-funded benefits provided by an employer's plan or by an employee organization is governed by the Employee Retirement Income Security Act. Those plans typically include reimbursement provisions which must be honored as protected subrogation rights out of settlement or judgment proceeds.

**Releases:** A release is a contract whereby a party abandons a claim or relinquishes a right that could be asserted against another. The release must state with particularity the parties' intention because it will release only those claims expressly covered by its terms. A person or entity that is not named in a release will not be bound by the terms of the release. Only those persons or entities specifically designated in a release or covenant not to sue are released thereby.

**Punitive Damages:** In Illinois, insurance for punitive damages is permitted if the damages are awarded on the basis of negligence, recklessness, or vicarious liability, but not if the damages are imposed because of intentional conduct in which the policy holder actively participated.

**Permissive Use:** In Illinois, primary motor vehicle liability insurance coverage routinely extends to protect those persons who are considered *permissive users* of the named insured's vehicle. *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Group*, 695 N.E.2d 848 (1998). This extension of insurance coverage is realized through an "omnibus clause," a provision which is read into every motor vehicle liability policy – commercial vehicles included – pursuant to Illinois law. *State Farm Mut. Auto. Ins. Co. v. Enterprise Leasing Co. of Chicago*, 899 N.E.2d 408 (Ill. App. 1st Dist. 2008); *Zurich Am. Ins. Co. v. Key Cartage, Inc.*, 923 N.E.2d 710 (2009).

The standard omnibus clause grants an operator protection as an additional insured if he or she uses the motor vehicle with either the express or implied permission of the named insured. Therefore, although permission may be realized through express conduct, such a finding of permissive use is not predicated exclusively upon the affirmative action(s) of the named insured. *Great Cent. Ins. Co. v. Harris*, 360 N.E.2d 1151 (Ill. App. 3d Dist. 1977) (citing *Orrill v. Garrett*, 241 N.E.2d 1, 3 (Ill. App. 4th Dist. 1968)). Surrounding circumstances may warrant *implying* the permissive use of a motor vehicle. *Id.* Specifically, implied permission may be established through either an inference or through other circumstances which arise from a course of conduct or relationship between the parties which shows a mutual acquiescence or lack of objection under the circumstances. *Id.*

If it is determined that permission was given to another person – either through the express conduct of the named insured or impliedly through the surrounding circumstances – then the "initial permission rule" will define the scope of the omnibus clause. *Country Mut. Ins. Co. v. Federated Mut. Ins. Co.*, 735 N.E.2d 1045, 1049 (Ill. App. 4th Dist. 2000). Under the initial permission rule, departure from the authorized use originally granted by the named insured will not terminate such initial permission, and thus will not preclude further liability coverage. *Id.* For example, the permissive user may deviate from the authority given by the insured, and will still be covered. *St. Paul Fire and Marine Ins. Co. v. Guthrie*, 773 N.E.2d 763, 765 (2002). In *St. Paul Fire and Marine Ins. Co. v. Guthrie*, the insurance policy covered any family member, but excluded coverage where a family member used the vehicle without the *owner's* permission. There, one family member rented a car and signed a rental agreement stating that no other persons were allowed to drive the vehicle. However, a different family member drove the rental vehicle, with permission of the signee, and was involved in an accident. The Illinois Court held that the initial permission rule applied. Thus, the passenger who rented the car was allowed to give the driver permission to operate it, and therefore the driver was still covered under the family's insurance policy. *Id.*

The initial permission rule has applied even where it could not be established that the initial permitee granted permission to a third-party to drive the named insured's vehicle. *United States Fidelity & Guarantee Co. v. McManus*, 356 N.E.2d 78 (1976).

Illinois Courts have adopted an expansive definition of the term *use*, as one can *use* a motor vehicle without actually operating it. *Orrill v. Garrett*, 241 N.E.2d 1 (1968). For example, the term "use" has been held to include "control of operation." *Pekin Ins. Co. v. Fidelity & Guar. Ins. Co.*, 830 N.E.2d 10, 15 (Ill. App. 4th Dist. 2005). In *Pekin*, a tow truck owner and driver used the van towed by them, and were considered permissive users and therefore additional insureds under the van owner's policy. *Id.*

# Indiana

**Insurance Minimums and Collateral Source Payments**

**Bodily Injury:** Minimum limit $25,000/$50,000. (Ind. Code § 9-25-2-3; Ind. Code § 9-25-4-5). Coverage is Mandatory.

**Property Damage:** Minimum limit $25,000. (Ind. Code § 9-25-2- 3(3)). Property Damage coverage is mandatory. *Id.*

**Personal Injury:** Minimum limit motor vehicles $25,000/$50,000. (Ind. Code § 9-25-2-3).

No minimum injury threshold exists before one can make a claim of bodily injury. Indiana has a collateral source statute. Its purpose is to determine the actual amount of the prevailing party's pecuniary loss and to preclude the injured party from recovering more than once from all applicable sources for each item of loss sustained in a personal injury or wrongful death action. *Shirley v. Russell*, 663 N.E.2d 532, 534-35 (Ind. 1996); Ind. Code § 34-44-1-1. Indiana's Collateral Source Rule is drafted as a rule of mandatory inclusion, not exclusion. *Shirley,* 663 N.E.2d at 535; *Knowles v. Murray,* 712 N.E.2d 1, 2 (Ind. Ct. App. 1999). Thus, evidence of collateral source payments are admissible except the following: 1) payments of life insurance or other death benefits; 2) insurance benefits for which the plaintiff or members of the plaintiff's family have paid for directly; or 3) payments made by Indiana or the United States or any agency, instrumentality, or subdivision of Indiana or the United States made before trial. Ind. Code § 34-44-1-2. Worker's compensation benefits paid are admissible, but proof of the amount of money that the plaintiff is required to repay if recovery is made is admissible as well. *Id.*

**Medical Payments under Blanket**

**Accident and Sickness Policies:** Medical payment coverage is not mandatory (Ind. Code § 27-8-5-15). Under any blanket accident and sickness policy, the policy may provide that any benefits provided by any such policy on account of hospital, nursing, medical or surgical services, may be paid directly to the hospital or person rendering such services; but, the policy may not require that the service be rendered by a particular hospital or person. Payment so made shall discharge the insurer's obligations with respect to the amount of insurance so paid.

**Uninsured/Underinsured Motorist:** All motor vehicle liability policies must include uninsured and underinsured motor vehicle coverage unless insured specifies in writing that he/she does not want coverage. (Ind. Code § 27-7-5-2, *et seq.*)

**Subrogation**: An insurer that, under certain circumstances, advances payment to the insured in an amount equal to the amount provided for in the offer of agreement or settlement, has full rights of subrogation as provided in its policy or endorsement affording the underinsured motorist coverage. (Ind. Code § 27-7-5-6).

**Negligence:** Indiana is a modified comparative fault state. Ind. Code § 34-51-2-1 *et seq.* If the percentage of fault of the claimant is greater than fifty percent (50%) of the total fault involved in the incident which caused the claimant's death, injury, or property damage, the claimant is completely barred from recovery. Ind. Code §§ 34-51-2-6 and 34-51-2-7. If the claimant's fault is 50% or less, then any contributory fault chargeable to the claimant proportionately diminishes the amount awarded as compensatory damages, but will not bar recovery. Ind. Code § 34-51-2-5. There is no contribution among joint tortfeasors in Indiana (Ind. Code § 34-51-2-12) and a defendant is only liable for his/her/its proportionate share of the claimant's total damages that are attributable to the tortfeasor's fault. Ind. Code § 34-51-2-8. The Comparative Fault Act does not apply to governmental entities or medical malpractice actions. Ind. Code §§ 34-51-2-1(b)(1); 34-51-2-2.

**Statute of Limitations:**

Bodily injury: 2 years. (Ind. Code § 34-11-2-4).

Damages to Personal Property: 2 years. (Ind. Code § 34-11-2-4).

Damages to Real Property: 6 Years. (Ind. Code § 34-11-2-7).

Minors: A person who is under legal disabilities (including minors) when the cause of action accrues may bring the action within two (2) years after the disability is removed. (Ind. Code § 34-11-6-1).

**Punitive Damages Covered by Insurance:** Public policy prohibits insurance coverage for direct liability for punitive damages; insurance may be obtained to cover vicarious liability for punitive damages. *Commercial Union Insurance Co. v. Ramada Hotel Operating Co.*, 852 F.2d 298, 299 (7th Cir. 1988); *Executive Builders, Inc. v. Motorists Insurance Cos.*, 2001 U.S. Dist. Lexis 6775, 2001 Westlaw 548391 (S.D. Ind.).

Punitive damages are allowed only where the evidence shows malice, fraud, gross negligence, or oppressiveness, and where such is inconsistent with the "hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, over-zealousness, mere negligence or other such noniniquitous human failing." *Budget Car Sales v. Stott*, 656 N.E.2d 261, 265 (Ind. App. 1995), *trans denied* (Ind. 1996), quoting *Travelers Indemnity Co. v. Armstrong*, 442 N.E.2d 349, 362 (Ind. 1982). A punitive damage claim must be proved by clear and convincing evidence. *Inlow v. Wilkerson*, 774 N.E.2d 51, 57 (Ind. App. 2002) *trans denied* (Ind. 2002).

By statute, a punitive damage award may not be more than the greater of three (3) times the amount of compensatory damages awarded or fifty thousand dollars ($50,000.00). Ind. Code § 34-51-3-4. A claimant is only entitled to twenty-five percent (25%) of any punitive damage award returned by a jury. Ind. Code § 34-51-3-6. The remaining seventy-five (75%) is payable to the State of Indiana to be deposited into the violent crime victims compensation fund. *Id.*

**Joint and Several Liability:** At common law, joint tortfeasors were jointly and severally liable to an injured plaintiff, meaning that two or more Defendants could be held liable for Plaintiff's full damages, regardless of their apportionment of fault. However, the Indiana Comparative Fault Act abrogated this rule in situations to which the Act applies. Therefore, the doctrine of joint and several liability does not apply to most tort suits. *See Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 109 (Ind. 2002); *See also Indiana Dept. of Ins. v. Everhart*, 960 N.E.2d 129, 138 (Ind. 2012). One notable Indiana exception is medical malpractice claims, in which healthcare providers are jointly and severally liable.

**Minor Settlements**

Court Approval Is Necessary. To be effective, all settlements involving minors must be approved by an appropriate probate court. If the settlement amount does not exceed the value of ten thousand dollars ($10,000), the court may, without the appointment of a guardian, giving of bond, or other order of court, authorize:

1) The deposit of the property in a depository authorized to receive fiduciary funds in the name of a suitable person designated by the court; or

2) If the property does not consist of money, the delivery of the property to a suitable person designated by the court.

The person receiving the property shall hold and dispose of the property in the manner the court directs and is entitled to reasonable compensation and to reimbursement for reasonable expenses incurred in

good faith on behalf of the incapacitated person and approved by the court. (Ind. Code § 29-3-3-1 and 29-3-3-2).

When the settlement amount is more than $10,000, the court will appoint a guardian and the settlement will be delivered to the guardian upon terms the court decides. (Ind. Code sec. 29-3-9-7).

**Bad Faith Issues:** Indiana recognizes a special remedy for first party claims of bad faith against an insurer. *Erie Ins. Co. v. Hickman*, 580 N.E. 320 (Ind. 1992). To prevail on a bad faith claim, a Plaintiff must show that the insurer had no legitimate basis for denying a claim or that the insurer was deliberately and intentionally failing to properly represent the insured's interests. *Friedline v. Shelby Insurance Co.,* 774 N.E.2d. 37, 40 (Ind. 2002). Indiana does not recognize third party bad faith claims. *Cain v. Griffin*, 849 N.E.2d. 507, 515 (Ind. 2006). An insurance company does not act in bad faith through mere negligence. *Travelers Indemnity Company v. Johnson* 2020 WL 820921 (citation pending). For a general outline of what constitutes improper claims practices, see Ind. Code 27-1-22 et. seq.

**Alcohol Issues:** A person who operates a vehicle with an alcohol concentration equivalent to at least eight-hundredths (0.08) gram of alcohol but less than fifteen-hundredths (0.15) gram of alcohol per one hundred (100) milliliters of the person's blood; or two hundred ten (210) liters of the person's breath; commits a Class C misdemeanor. But, a person who operates a vehicle with an alcohol concentration equivalent to at least fifteen-hundredths (0.15) gram of alcohol per one hundred (100) milliliters of the person's blood; or two hundred ten (210) liters of the person's breath; commits a Class A misdemeanor. Ind. Code § 9-30-5-1.

Indiana recognizes the 3rd party tort of negligent entrustment against vehicle owners in cases wherein the owner allows an incapacitated person to drive their vehicle and injury to a third party results. See *Davidson v. Bailey*, 826 N.E.2d. 80, 88 (Ind. Ct. App. 2005).

**Legal Age:** Age of majority: 18. Ind. Code § 1-1-4-5(1).

**Interspousal Immunity:** In 1972, the Indiana Supreme Court abrogated the common law doctrine of interspousal immunity in tort actions. *Brooks v. Robinson*, 259 Ind. 16, 284 N.E.2d 794 (1972). Spouses may sue one another in actions of ejectment, partition and contract. *Allstate v. Boles*, 481 NE.2d 1096 (Ind. 1985). Insurance contracts are still permitted to include household exclusion clauses. Allstate v. Boles , 481 N.E.2d. 1096 (Ind. 1985).

**Seatbelt Defense:** Failure to use a seat belt does not constitute fault under Indiana's Comparative Fault Act, does not limit the liability of an insurer, and is generally not admissible to mitigate damages in a civil action. *See Hopper v. Carey*, 716 N.E.2d 566 (Ind. Ct. App. 1999); *City of Fort Wayne v. Parrish*, 32 N.E.3d 275 (Ind. Ct. App. 2015).

**Wrongful Death:** Indiana has three wrongful death statutes. The first, Ind. Code § 34-23-1-1, commonly referred to as the "General Wrongful Death Statute," deals with situations where a person dies with dependent next of kin. The second, Ind. Code § 34-23-1-2, commonly referred to as the "Adult Wrongful Death Statute," deals with the death of unmarried adults without dependent next of kin. The third, Ind. Code § 34-23-2-1, commonly referred to as the "Child Wrongful Death Statute," deals with injury to or death of children. The recoverability of attorneys' fees under these statutes is addressed separately below.

**General Wrongful Death Statute:** Damages include last illness and death expenses, lost wages, and loss of consortium. Ind. Code § 34-23-1-1. The plaintiff in such suits are the estate of the decedent, with the beneficiaries of the claim being the surviving spouse and dependent next of kin, related by blood (or adopted offspring). "Proof of dependency must show a need or necessity of support on the part of the person alleged to be dependent ... coupled with the contribution to such support by the deceased." *New York Cent. Ry. v. Johnson*, 127 N.E.2d 603, 607 (Ind. 1955). The statute does not require total dependence; partial dependence will suffice. *Id.*

**Adult Wrongful Death Statute:** The Adult Wrongful Death Statute section for unmarried adult wrongful death only applies when the decedent is an unmarried adult and has no dependent next of kin. Ind. Code § 34-23-1-2. Damages include last illness and death expenses, which inure to the exclusive benefit of the estate for the payment of those expenses, and damages for loss of the adult person's love and companionship, which inure to the benefit of decedent's parents and/or non-dependent children. These latter damages are capped at $300,000. A parent or child seeking to recover has the burden of proving a genuine, substantial and ongoing relationship with the decedent. Evidence of the decedent's lost earnings is not admissible and a jury is not informed of the $300,000 cap on damages. *Id.* A 2020 bill to increase the cap on damages from $300,000 to $700,000 passed the Indiana Senate but was quashed in the Indiana House of Representatives. *See* IN SB0101.

**Child Wrongful Death:** The child wrongful death statute only applies to unmarried individuals who are under the age of 20 or under the age of 23 if attending higher education, e.g., college, vocation or technical school. Ind. Code. § 34-23-2-1. Damages include loss of the child's services, love and companionship, and last illness and death expenses, reasonable counseling expenses incurred by the parents or remaining siblings, and uninsured debts of the child which a parent is obligated to repay.

**Attorneys' Fees Under Wrongful Death Statutes:** Reasonable attorney fees are recoverable under the Child Wrongful Death Statute. *Angel Shores Mobile Home Park, Inc. v. Crays*, 78 N.E.3d 718 (Ind. Ct. App. 2017). Reasonable attorney fees are also recoverable under the Adult Wrongful Death Statute. *McCabe v. Commissioner, Indiana Dept. of Ins.*, 949 N.E.2d 816 (Ind. 2011). However, attorney fees are not recoverable under the General Wrongful Death Statute. *SCI Propane, LLC v. Frederick*, 39 N.E.3d 675 (Ind. 2015).

**Salvaged, Totally Demolished and Rebuilt Vehicles:** Indiana Code section 9-22-3 *et seq*. governs the processes for handling vehicles that have been salvaged, totally demolished or rebuilt.

**Releases:** Indiana follows the 'intent-of-the-parties' rule in respect to releases. *Huffman v. Monroe County Community School Corp.*, 588 N.E.2d 1264, 1267 (Ind. 1992). The parties' intent should govern interpretation of the release. Id. A proper release works only to release those parties involved in the agreement unless it is clear from the document that others were intended to be released as well. *Id.*

**Collision Waiver:** Rental car contracts are governed by the Indiana Vehicle Rental Act. Ind. Code § 24-4-9-10. Collision waivers are permitted as long as certain information is provided in writing to the renter. Section 9 of the Act limits the circumstances in which the rental agreements may provide that a waiver does not apply. *Harbour v. Arelco*, 678 N.E.2d. 381, 383 (Ind. 1997).

**No Fault:** No Fault Insurance has not been adopted in Indiana.

**Worker's Compensation:** The Indiana Worker's Compensation Act applies, with exceptions, to every employer and employee in the state. Ind. Code § 22-3-2-2. The Act provides the exclusive remedy for an employee injured as a result of an accident occurring in the course of employment. Ind. Code § 22-3-2-6. An injured employee must file a claim for compensation within two years after the occurrence. Ind. Code § 22-3-3-3. Employer or insurer paying worker's compensation benefits is entitled to reimbursement by way of lien or subrogation from a third party that is liable for causing the employee's injuries. Ind. Code § 22-3-2-13.

**Permissive Use:**

I.C. 27-1-13-7(a) provides, in pertinent part, that:

> No...policy shall be issued or delivered in this state to the owner of a motor vehicle, by any domestic or foreign corporation, insurance underwriters, association or other insurer authorized to do business in this state, unless there shall be contained within such policy a provision insuring such owner against liability for damages for death or injury to person or property resulting from negligence in the

> operation of such motor vehicle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, expressed or implied, of such owner.

Indiana courts have held that this statute only requires coverage for the owner of a vehicle when the owner gives either express or implied permission to use the insured vehicle and does not require coverage for permissive users. *Manor v. Statesman Insurance Co.,* 612 N.E. 2d 1109 (Ind. App. 1993). Thus, insurance companies may, consistent with public policy, limit or exclude coverage under a policy for permissive users. For instance, a policy provision excluding coverage for any permissive user under 25 years of age is valid and enforceable. *Greene v. American Underwriters, Inc.*, 364 N.E. 2d 1194 (Ind. App. 1977). Similarly, the Indiana Court of Appeals has held that a policy provision limiting liability coverage for permissive users to those who had no other available insurance or had other available insurance that was less than the limits required under the applicable financial responsibility laws did not violate public policy. *Harden v. Monroe Guaranty Insurance Co.,* 626 N.E. 2d 814 (Ind. App. 1993).

Alternatively, when construing permissive use provisions contained in automobile liability policies, Indiana courts apply a liberal rule pursuant to which one who has the permission of an insured owner to use his automobile continues as a permissive user while the car remains in his possession, even though he or she may later use the vehicle for a purpose not contemplated by the insured owner when he entrusted the automobile to the use of the permittee. *Bryles v. Wausau Insurance Cos*., 858 N.E. 2d 208 (Ind. App. 2006). In that regard, where the named insured places no prohibition or restriction upon the use or user of the vehicle, the permissive user is generally deemed to have the implied right to give permission to use the vehicle to a second permittee. *Learman v. AutoOwners Insurance Co.,* 769 N.E. 2d 1171 (Ind. App. 2002). However, where the named insured places an express restriction as to who can drive the vehicle or the circumstances under which the permissive user can operate the vehicle, that express restriction will be given effect and use of the vehicle in violation of the expressed restriction will not be deemed to be a permissive use of the vehicle. *Bryles v. Wausau Insurance Cos., supra.*

**Damages:** Damages in an auto liability action can include all forms of traditional damage including property and personal injury. Notably, the Indiana Supreme Court has noted that pre-judgment interest can be awarded under Ind. Code 34-51-4-1, even in actions against a UIM or UM policy. *Inman v. State Farm Mut. Auto Ins. Co.*, 981 N.E.2d 1202 (Ind. 2012).

# Iowa

**Coverage/Bodily Injury/Property Damage:** $20,000/$40,000/$15,000. The minimum mandatory limits are established under Iowa Code § 321A.5 of not less than $20,000 because of bodily injury or death to one person in any one accident and, subject to the limit for one person, to a limit of not less than $40,000 because of bodily injury or death of two or more persons in any one accident. If the accident has resulted in injury to or destruction of property, to a limit of not less than $15,000 because of the injury to or destruction of property of others in any one accident.

Under Iowa Code § 325A.6, motor carriers must have the minimum insurance coverage which meets the limits established in the Federal Motor Carrier Safety Regulations 49 C.F.R. Chapter 387.

A motor carrier who contracts with an owner-operator who is acting as an independent contractor shall not be required to insure the motor carrier's liability for the owner-operator. A motor carrier may procure compensation liability insurance coverage for these owner-operators and may charge the owner-operator for the costs of the premiums. A motor carrier shall require the owner-operator to provide and maintain a certificate of workers' compensation insurance covering the owner-operator's employees. An owner-operator shall remain responsible for providing compensation liability insurance for the owner-operator's employees. Iowa Code § 87.1.

**Uninsured/Underinsured:** Iowa Code § 516A.1 requires that all automobile liability policies issued in this state include uninsured and underinsured motorist coverage —for the protection of persons insured under such policy. ‖ Iowa Code § 516A.1. However, —the named insured may reject [some or all of such coverages], by written rejections signed by the named insured. ‖ Id. Under Iowa Code § 516A.1 there is a $20,000 statutory minimum. Iowa Code § 321A.1(11). When two or more policies provide underinsured benefits to an insured, the anti-stacking provisions of Iowa Code § 516A.2 are implicated. Iowa Code § 516A.2 provides that when there is more than one applicable motor vehicle insurance policy which provides underinsured motorist coverage:

the injured insured is entitled to recover up to an amount equal to the highest single limit for . . . underinsured . . . motor vehicle coverage under any one of the . . . policies insuring the injured person which amount shall be paid by the insurers according to any priority of coverage provisions contained in the policies insuring the injured person. Iowa Code § 516A.2(3).

Iowa Code § 516A.2 is considered to be part of all automobile insurance policies in the state of Iowa, and is treated as if the parties themselves had actually written it into the policy. *Mewes v. State Farm Auto Ins. Co., Inc.*, 530 N.W.2d 718, 722 (Iowa 1995).

**Negligence/Comparative Fault:** Under Iowa Civil Jury Instruction 700.2, —negligence‖ means failure to use ordinary care. —Ordinary care‖ is the care which a reasonably careful person would use under similar circumstances. —Negligence‖ is doing something a reasonably careful person would not do under similar circumstances or failing to do something a reasonably careful person would do under similar circumstances.

With respect to Plaintiff's fault, Iowa has adopted a modified comparative fault tort scheme by statute. Contributory fault will not bar recovery in an action by a Plaintiff to recover damages unless the Plaintiff bears a greater percentage of fault than the combined percentage of fault attributable to all Defendants. But any damages allowed will be diminished in a proportion equal to the amount of the fault attributable to the Plaintiff. A Plaintiff bearing 51% or more of the fault cannot recover at all. See Iowa Code § 668.3.

The jury will be asked to allocate a percentage of fault against all parties. The rule of joint and severe liability does not apply to Defendants who are found to bear less than 50% of the total fault assigned to all parties. However, a Defendant found to bear 50% or more of fault shall only be jointly and severely liable for economic damages and not for any non-economic damage awards. See Iowa Code §668.4.

The elements of a plaintiff's personal injury lawsuit are as follows:

Past medical expenses  Future medical expenses  Past lost wages  Loss of future earning capacity  Past loss of full mind and body  Future loss of full mind and body  Past physical and mental pain and suffering  Future physical and mental pain and suffering

In addition, an injured plaintiff's spouse will be entitled to recover for her loss of spousal consortium (see Iowa Jury Instruction 200.31).

In Iowa, punitive damages are governed by statute. See Iowa Code §668A.1. The statute requires proof —by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the Defendant from which the claim arose constituted willful and wanton disregard for the safety of another. …‖

**Statute of Limitations:** Injuries to the person or reputation must be brought within two years. See Iowa Code § 614.1. Those centered on unwritten contracts, injuries to property or relief on the ground of fraud within five years. Id. Those centered on written contracts, or on judgments of any court, within ten years. Id. With respect to minors, the time limits are extended in favor of minors so that they shall one year from and after attaining majority within which to commence an action. Id. at § 614.8. Under Iowa law, the age of majority of minors is 18 years. Iowa Code § 599.1.

**Comparative Fault/Joint and Several Liability:** With respect to plaintiff's fault, Iowa has adopted a modified comparative fault tort scheme by statute. If an injured party is found to be more than 50% at fault, then no recovery is permitted. If an injured plaintiff's fault is 50% or less, then any damages are reduced by the plaintiff's percentage of fault. Joint and several liability is abolished except as to any defendant who is found to be more than 50% at fault. Iowa's comparative fault statute is found at Chapter 668 of the Iowa Code. A Defendant found to be 50% or more of the fault shall only be jointly and severally liable for economic damages and not for noneconomic damages. A plaintiff bearing 51% or more of the fault cannot recover at all. Any defendant found to be 50% or less at fault is only responsible for its percentage share of the verdict.

**Minor Settlements:** Under the law in Iowa, code § 633.555, there is no need to open a probate/conservatorship to settle the claim of the minor child if the settlement is under $25,000.

**Bad Faith Issues:** An insurance company must act in good faith in making decisions about claims made against its insured. The company must give equal consideration to its own interests and to the interests of the insured. The insurance company must view the situation as if there were no policy limits applicable to the claim. Bad faith arises when the insurance company, by its misconduct, serves its own interest and irresponsibly exposes the insured to an unreasonable risk of liability (see Iowa Jury Instruction 1400.2).

In order to recover, the plaintiff must prove all of the following propositions:

1. A specific demand for settlement was made by (name of claimant). 2. The defendant rejected the proposed settlement in bad faith. 3. The bad faith was a proximate cause of plaintiff's damages. 4. The nature and extent of the damage (see Iowa Jury Instruction 1400.1).

Alcohol Issue: Iowa has adopted a standard of .08 blood alcohol concentration for the legal level of intoxication. Iowa Code § 321J.2. A server of alcohol may be held liable under Iowa's dram shop statute, Iowa Code § 123.92, for serving an intoxicated person when the licensee or permitee knew or should have known the person was intoxicated, or sold to and served to the person to a point where the licensee or permitee should have known the person would become intoxicated (see Iowa Jury Instruction 1300.1). If the injury was caused by an intoxicated person, a licensee or permitee may establish as an affirmative defense that the intoxication did not contribute to the injurious action of the person (see Iowa Jury Instruction 1300.4).

**Legal Age:** The legal age is 18 for the purposes of tolling the statute of limitations. Iowa Code § 599.1.

**Inter-Family/Inter-Spousal Immunity:** Under Iowa law, parental immunity for injuries to a child was abrogated in 1982 by the Iowa Supreme Court in Turner v. Turner, 304 N.W.2d 786 (Iowa 1982). Thus, a

parent can be held be responsible for injuries caused to their child by the parent's negligent acts or omissions. The Iowa Supreme Court has held that a parent remains immune from liability for alleged acts emanating from the parent-child relationship if the act involves an exercise of: (1) parental authority over the child; or (2) parental discretion in respect to the provision of food, clothing, shelter, education, medical and dental services and other care. See Wagner by Griffith v. Smith, 340 N.W.2d 255, 256 (Iowa 1983). Likewise, the Iowa Supreme Court abolished the doctrine of intra-spousal immunity. See Shook v. Crabb, 281 N.W.2d 616, 620 (Iowa 1979). However, one spouse cannot recover for the loss of consortium resulting from injury and/or death to the other spouse on the grounds that as between spouses, consortium is voluntary. See McIntosh v. Barr, 397 N.W.2d 516, 518 (Iowa 1986).

**Workers' Compensation:** Workers' compensation provides medical, temporary disability (wage replacement) and permanent impairment benefits for injuries which arise out of, and in the course of, employment. Heart attacks and mental injuries have a more stringent or legal causation standard than other types of injuries. Workers' compensation is generally the injured employee's exclusive remedy against the employer and co-workers for injuries arising of and in the course of employment. Iowa Code § 85.20. The exclusivity rule does not bar claims of co-worker gross negligence, which requires a conscious failure to avoid a known danger from which injury will be a probable result. Iowa Civil Jury Instruction 710.3. The statute of limitations for workers' compensation claims is two years from the date of injury or three years from the last payment of weekly benefits, but can be extended by the discovery rule. Iowa Code § 85.26. Gross negligence claims are subject to the Statute of Limitations for Tort Claims under Iowa Code § 614.1 (two years). The Workers' Compensation Statute contains lien, indemnification and subrogation provisions which apply to potential third-party liability claims and any recovery from the third-party by settlement or judgment. The employer and/or insured shall be indemnified out of any recovery of damages, with legal interest, except for such attorney fees as may be allowed by the Court and shall have a lien on the claim for such recovery and the judgment thereon. The employer or insurer must file a notice of the lien within 30 days after receiving notice of the suit from the employee. Iowa Code § 85.22(2).

**Seatbelt Defense:** Under Iowa Code § 321.445(4), the failure to wear a seatbelt shall not be considered as evidence of comparative fault under Iowa Chapter 668. However, the failure to wear a seatbelt may be admitted to mitigate damages upon substantial evidence that the failure to wear a seatbelt contributed to the injury or injuries claimed by the plaintiff. Under such circumstances, the jury may reduce the amount of plaintiff's recovery by an amount not to exceed 25% of the damages awarded after any reductions for comparative fault.

**Wrongful Death Damages:** The elements of wrongful death damages in Iowa consist primarily of loss of accumulation to the estate; pecuniary loss of support to the surviving spouse and children; and loss of services and consortium to the surviving spouse and children.

—Loss of accumulation‖ is generally measured by multiplying the decedent's yearly income after taxes and after deduction for personal consumption expenditures (e.g., food, shelter, clothing, etc.) by decedent's work life expectancy. This element of damage is to be determined by the amount decedent would have been expected to accumulate had he lived. See Iowa Civil Jury Instruction 200.15. Most Plaintiffs' economists offset the inflation rate and the discount or present value rate. Jury Instruction 200.21(A) further defines this element of damages.

In addition, Plaintiff is entitled to receive monetary damages for loss of decedent's companionship, services and support as a spouse and parent. This includes adult children if the evidence is sufficient. The jury is given wide discretion under Iowa law as to the amounts that they can award for these elements of damage.

Loss of support to the surviving spouse is the present value of the amount of financial support which the Decedent would have contributed to his spouse or children but for his death. Damages for financial spousal support are limited in time to the shorter of the spouse's or Decedent's normal life expectancy. See Jury Instruction 200.17. Damages for loss of support for children are defined in Jury Instruction 200.18.

Loss of services-spousal consortium is the present value of the services which Decedent would have performed for his spouse but for his death. This is also known as loss of spousal consortium. Damages for spousal

consortium are also limited in time to the shorter of the spouse's or Decedent's normal life expectancy. See Jury Instruction 200.19. Damages for loss of services for parental consortium are defined in Jury Instruction 200.20. Jury Instructions 200.21 B and C further define these elements of damages.

**Punitive Damages:** Under Iowa law, ―[p]unitive damages are not awarded as a matter of right but only as a form of punishment and to deter others from conduct which is sufficiently egregious to call for the remedy.‖ Larson v. Great West Cas. Co., 482 N.W.2d 170, 175 (Iowa Ct. App. 1992). Accordingly, pursuant to Iowa Code § 668A.1, punitive damages may be awarded only upon a showing that the conduct of the defendant ―constituted willful and wanton disregard for the rights or safety of another.‖ Conduct is willful and wanton when the ―actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.‖ Kiesau v. Bantz, 686 N.W.2d 164, 173 (Iowa 2004) (*overruled* on other grounds by *Alcala v. Marriott International, Inc.*, 880 N.W.2d 699 (Iowa 2016)). Wantonness requires proof that the defendant ―knew or should have known that his conduct placed the plaintiff in a zone of imminent danger.‖ Alden v. Genie Indus., 475 N.W.2d 1, 2 (Iowa 1991). Moreover, ―[t]he willful and wanton disregard necessary to support an award of punitive damages must be established by clear, convincing, and satisfactory evidence, a statutorily imposed burden of proof greater than a mere preponderance of evidence." Larson, 482 N.W.2d at 175; see also Iowa Code § 668A.1(1)(a).

In any trial involving a claim for punitive damages, the court is required to instruct the jury to answer special interrogatories. Iowa Code § 668A.1(1). The first interrogatory asks the jury to determine whether the defendant's conduct constituted willful and wanton disregard for the safety of another. Iowa Code § 668A.1(1)(a). If the jury answers in the affirmative, then the jury is asked the second interrogatory—whether the defendant's conduct was specifically directed at the plaintiff. Iowa Code § 668A.1(1)(b). If the jury finds that the conduct was specifically directed at the plaintiff, then the plaintiff is entitled to the entire punitive damages award. Iowa Code § 668A.1(2)(a). However, if the jury finds that the conduct was not specifically directed at the plaintiff, then the plaintiff is awarded only up to 25% of the total punitive damages award with the remainder being deposited into a civil reparations fund. Iowa Code § 668A.1(2)(b).

Punitive damages are insurable and are covered under the policy unless specifically excluded by express language. See Skyline Harvestore Systems, Inc. v. Centennial Ins. Co., 331 N.W.2d 106, 109 (Iowa 1983).

Iowa Civil Jury Instruction 210.3 instructs that an employer is liable for punitive damages by reason of the act of an employee if one of the following occurred:

1. The employer authorized the act and the way it was done; or 2. The employer was unfit and the employer was reckless in employing or retaining him; or 3. The employee was employed in a managerial capacity and was acting in the scope of employment; or 4. The employer ratified or approved the act.

**Permissive Use:** Under Iowa law, the definition of "financial liability coverage" includes insurance for the benefit of "any person using an insured motor vehicle with the express or implied permission of the named insured." Iowa Code § 321.1. Therefore, even if not included in a policy, Iowa law "requires that an insurer issuing an owner's policy of liability insurance providing coverage for a motor vehicle registered in this state must conform its liability coverage to the statutory definition of 'financial liability coverage,'" and therefore include at least minimum coverage for permissive users. Lee v. Grinnell Mut. Reinsurance Co., 646 N.W.2d 403, 411 (Iowa 2002). Permissive use may be express or implied, and there is a rebuttable presumption that the use was permissive. See Farm and City Ins. Co. v. Gilmore, 539 N.W.2d 154, 159 (Iowa 1995). Iowa rejected adoption of the initial permission rule where permission to allow one driver to operate a vehicle would indicate the owner's permission for other parties to operate the vehicle, short of actual conversion or theft. See Van Zwol v. Branon, 440 N.W.2d 589, 593 (Iowa 1989). Iowa cases show that absent express permission to use a vehicle by the owner, "existence of implied consent is to be shown by the circumstances surrounding the original grant of permission or by a course of conduct on the part of the owner inconsistent with the grant of authority." Id. at 593–94. Implied consent cannot be assumed, but must be derived from the facts of the case. To determine "whether delegation by [a] first permittee was expressly authorized or prohibited, the relationship

and conduct of the parties, and the attending circumstances generally, have been regarded as material and sometimes decisive factors." See Grinnell Mut. Reinsurance Co. v. State Farm Mut. Auto. Ins. Co., 558 N.W.2d 176, 179 (Iowa 1997).

Insurers are allowed to exclude non-permissive users from coverage in the insurers' omnibus clause. If a policy specifically excludes coverage "for any person [u]sing a vehicle without a reasonable belief that that person is entitled to do so," then there is no coverage for those who have not been given permission. Nationwide Agri-Business Ins. Co. v. Goodwin, 782 N.W.2d 465, 474 (Iowa 2010). This includes situations where the use was not reasonably authorized, such as lending a rental car to an unauthorized driver. See id.

# Kansas

**Bodily Injury:** Minimum Limit Required. Automobile coverage is mandatory with minimum limits of 25,000/50,000/10,000. Kansas is a no-fault state. The tort threshold before a bodily injury claim can be made is $2,000 in medical expense or fracture of a weight-bearing bone, a compound, comminuted, displaced or compressed fracture; permanent disfigurement; loss of a body member; permanent injury, permanent loss of a bodily function or death.

The no-fault benefits required by statute are medical benefits - $4,500; disability benefits - 85% of loss of income with minimum limits of $900 per month; funeral benefits -$2,000 per individual; rehabilitation benefits -$4,500; survivors benefits - loss of injured person's monthly earnings of $900 a month; and substitution benefits - $25.00 per day for 365 days. See Manual on Kansas No-Fault for further information.

**Property Damage:** Minimum Limit Required. Liability coverage for property damage is mandatory with limits of at least $10,000. Loss of use is a recoverable item of damage, but a claimant may recover loss of use only if plaintiff claims cost of repair and then the cost of repair plus loss of use cannot exceed the value of the property. If plaintiff recovers based on before and after value, i.e., a total loss, loss of use is not recoverable. There is no law on whether the insurance company must pay tax, title and license fee, but the Commissioner of Insurance has issued an opinion that such fees must be paid.

Attorney's fees may be recoverable in an automobile negligence claim for only property damage where the damage is $7,500 or less.

**Personal Injury:** MANDATORY. No-fault benefits are set forth above. No-fault benefits cannot be rejected except by a motorcyclist. P.I.P. is subrogable and the personal injury claim is assigned to the P.I.P. insurance carrier if the injured party does not file suit within eighteen (18) months after the event causing personal injury. P.I.P. cannot be used as a set-off, instead, it is subrogable. Worker's compensation benefits are primary to P.I.P. The P.I.P. carrier is entitled to a set-off based on the worker's compensation benefits that are paid. The set-off goes to the P.I.P. policy limit, not the total claim of the injured person. P.I.P. does not stack. Any suit for failure to pay P.I.P. benefits must be filed within five (5) years of the alleged breach of contract.

**Medical Payments:** Medical payments coverage is not required. Many insurers do not offer it, but will offer, instead, increased limits of PIP, medical coverage. In that way, subrogation can be effected. Subrogation is not allowed on medical payments coverage. Unless excluded by the policy, a worker's compensation claimant can receive med pay benefits. Med pay benefits can off-set a B.I. claim. The statute of limitations is five (5) years from the date of breach of the med pay contract.

**Uninsured/Underinsured Motorist - UMBI/UMPD:** Uninsured and underinsured motorist coverages **are both mandatory.** The minimum limits are 25,000/50,000. The insurance carrier must offer uninsured and underinsured motorist coverage with bodily injury limits equal to the liability bodily injury limits on the policy. The insured can reject UM and/or UIM coverage in excess of the minimum (25,000/50,000) if that rejection is made in writing. The statute of limitations for an uninsured motorist claim is five (5) years. An underinsured motorist claim is typically made against the tortfeasor, and not the underinsured motorist carrier. In that event, the underinsured carrier must receive notice of the claim consistent with the policy and then may substitute its payment for the tortfeasor and subrogate against the tortfeasor or intervene in the action. If the UIM carrier has notice but chooses not to intervene, it will be bound by any judgment. The statute of limitations for suing the underinsured motorist is five (5) years. An employee can make an uninsured motorist or underinsured motorist claim against the employer's coverage. Subrogation is allowed on both uninsured and underinsured motorist claims, if properly preserved. By statute, neither uninsured nor underinsured motorist coverage can be stacked. Stacking is specifically precluded regardless of whether that is contained in the policy.

**Negligence. Modified Comparative Negligence:** Kansas comparative negligence statute applies the "50%" rule. If plaintiff's comparative fault is less than 50% "parties" plaintiff may recover even against defendant with less fault than himself. Negley v. Massey Ferguson. Inc., 229 Kan. 465, 625 P.2d472 (1981).

Doctrine of comparative negligence has abrogated doctrine of active - passive negligence as a basis for indemnification. Kennedy v. City of Sawyer, 228 Kan. 635, 666 P.2d 192 (1983).

**Statute of Limitations:** The Statute of Limitations for either bodily injury or property damage, based on negligence, is two (2) years. A minor has either one year after reaching the age of majority (18) or eight years from the date of accident, whichever is the shortest. The adjuster need not notify the adversary of the statute of limitations unless there are actual negotiations within thirty (30) days of the running of the statute.

**Punitive Damages:** It is contrary to public policy for insurance to cover punitive damages other than coverage for an employer who is liable for punitive damages as a result of the actions of an employee that were not done with the acquiescence or ratification of the employer. Punitive damages are allowed if plaintiff can prove willful, wanton, or reckless conduct. The jury decides whether punitive damages should be awarded. The Court assesses the amount of punitive damages, subject to a statutory cap.

**Joint and Several Exposures:** NO. There is no joint and several exposure among joint tortfeasors in claims involving negligence. Each negligent party is liable only for his own proportionate share of the damage based on his percentage of fault.

**Worker's Compensation:** Worker's compensation is subrogable. The cause of action is assigned to the employer and/or employer's insurance carrier one year from the date of injury. The lien is protected by either filing a Notice of Lien in the tort case or intervening in the tort case. The worker's compensation has the first right of recovery. Worker's compensation recovery cannot be made from no-fault benefits because no-fault does not cover anything paid by worker's compensation. By statute, the uninsured motorist and/or underinsured motorist contract can exclude coverage for anything paid by worker's compensation.

**Minor Settlements:** There is no limit on the amount that can be paid with or without court approval. A parents' release is not binding on the child. An economic decision is usually made on whether to take a chance with a parents' release or have the Court approve the settlement. Any payment to a minor in excess of $5,000 must be paid to a minor's conservator. Minors can be negligent based on reasonable care exhibited by minors of like age and experience. There is no cut off age for such claims.

**Bad Faith Issues:** There is no cause of action for bad faith breach of contract in Kansas. An insurance company may, however, be liable in excess of its limits if it fails to defend a claim against the insured with good faith and reasonable care,

**Alcohol Issue:** Legal limit of intoxication is .08. There is a presumption of intoxication at that level or above and a presumption of no intoxication below that level unless there is other evidence which suggests the vehicle could not be safely operated. A breath test result of .15 or above will result in a one-year license suspension unless an administrative hearing is requested within 10 days of arrest. The server of alcohol cannot be held liable, even if the alcohol is served to a minor who becomes intoxicated and either injures himself or a third person.

**Legal Age:** 18 years to contract, play the lottery or participate in paramutual wagering. 21 to consume alcohol or gamble. 16 to consent to sex.

**Inter-Family and Spousal Immunity:** None on claims of negligence or intentional tort.

**Seatbelt Defense:** None, either for seatbelts or child restraints systems. Nevertheless, seatbelts and child restraints systems are mandatory.

**Wrongful Death:** In a wrongful death action, the estate can only bring a claim for a survival action, which usually amounts to the medical expenses from the time of injury until death, funeral expenses, and conscious pain and suffering from the time of injury until there is no more conscious pain and suffering. Wrongful death claims are brought by heirs at law of the deceased.

**Statute of Limitations:** The statute of limitations for negligence is two (2) years. The statute of limitations for breach of a written contract is five (5) years. The statute of limitations for breach of an oral contract is three (3) years. The statute of limitations for intentional torts is one (1) year.

**Collision Damage Waiver:** K.S.A. 1993 Supp. *50-654* is the Kansas Collision Damage Waiver Act. This Act includes provisions setting forth the rental agreement and collision damage waiver requirement. The Act applies to those who lease rental vehicles for a period of 60 days or less from locations in Kansas under the agreement that the lessee will pay damages caused to leased vehicle. All agreements had a notice which state the waiver and that the contract offers an additional charge for the waiver. All potential purchases should determine whether their own auto insurance offers this coverage for damage to a rental vehicle. This coverage is optional for damage to a rental vehicle. This coverage is optional fur insurers. See K.S.A. 1993 Supp. 50-654 et seq. regarding the Act.

**Releases:** The effect of a release on the liability of another is to be determined by the terms of the releasing instrument. Lupton v. Torbev, 548 F.2d 316(10th Cir. 1977). When the document is silent on the matter, other parties are presumed not released. McCullough v. Bethany Med. Center, 235 Kan.

732, 683 P.2d 1258 (1984).

A settlement by an insurer of a claim by a third person against an insured does not necessarily bar an action by insured against the third person. Lohman v. Woodruff, 224 Kan. 51 578 P.2d 251 (1978).

Kansas does not have a specific statute requiring a TPA to protect the lienholder on third party settlements. As a precautionary measure, the lienholder should be included. Courts will enforce a valid lien.

**Rental Vehicles:** Kansas does not have a specific statute requiring insurers to provide a rental vehicle. This is optional.

**Salvage:** K.S.A. 8-1102 governs the disposition of abandoned motor vehicles. If any motor vehicle is abandoned for more than 30 days after impoundment, and diligent efforts of locating the title owner are made within a prescribed time and no owner is determined, the authorities may sell the vehicle at a public auction.

**Permissive Use:** Under Kansas law, for reasons of public policy, the scope of the omnibus clause in an automobile liability insurance policy is to be liberally construed in favor of coverage. United States Fidelity and Guaranty Co. v. Continental Ins. Co., 573 P.2d 1106 (Kan. 1977). The permission referred to in the omnibus clause of an automobile liability insurance policy may be express or implied and may be established by facts and circumstances showing a course of conduct signifying acquiescence or consent on the part of the named insured. Alliance Mutual Cas. Co. v. Hartford Accident & Indemnity Co., 504 P.2d 161, 162 (Kan. 1972). This rule tightens, however, where the named insured expressly prohibits the first permittee from letting other persons use the car. Decker v. Avis Rent A Car System, Inc., 883 P.2d 781, 784 (Kan. Ct. App. 1994).

Insurers in Kansas may exclude coverage for non-permissive use. *See generally* Decker v. Avis Rent A Car System, Inc., 883 P.2d 781 (Kan. Ct. App. 1994). However, previous courts have noted that "[p]erhaps as a consequence of the harshness of (the strict rule of denying coverage) many courts, when given the opportunity, have been able to discover an implied consent from the named insured even in the face of express prohibitions against the loaning of the insured automobile." Gangel v. Benson, 523 P.2d 330, 335 (Kan. 1974).

The court in *Gangel* identified factors justifying an implication of consent in the face of a restriction on others to use the car. The Court stated: "If the first permittee is actually in the car, or the car is being used for the benefit of the first permittee or the named insured, or if the first permittee has an equivalent of equitable title and has unfettered control over the daily use of the car outside of the surveillance of the named insured, or if the named insured is aware of past violations of instructions but allows the permittee to retain possession, or when an emergency arises, regardless of the express prohibitions against third party use, many courts will imply consent on the part of the named insured for the third party's use."

Kansas adheres to the "moderate or minor deviation rule" for the purpose of determining whether coverage of the omnibus clause applies to a given state of facts. Cimarron Ins. Co. v. Loftus, 612 P.2d 1245 (Kan. Ct. App. 1980). In *Cimarron*, two employees received permission to drive a company truck to Brewster to play pool and drink beer. The only restriction the owner (Loftus) placed on the employees was: "Don't drive around the country." After leaving Brewster, and while on the way to Colby, they were involved in an accident. The court found that:

> When Loftus granted permission for the use of his pickup he was fully aware of the purpose and the manner in which it would be used. Although it was initially intended that these activities be conducted at Brewster, the fact they drove an additional eighteen miles to Colby in pursuit of the same activities for which permission had been granted was at most a minor deviation which does not preclude coverage under the omnibus clause. Id. at 1248.

# Kentucky

**Overview**: Kentucky adopted a comprehensive no-fault insurance plan effective July 1, 1975, to provide "basic reparation benefits" to insureds for net losses suffered for personal injuries and to limit the right to sue for general damages. Claims for property damages are excluded from no-fault insurance coverage.

Specific sections of chapters in the insurance code provide as follows:

All operators and users of motor vehicles other than motorcycle operators and passengers who are exempted from mandatory coverage of law are deemed to have consented to certain limitations upon their tort rights unless they have assertively rejected the benefit of the act in writing.

Motor vehicle registrants are required to procure insurance providing basic reparation benefits of $10,000 per person, payable for medical expenses, wage loss, funeral expenses, rehabilitation, and substitute services. Registrants must also carry either split liability insurance consisting of minimums of $25,000 per person with a $50,000 per-accident aggregate limit, and $25,000 limit for property damage, or single liability insurance coverage for all damages whether arising out of bodily injury or damage to property with a minimum limit of $60,000 per accident. *See* KRS § 304.39-110.

General damages are not recoverable by suit unless the accident results in medical expenses which exceed $1,000, or the injury or disease consists in whole or in part of permanent disfigurement, fracture to bone, compound, comminuted, displaced or compressed fracture, loss of body member, permanent injury within reasonable probability, permanent loss of bodily functions, or death. KRS § 304.39-060. Typically, a two-year statute of limitations applies to bringing a suit for general damages. In an action for tort liability the statute begins to run two years after injury, death, or the last payment of no-fault benefits, whichever is latest. *See* KRS § 304.39-230.

KRS § 304.39-070 is the primary statute governing no-fault subrogation. A carrier paying no-fault benefits that is entitled to subrogation may either intervene in the underlying tort suit within 5 years of its filing or seek arbitration. A carrier must initiate arbitration within 60 days after its claim has been presented to the at-fault party's insurance carrier.

Insurers must provide Uninsured Motorist Coverage to policyholders if requested. As such, it is not mandatory. The same statute of limitations applies to make a claim against an uninsured or underinsured driver. Insureds can "stack" Uninsured Motorist Coverage based upon the number of insured vehicles listed on the policy. Insurers, however, may limit stacking based on a two-tiered and single-tiered premium structure contained in the policy.

**Required Minimum Tort Liability Insurance:** KRS § 304.39-110

Bodily Injury – Split liability of no less than $25,000 for all damages to any one person and no less than $50,000 for damages by all persons as a result of one accident, plus liability coverage of not less than $25,000 for property; or

Single-limits liability coverage of not less than $60,000 for all damages whether arising out of bodily injury or damage to property as a result of any one accident arising out of ownership, maintenance, use, loading or unloading, of the secured vehicle.

**Comparative Negligence:** Kentucky is a pure comparative negligence state. It has not adopted the Uniform Comparative Fault Act. A jury must apportion damages by degree of contribution to causation by joint

trespassers including third-party defendants. Defendants are only responsible for the share of liability which has been apportioned to them. As such, joint and several liability is limited to those situations involving respondeat superior, etc.

**Punitive Damages:** Punitive damages are specifically recoverable by statute in some circumstance. KRS §§ 411.184 and 411.186 govern punitive damages claims. Under KRS § 411.184(2), punitive damages require proof "by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice." The statute's definition of malice, which required a showing of subjective intent, has been subsequently declared unconstitutional, and the Kentucky Supreme Court has reaffirmed the common law standard. *Williams v. Wilson*, 972 S.W.2d 260, 262–65, 269 (Ky. 1998); *See McGonigle v. Whitehawk*, 481 F. Supp. 2d 835, 841-842 (W.D. Ky. 2007) (discussing Kentucky punitive damages standard).

**Workers' Compensation:** Worker's compensation benefits are subrogable in Kentucky. A worker's compensation claimant can collect no-fault benefits in some situations. Worker's compensation liens are statutory.

**Infant Status:** Court approval must be had for a settlement with any infant under the age of 18. Minors of both sexes obtain their majority at the age of 18 except for the purchase of alcoholic beverages. There is joint and several liability with a minor under the age of 18 for the negligence of such minor when "the owner of the vehicle normally permits such minor to drive his motor vehicle on a highway;" or "a person gives or furnishes a motor vehicle to a minor;" or "a parent, guardian, or employer of a minor who signs on behalf of such minor an application on which he obtained his driver's license." Kentucky applies the "family purpose doctrine."

**Alcohol**: A driver in Kentucky is presumed to be intoxicated with a .08 breathalyzer reading. Kentucky has adopted a Dram Shop Act, which makes it very difficult to recover from the purveyor of alcoholic beverages. *See* KRS § 413.241.

**Seatbelt Defense:** Kentucky has adopted a limited seat belt defense. The failure to wear a seat belt is simply one factor in determining the comparative negligence of the parties. The party raising the seatbelt defense must provide expert testimony that use of a seatbelt would have limited injuries which the Plaintiff sustained.

**Wrongful Death:** The Estate may recover for the destruction of the decedent's loss of power to earn income (in this regard, Kentucky is a minority jurisdiction). *See W.L. Harper Co. v. Slusher*, 469 S.W.2d 955, 959 (Ky. 1971); *Adams v. Davis*, 578 S.W.2d 899, 902 (Ky. Ct. App. 1979). The statute of limitations is one year after appointment of personal representative or two years after the date of death if no personal representative is appointed in the first year following the decedent's death.

**Imputed Negligence/Joint Enterprise:** Joint enterprise requires agreement to seek commercial profit and equal right of control among parties. In a joint venture, each member is an agent of the other and all are vicariously liable for acts of members of the joint venture.

**Minor's Settlement:** Infants' claims may be compromised only by their legal guardian or representative legally authorized to act for the infant. Compromise must be supported by consideration, but slight consideration is sufficient. *Posey v. Lambert - Graham Hardware Co.*, 247 S.W. 30 (Ky. 1923). Court approval is required for all settlements with minors, but the appointment of a guardian or conservator is not required where the settlement value is less than $10,000. *See* KRS § 387.280. The mechanism for approving settlements under $10,000 varies from county to county but is usually handled by the probate division of the district court.

**Salvage:** Kentucky does not have a specific statute related to the disposal of salvaged vehicles. Abandonment and removal of automobiles is discussed under KRS § 189.753 and presumes that any motor vehicle left upon the right-of-way of a state highway for more than three (3) consecutive days shall be presumed to be abandoned.

**Lienholders/Settlement:** Kentucky does not have a specific statute requiring the TPA to protect a lienholder on settlements. As a precautionary measure, the lienholder should be listed, as courts will enforce valid liens.

**Collision Waivers and Rental Vehicles:** Kentucky does not have a specific law regarding collision waivers. Providing a rental vehicle would be an optional coverage in Kentucky. *See also* material damage outline attached hereto.

**Material Damage Summary**

## I. Statutory Requirements

There are no specific sections of the Ky. Revised Statutes pertaining solely to material damage.

## II. Regulatory Requirements

KAR: 806 12:095, discussed herein.

## III. Motor Vehicle Mortgagee's Lien

KRS § 186.232

Registration not transferable until taxes paid, liens released, and proof of insurance and notarized affidavit presented.

## IV. Material Damage Topics

**A.** Actual Cash Value (ACV) is the difference between the fair market value of the vehicle

before and after the collision. The measure of damages in a third-party motor vehicle loss shall be the difference between the fair market value of the motor vehicle immediately before and after the loss, proportioned by the third-party's contributory negligence, if any. Repair estimates or appraisers' reports may be used to indicate the difference in fair market value. The measure of damages in a first-party vehicle loss shall be governed by the policy of insurance issued to the first-party and shall not include any measure of damages not specifically provided for in the policy.

The Actual cost shall be determined by any one (1) of the following:

1. The cost of a comparable motor vehicle in the local market area if a comparable motor vehicle is available in the local market area;

2. If a comparable motor vehicle is not available in the local market area, one (1) of two (2) or more quotations obtained by the insurer from two (2) or more qualified and licensed dealers which engage in the buying and selling of comparable motor vehicles in the ordinary course of their business located within the local market area; or

3. Any source for determining statistically valid fair market values including nationally-recognized automobile evaluation publications that meet all of the following criteria:

    a. The source shall give consideration to the values of vehicles in the local market area and may consider data on vehicles outside the area;

b. The source's data base shall produce values for at least eighty-five (85) percent of all makes and models for the last eight (8) model years taking into account the values of all major options for these vehicles;

c. The source shall produce fair market values based on current data available from the local market area where the insured vehicle was principally garaged or a necessary expansion of parameters such as travel time and area to assure statistical validity;

d. Actual cash value as determined by the use of the source's database shall be adjusted to reflect any value of enhancements to the motor vehicle not accounted for by the database;

e. If the vehicle's condition does not meet the criteria for value used in source's database, the actual cash value amount may be adjusted; and

f. Absent an appraisal provision in the insurance contract, if the insured demonstrates, by presenting two (2) independent appraisals, based on measurable and discernable factors, that the vehicle would have a higher cash value in the local market area than the value reflected in the source's database, the local market value shall be considered when determining the actual cash value; *See* 806 KAR 12:095, sec. 7.

B. Appraisal Clauses have been upheld by Ky. courts, at least in Fire policies, and are referenced in the Ky. regulations as discussed above. *See Royal Ins. Co. v. Santamoro*, 56 S.W.2d 359 (Ky. 1932)

C. Betterment/Depreciation

(1) If the amount claimed is reduced because of betterment or depreciation, all information for the reduction shall be contained in the claim file. These deductions shall be itemized and specified as to dollar amount and shall be appropriate for the amount of deductions.

(a) Betterment deductions shall be allowed only if the deductions reflect a measurable decrease in the market value and general overall condition of the motor vehicle.

(b) The deductions set forth in paragraph (a) of this subsection shall be measurable, itemized, specified as to dollar amount, and documented in the claim file.

D. Customization

An insured can show through appraisals that the vehicle has a higher value in the local market, and this can be a factor in value of the loss.

E. Diminution of Value

Diminution of value (or diminished value) refers to the loss of the fair market value of a vehicle if after repairs have been made, the vehicle has lost market value compared to its market value before the auto accident. *See* 806 KAR 12: 095, sec. 8.

1. First-Party Claims: Diminution in value is not recoverable, since collision policy does not require restoration of value, but only the restoration of physical condition. (*General Acc. Fire and Life Assur. Corp. v. Judd*, 400 S.W. 2d 685 (Ky. App. 1966).

2. Third-Party PD Claims: Diminution in value is recoverable. *See Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993); *Eckler-Moore Exp v. Hood*, 256 S.W.2d 33 (Ky. 1953) (Measure of damages is the "difference between the market value immediately before and immediately after the injury.")

**F.** Private Passenger Auto: defined in the Kentucky Auto Policy( V-016) as: A four-wheel:

a) private passenger auto;

b) van; or

c) pickup truck having either four or six wheels.

Cases that discuss private passenger vehicles include, *Grange Mutual Ins. Co. v. Bradshaw*, 724 S.W.2d 216 (Ky. App. 1986); *Brown v. Bankers Life & Casualty Co.*, 531 S.W.2d 488 (Ky. 1975); *Buckingham Life Ins. Co. v. Winstead*, 454 S.W.2d 696 (Ky. 1976).

**G.** "Like, Kind and Quality" (LKQ)

The term "like, kind and quality" (LKQ) refers to the use of parts in repair of the vehicle of like, kind and quality to the parts used on the damaged vehicle. They are qualifying words that permit, but **do not** require the use of parts of similar age, use, condition or present cash value, but rather simply refer to repairing the damaged vehicle with parts that are suitable or fit for its intended purpose; i.e., to make the motor vehicle as serviceable as it was before the accident.

Therefore, LKQ parts can include used parts, reconditioned parts, after-market parts and of course new parts, as long as the use of the parts repairs the vehicle so it is suitable or fit to drive and it is as serviceable as it was before the loss.

*Tomes v. Nationwide Ins. Co.*, 825 S.W.2d 284 (Ky. App. 1991). It is reasonable to expect to have as good a vehicle as one had before the collision. If the vehicle had been fairly new, one could reasonably expect the use of new parts. *See also* 806 KAR 12: 095, sec. 8(4).

**H.** Loss of Use Damages - Rental Cars

a. Third-Party Claims. KRS § 304.39-115: "Loss of use of a motor vehicle, regardless of the type of use, shall be recognized as an element of damage in any property damage liability claim. Such a claim for loss of use shall be limited to reasonable and necessary expenses for the time necessary to repair or replace the motor vehicle."

(1) Total Losses - Reasonable and necessary expenses for the time necessary to replace.

(2) When a Vehicle is Repairable - Reasonable and necessary expenses for the time necessary to repair.

**Third-Party Rental Issues: Questions and Answers**

**Question**: Can a claim for loss of use be brought even if the owner does not rent a car while his vehicle is being repaired?

**Answer**: Yes. It is not necessary for the owner of the vehicle to rent a vehicle to recover damages for loss of use. *Columbia Gas of Ky., Inc. v. Maynard*, 532 S.W.2d 3 (Ky. 1975) (rental value is admissible as a **relevant factor** in determining value of loss) (emphasis added); *but see Wittmer v. Jones*, 864 S.W.2d 885, 889 (Ky. 1993) (indicating that the fact no rental expense is incurred may be relevant to loss of use claim: "Loss of use claims of this nature do not cover inconvenience in being without a vehicle until one replaces it. . . .").

**Question**: What is "a reasonable rental value of a substitute vehicle"?

**Answer**: Ultimately, it is going to be a jury question as to what the "reasonable rental value of a substitute vehicle" is.

**Question**: Is a claimant entitled to a loss of use for the same type of vehicle they own or "a comparable vehicle"?

**Answer**: Courts have not addressed this issue, however, it is likely to vary from case to case, and, as stated above, the claimant is entitled to reasonable rental value.

**Question**: How long is a reasonable rental?

**Answer**: This is determined on a case by case basis. The Kentucky statute provides that "such a claim for loss of use of a motor vehicle shall be limited to reasonable and necessary expenses for the time necessary to repair or replace the motor vehicle." KRS § 304.39-115.

**I.** "Repair and Replace"- (*Western Auto. Cas. Co. v. Lee*, 55 S.W.2d 1 (Ky. App. 1932)). If it is not practical to repair the car, the measure of damages is the difference between the fair market value before and after the collision. If the car is repairable, the measure of damages is the cost of placing the car in as good condition as it was immediately before the collision. *Niagara Fire Ins. Co. v. Huffman*, 253 S.W.2d 617 (Ky. 1952).

**J.** Property Damage (PD) Claims – Third-Party

1. Total Losses- (75% of National Automobile Dealers Association (NADA) value)

2. Repairable Vehicles (under 75 % of the NADA value)

**K.** Theft: KRS § 514.100 - **Unauthorized use of automobile or other propelled vehicle -** A person is guilty of the unauthorized use of an automobile or other propelled vehicle when he knowingly operates, exercises control over, or otherwise uses such vehicle without consent of the owner or person having legal possession thereof. It is presumed that vehicle damages in case of theft will be determined as set forth under policy terms and conditions so long as they are consistent with Ky. rules for determining total loss of a vehicle.

L. Insurable Interest: KRS § 304.14-060 - Insurable Interest, Property - No contract of insurance of property or of any interest in property or arising from property shall be enforceable as to the insurance except for the benefit of persons having an insurable interest in the things insured as at the time of the loss.

In property insurance, the insurable interest must exist both at the time of the making of the contract and at the time of the loss. A person is usually regarded as having an insurable interest when he will derive pecuniary benefit or advantage from its preservation or will suffer pecuniary loss or damage from its destruction or injury by the happening of the event insured against. There is, however, a material difference between having an insurable interest and

having it insured versus the policy, which may require ownership. *Crabb v. Calvert Fire Ins. Co.*, 255 S.W.2d 990 (Ky. 1953).

Once a seller delivers the properly endorsed certificate of title and the vehicle transfer registration form to the buyer, then title passes to the buyer and the seller no longer has to make sure that the change in title is recorded in the clerk's office. *Nantz v. Lexington Lincoln Mercury*, 947 S.W.2d 36 (Ky. 1997), overruling *Mitchell v. Kentucky Farm Bureau Mutual Ins. Co.*, 927 S.W.2d 343 (Ky. 1996).

M. Ownership/Title of Vehicles

Owner "means the person who holds the legal title of a vehicle or a person who pursuant to a bona fide sale has received physical possession of the vehicle subject to any applicable security interest." KRS § 186.010.

Under the vehicle title statutes, a commercial vehicle dealer is given the option of either completing its portion of the title documents and giving them to the purchaser for delivery to the county clerk or retaining the documents and delivering them to the clerk. A commercial vehicle dealer that chooses to retain certificate of title upon sale of vehicle, while delivering possession of vehicle to buyer, is required to promptly transfer title to avoid being deemed the owner of vehicle for insurance liability purposes. *Ellis v. Browning Pontiac-Chevrolet-GMC- Truck-Geo Inc.*, 125 S.W.3d 306 (Ky. App. 2003).

Although no bill of sale had been issued as required by statute, due to the existence of a vehicle sale agreement accompanied by delivery of possession, the buyer of the vehicle was an "owner," falling within the exclusionary clause of the seller's liability insurance policy. *American Interinsurance Exchange v. Norton*, 631 S.W.2d 851 (Ky. App. 1982).

"Title" to automobile for liability insurance purposes does not automatically pass to buyer upon delivery, but it does pass if seller and buyer have complied with statutory requirements by completing applicable portions of vehicle transaction record and by promptly submitting record to county clerk.

N. Towing and Storage - reasonable towing and storage charges would be an element of damages in 3rd party claims.

**Permissive Use**

For purposes of omnibus automobile insurance coverage, permission to use a vehicle can be either express or implied. *Mitchell v. Allstate Ins. Co.*, 244 S.W.3d 59, 62 (Ky. 2008). Kentucky follows the "initial permission" rule, under which insurance coverage remains in place for a borrower of a covered vehicle, even if the borrower's use exceeds the scope of the initial permission. *Id.* Insurance coverage also exists for successive permittees, unless the subsequent user converted the vehicle. *Id.* at 65.

Whether a driver has permission to use an automobile is a fact issue for a jury. *Maryland Cas. Co. v. Hassell*, 426 S.W.2d 133, 134-35 (Ky. 1967). But if it is undisputed that a non-relative drove an automobile without permission, the insurer is entitled to summary judgment, notwithstanding any public policy arguments in favor of coverage. *York v. Ky. Farm Bureau Mut. Ins. Co.*, 156 S.W.3d 291, 294 (Ky. 2005).

# Louisiana

**Bodily Injury:**

Minimum Limits Required**:** $15,000 per person and $30,000 per accident. *See* LA R.S. 32:900(B)(2).

Is Coverage Mandatory? Yes. *See* LA R.S. 32:861 et seq.

Tort Threshold: None. *See* La. C.C. arts. 1999 and 2324.1.

Can collateral sources be used as an offset? Yes and no. Generally, under Louisiana law, a tortfeasor and his insurer may not benefit, and an injured plaintiff's tort recovery may not be diminished, because of benefits received by the plaintiff from sources independent of the tortfeasor's contribution. *See Cooper v. Borden, Inc.*, 709 So.2d 878 (La.App. 2 Cir. 1998).

In bodily injury litigation we often deal with this issue in the context of seeking a credit, not for direct payments, but for medical expense write offs made by Medicare, Medicaid, and private health insurance plans. Until recently, there was a split among the appellate circuits as to whether the defendant/tortfeasor receives a credit for such write-offs. However, the Louisiana Supreme Court resolved this split with its 2004 opinion in the case of *Bozeman v. Department of Transportation and Development*, 2003-1016 (La. 7/2/04), 879 So.2d 692. In *Bozeman*, the court concluded that the collateral source rule only entitles the plaintiff to recover the full value of their medical care, including the written off amount, whether the plaintiff has paid some consideration for the collateral source benefit. However, in the case of medicate write-offs, for which the plaintiff pays no consideration, the plaintiff is unable to collect the written-off amount as damages and the defendant/tortfeasor is thereby entitled to an "offset" of that amount. *See id.*

The Louisiana Supreme Court has also ruled, in the case of *Louisiana Department of Transportation and Development v. Kansas City Southern Railway Co.*, 846 So.2d 734, 2002-2349 (La. 5/20/03), that the collateral source rule applies in a case in which the Department of Transportation sought recovery for hazardous cleanup costs from various private land owners. The defendants argued that the Department of Transportation could not recover the full extent of cleanup costs because the Federal Highway Administration paid 90% of the costs. The Supreme Court held that the collateral source rule applies and the defendants did not get a credit. *See id.*

*Minimum Limits Required for Motor Carriers:* Motor carriers, i.e., any person owning, controlling, managing, operating, or causing to be used or operated any commercial motor vehicle used in the transportation of persons or property over the public highways of this state, whether as a transportation agency or howsoever utilizing said public facilities, operating a vehicle that has a gross vehicle weight or gross combined weight rating in excess of twenty (20) thousand pounds (but not more than fifty (50) thousand pounds), are required to maintain bodily injury liability limits of $25,000 per person and $50,000 per accident. *See* R.S. 32:900 M(1)(a)(i)(ii)(iii). For vehicles with a gross weight of fifty (50) thousand pounds or more, policy limits of $100,000 per person and $300,000 per occurrence shall be maintained. *See* R.S. 32:900M(1)(b). If, however, the motor carrier has qualified with the U.S. Department of Transportation (Interstate Commerce Commission) as a self- insurer, as authorized by 49 U.S.C. 10927, then the carrier can be authorized as a self-insurer in Louisiana. *See* R.S. 32:900M(2).

**Property Damage:**

Minimum limit required: $25,000. *See* LA R.S. 32:900.

Is PD coverage mandatory? Yes. *See* LA R.S. 32:900.

*Salvage:* Louisiana has no requirements regarding the disposal of salvage vehicles. However, when insurance is cancelled on the salvage vehicle, the insured must provide the Louisiana Department of Public Safety Office of Motor Vehicles with acceptable written evidence that the vehicle was junked or salvaged (i.e. a receipt from a salvage yard or junk dealer).

Settlement of property damage claims: *All* insurers shall make a written offer to settle any property damage claim, including a third-party claim, within thirty (30) days after receipt of satisfactory proofs of loss of that claim. *See* LA R.S. 22:658A(4). Failure to do so, when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of 50% damages on the amount found to be due from the insurer to the insured, or $1,000.00, whichever is greater.

Loss of use: Loss of use is compensable under Louisiana law. However, damages for loss of use of "totaled" automobiles are recoverable only for a reasonable time after claimant learns that the car is a total loss. *See Neloms v. Empire Fire & Marine Ins. Co.*, 37,786 (La.App. 2 Cir. 10/16/03), 859 So.2d 225. A period of thirty (30) days after discovering that vehicle is a total loss is generally deemed reasonable time to replace a vehicle. *See Bonner v. Louisiana Indem. Co.*, 607 So.2d 915 (La. App. 2d Cir. 1992). However, the Louisiana courts have also found more lengthy periods of time to be reasonable under the circumstances.

Generally, damages are measured by the rental cost of a substitute vehicle. However, this award does not have to be limited to rental cost. The trial court has much discretion in making such an award. *See Romco, Inc.. v. Broussard*, 528 So.2d 231 (La. App. 3d Cir. 1988); *Alexander v. Qwik Change Car Center, Inc.*, 352 So.2d 188(La. 1977).

Can there be loss of use on a totaled vehicle? Yes, but claimant has the obligation to mitigate damages so that a claim for loss of use is limited to a "reasonable time." *See Neloms v. Empire Fire & Marine Ins. Co.*, 37,786 (La.App. 2 Cir. 10/16/03), 859 So.2d 225.

Motor Carriers: Motor Carriers operating a vehicle that has a gross vehicle weight or gross combined weight rating in excess of twenty (20) thousand pounds are required to maintain a minimum of $25,000 in property damage coverage. *See* R.S. 32:900 M(1)(a)(i)(ii)(iii).

If, however, the motor carrier has qualified with the U.S. Department of Transportation (Interstate Commerce Commission) as a self- insurer, as authorized by49 U.S.C. 10927, then the carrier can be authorized as a self-insurer in Louisiana. *See* R.S. 32:900M(2).

**Personal Injury:** Louisiana is not a "No-Fault" State. Therefore, PIP coverage is not applicable.

**Medical Payments Coverage Not Mandatory:**

*Minimum limit required:* None. Insurers may limit their liability under a policy of insurance as long as the limitation does not conflict with statutory law or offend public policy. "Med-Pay" is not regulated by statute and presumably, its limitation does not offend public policy. It can be modified as appropriate by the insurer.

Is Med Pay Mandatory? No.

What does Med Pay cover in Louisiana? Generally, "Med Pay" covers reasonable expenses incurred, subject to the limits of liability for this coverage, for necessary medical and funeral expenses because of bodily injury caused by an accident and sustained by an insured, as defined by the policy. In most policies an insured, for the purposes of Med-Pay coverage, is the named insured and any other person occupying the insured vehicle while the vehicle is being driven by the named insured or any other person that has the named insured's permission. It also generally extends to the named insured, a family member, or a resident of the household who as a pedestrian is struck by a vehicle. However, as MedPay is not regulated by statute and it can be modified as appropriate by the insurer.

Is there any threshold to be met? No.

Does coverage have to be rejected in writing*?* No.

Is Med Pay subrogable? Yes. An insurer who provides med pay benefits for its insured is subrogated to the rights of its insured against a tortfeasor to seek recovery of amounts which it paid to the insured pursuant to the insurance contract. The insurer, or subrogee, steps into the shoes of its insured against the tortfeasor so whatever prescriptive period is applicable to the insured is applicable to the insurer/subrogee. *See generally Epros v. Pempton*, 606 So.2d 780 (La. 1992).

Can a worker's comp claimant receive Med Pay benefits? Maybe. It is dependent upon the policy affording the Med Pay coverage. In general, most policies providing Med Pay contain an exclusion of coverage for bodily injury occurring during the course of employment if worker's compensation benefits are required or available for the bodily injury.

Can Med Pay benefits offset a BI claim? No. Generally, under Louisiana law, a tortfeasor and his insurer may not benefit, and an injured plaintiff's tort recovery may not be diminished, because of benefits received by the plaintiff from sources independent of the tortfeasor's contribution. *See Cooper v. Borden, Inc.*, 709 So.2d 878 (La.App. 2 Cir. 1998). However, if Med Pay benefits are paid by the claimant's insurer, the insurer will typically make a subrogation claim against the tortfeasor to recover the sums paid.

Statute of Limitation: None is specifically set by Louisiana law. However, most policies contain provisions stating that the insurer will pay only those expenses incurred for services rendered within a certain number of years from the date of loss or that any such expenses must be reported within a certain number of years of the date of loss.

**Louisiana Direct Action Statute:** Louisiana law allows a claimant to proceed directly against an insurance company/insurer alone, without the insured, assuming there is proper jurisdiction over the insurer, when:

1. The insured has been declared bankrupt or proceedings to declare an insured bankrupt have been commenced before the proper court;
2. The insured is insolvent;
3. Service cannot be obtained on the insured;
4. When the cause of action is for damages resulting from an offense between children and their parents or between married persons;
5. When the insurer is an uninsured motorist carrier; or
6. The insured is deceased.

*This right of direct action is available to a claimant when either:*

*1. The policy was issued or delivered in Louisiana; or*

*2. The accident or injury occurred in Louisiana.*

*See* LA R.S. 22:655.

**"No Pay No Play" Law:** Act 1476 of the Louisiana Legislature created the Omnibus Premium Reduction Act of 1997. This act became effective September 4, 1998, and is commonly referred to as the "No Pay/No Play" Law. The law can be divided into four (4) subtopics, discussed below.

1. Limitation of Damages: An owner or operator of an uninsured vehicle involved in a motor vehicle accident cannot recover the first $10,000.00 of bodily injury damages, nor may he recover the first $10,000.00 of property damage (in other words, he is responsible for his own damages up to the minimum amount of insurance required under state law). There are four exceptions to these limitations which apply when the other vehicle's driver:

    *a.* Is cited for violation of LA R.S. 14:98 (DWI) and the driver is convicted of the offense or the driver pleads nolo contendere;

    *b.* Intentionally causes the accident;

    *c.* Flees from the scene of the accident; or

    *d.* At the time of the accident, the driver of the vehicle is in furtherance of the commission of a felony.

*See* LA R.S. 32:866A(1-3).

The limitation of recovery provisions do not apply to a passenger in an uninsured vehicle. *See* LA R.S. 32:866E. However, the limitation of recovery provisions do apply to the operator of an uninsured vehicle owned by another, when the operator does not have automobile liability insurance affording coverage either to himself or the uninsured vehicle. See *Jasper v. Progressive Ins. Co.*, 99-1479 (La. App. 3 Cir. 2/9/00),758 So.2d 848.

Except for newly acquired vehicles added to a policy subject to the policy terms, the issuance, change, or adjustment of any motor vehicle liability insurance policy after a motor vehicle accident, without proof of coverage having been in effect prior to such motor vehicle accident, shall not permit an individual to avoid the limitation of recovery provisions of the statute. LAR.S. 32:866G

The limitation of recovery provisions do not apply :

*a.* To any vehicle that is legally parked at the time of the accident. *See* LA R.S. 32:866H.

*b.* If at the time of the accident the other vehicle is not being operated and the vehicle is not in violation of any Louisiana motor vehicle or traffic regulation.

2. Payment of Court Costs**:** In the event that the owner of an uninsured motor vehicle makes a claim to recover damages in any amount, regardless of whether the uninsured owner/operator was at fault, if the owner/operator is awarded any amount equal to or less than the minimum amount of compulsory motor vehicle liability insurance, $10,000.00, the owner/operator will be held liable for all court costs incurred by all parties to the action. *See* LA R.S. 32:866C.

3. Insurer's Rights to Recovery: The statute does not affect an automobile insurer's subrogation rights. Any insurer has all rights to recover any amount paid by it under the applicable insurance policy for the recovery of any sum in excess of the first $10,000.00 of bodily injury and the first $10,000.00 of property damages. *See* LA R.S. 32:866F.

4. Uninsured/Underinsured Coverage*:* The "No Pay/No Play" Law amended the UM statute. This will be discussed under the UM section below

**Uninsured/Underinsured Motorist:**

Minimum Limit Required: Uninsured/Underinsured Coverage must be provided by all insurers issuing automobile liability insurance in an amount that is not less than the limits of bodily injury liability provided by the policy, unless:

1. The insured selects lower limits, however, an insured cannot select limits lower than $10,000.00 per person/$20,000.00 per accident; or

2. The insured rejects UM coverage in writing. *See* LA R.S. 22:680.

UM coverage must be provided to those persons who are insured under the automobile liability coverage. If the claimant is neither the named insured nor a relative (as defined in the policy) the statute allows UM coverage if claimant was occupying the insured vehicle.

Mandatory coverage? No, it can be rejected (see below).

Can it be rejected? Yes. Louisiana courts are very strict with regard to the rejection of UM coverage and any slight deviation from the statutory requirements discussed here can nullify the rejection.

After September 1, 1987, but prior to September 4, 1998, rejection of UM coverage or selection of lower limits could only be made on a form designed by each insurer. Any forms executed prior to September 4. 1998, the effective date of the "No Pay/No Play" Law, are valid until the policy renewal date. The "No Pay/No Play" Law requires the commissioner of insurance to prescribe a form for the rejection of UM, selection of lower limits, or selection of "economic only" coverage. A copy of the prescribed form is attached hereto as Exhibit "A". *See* LA R.S. 22:680(1)(a)(ii).

After September 4, 1998, when the prescribed form is signed by the insured or his legal representative initially rejecting coverage, selecting lower limits, or selecting economic-only coverage (discussed below) it shall remain valid for the life of the policy and shall not require the completion of a new selection form when a renewal, reinstatement, substitute, or amended policy is issued to the same named insured by the same insurer or any of its affiliates.

An insured may change the original uninsured motorist selection or rejection on a policy at any time during the life of the policy by submitting a new uninsured motorist selection form to the insurer.

Any changes to an existing policy, regardless of whether these changes create new coverage, except changes in the limits of liability, do not create a new policy and do not require the completion of new uninsured motorist selection forms. For the purposes of the statute, a new policy shall mean an original contract of insurance which an insured enters into through the completion of an application on the form required by the insurer. *See* LA R.S. 22:680(1)(a)(ii).

Economic-Only Coverage: The "No Pay/No Play" Law amended the UM statute and gives an insured another option regarding selection of UM coverage. Prior to the enactment of the "No Pay/No Play" Law, an insured had three (3) options:

1. Selection of limits equal to the bodily injury liability limits issued under the policy;

2. Selection, in writing, of limits lower than the bodily injury liability limits issued under the policy, provided the insured does not have the minimum amount of compulsory motor vehicle liability insurance ; and

3. Rejection of UM coverage. The rejection must be in writing.

*See* LA R.S. 22: 680(1)(a)(i).

With the amendments to the UM statute, an insured can now select "economic-only" coverage. This option allows recovery for economic damages, but excludes recovery for non-economic damages, i.e., pain, suffering, inconvenience, mental anguish. *See* LA R.S. 22:680(1)(a)(i).

What is the Statute of Limitations for UMBI? The Statute of Limitations, or under Louisiana law, the prescriptive period, for an uninsured motorist/bodily injury claim is two years. However, if the insured has filed a third party tort action, the third party action interrupts prescription as to a potential claim against his uninsured motorist carrier. *See* LA R.S. 9:5629.

What is the statute of limitations for UMPD? Same as above- two years. *See* LA R.S. 9:5629.

Can an employee successfully make a UMBI claim? Yes; if he is involved in an accident while in a company owned vehicle and the accident occurs while in the course and scope of his employment. The employee can collect worker's compensation benefits and make a claim for UM benefits against the employer's policy (assuming the tortfeasor is uninsured or underinsured), unless UM coverage has been properly rejected by the employer. However, the issue is much more complicated if the employee is using his own vehicle in the course and scope of his employment and is involved in an accident.

Whether the employee can recover UMBI benefits under the employer's policy, provided UM coverage was not rejected, depends on the language of the policy and any endorsements thereto. The Louisiana Appeals Courts have been divided on this issue and recently the Louisiana Supreme Court has interpreted the pertinent policy provisions commonly found in Louisiana business auto policies with UM coverage. In *Carrier v. Reliance Insurance Company*, 99-2573 (La. 4/11/00), 759 So.2d 37; rehearing denied (May 12, 2000), the Court held that an employee driving his own vehicle in the course and scope of his employment was not an insured for the purposes of the UM coverage under the employer's policy because the policy only provided UM coverage for specifically described autos. However, there was an endorsement to the policy, frequently used in Louisiana, entitled "Louisiana Uninsured Motorists Coverage--Bodily Injury." A portion of this endorsement defined who is an insured for the business auto coverage. Included in the definition of an insured was "Anyone else occupying an auto you do not own and that is a covered auto under this coverage part for Liability Insurance and is licensed or principally garaged in Louisiana." Plaintiff tried to argue that this meant that he qualified as an insured under this provision because he was occupying a vehicle not owned by this employer (the named insured), that was a "covered auto" under the liability portion of the policy which defined "covered auto" as any auto. The Court held that to read "covered auto" as "any auto" would not be reasonable because then UM coverage would be provided for any occupant of any auto. The Louisiana Federal Courts, specifically, the Fifth Circuit Court of Appeal has also addressed this issue in *Ehrlicher v. State Farm Insurance Company*, 171 F.3d 212 (5th Cir. (La.) March 15, 1999), and reached the same holding as the court in Carrier.

Can an employee successfully make a UMPD claim? This is dependent upon the terms of the policy.

Is UM subrogable? Yes, however the UM insurer can only seek to recover from the tortfeasor payments it made to the insured prior to insured's settlement and release of the tortfeasor. Further, a tortfeasor who settles with a claimant before a UM payment is made is protected from a subrogated UM carrier. *See State Farm Mutual Automobile Insurance Company v. Nathan*, 95-2001(La. App. I Cir. 5/10/96), 673 So.2d 710; LA R.S. 22:680.

Can UM coverage be stacked? Only under limited circumstances. The UM statute contains an anti-stacking provision that limits the insured to one UM policy except when the insured is a passenger in a motor vehicle not owned by the insured, his or her resident spouse or resident relative. In that instance, the UM policy on the occupied vehicle is primary. If that primary UM policy is exhausted, the injured party may recover, as excess, under another UM policy. However, "in no instance shall more than one coverage for more than one uninsured motorist policy be available excess over and above the primary coverage available to the injured occupant," thus allowing only one excess UM Policy. *See* LA R.S. 22:680(1)(c).

Must a UM tender be made? Yes, if the claimant/insured, or any party in interest, has submitted satisfactory proofs of loss to the insured. To establish a satisfactory proof of loss of a UM claim the insured must establish that the insurer received sufficient facts that fully apprize the insurer:

(1) that the owner and/or operator of the other vehicle involved in the accident was uninsured or underinsured;

(2) that the other driver was at fault;

(3) that such fault caused the damages to the insured; and

(4) the extent of the damages.

LA R.S. 22:658 provides that such a tender must be made within thirty days of receipt of satisfactory proofs of loss. When there is a failure to make such a payment within the prescribed time **and** the failure is found to be arbitrary, capricious, or without probable cause, the insurer shall be subject to a penalty, in addition to the amount of the loss, of 50% of the amount due or $1,000, whichever is greater, plus reasonable attorney's fees.

Further, if the insured submits sufficient evidence to establish the first three elements of the satisfactory proof of loss, but there is a dispute over the amount or the extent of the damages, the insurer must nevertheless unconditionally tender to the insured the reasonable amount due, or a "figure over which reasonable minds could not differ." Such a tender is referred to as a McDill tender. *See McDill v. Utica Mutual Insurance Company*, 475 So.2d 1085(La. 1985); LA R.S. 22:658A(I). In the event a partial payment is made by the insurer, and the insurer's conduct is determined to be arbitrary, capricious, or without probable cause, then the penalty is 50% of the difference between the amount paid or tendered and the amount found to be due plus reasonable attorney's fees. *See* LA R.S. 22:658B(1).

If the insurer fails to tender the amount due within 60 days of receiving a satisfactory proof of loss, and such failure is deemed to be arbitrary, capricious, or without probable cause, then La. R.S. 22:1220 allows the plaintiff to recover any damage he has suffered as a result of the delay as well as a discretionary penalty of two times the damages sustained of $5,000.00, whichever is greater. *See* La. R.S. 22:1220. However, a claimant may not recover damages under both 22:658 and 22:1220.

**Other Issues – Negligence:**

In general: Louisiana Civil Code Article ("C.C. Art.") 2315 requires that every person is obliged to repair the damages caused by his or her fault or act.

Relative to motor vehicle operation: Under Louisiana law, a motorist must operate his or her vehicle in a reasonable and prudent manner so as not to cause injury or property damage to others. LA R.S. 32:64 provides, in pertinent part, that no one shall drive at a rate of speed greater than reasonable and prudent under the conditions and potential hazards then existing, having due regard for condition of the traffic, road and weather. Louisiana courts have declined to hold that a violation of a traffic statute is "negligence per see" and instead impose liability only if the violation is the legal cause of the accident, or if the injury falls within the scope of the hazard sought to be protected against by the statute. *See, e.g.. Slaton v. Stein*, 640 So.2d 582 (La. App. 3dCir. 1984); *Kounterv. Carleton*, 510 So.2d 1370 (La. App. 3d Cir. 1987); *Rome v. State Farm Mutual Auto Insurance Co.*, 439 So.2d 1253 (La. App. 5th Cir. 1983).

How is fault allocated? Allocation of fault in Louisiana is done on a comparative fault basis. Under this system, the plaintiff's recovery is reduced by the percentage of fault assigned to the plaintiff for his own negligence. For example, if the plaintiff is found 30% at fault, then his recovery is reduced by 30% of the recoverable damages, but he is still allowed to collect the remaining 70% from the tortfeasor.

Fault may also be assessed against unnamed tortfeasors. La. C.C. art. 2323 was revised in 1996 and now provides, in pertinent part, that the percentage of fault of persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party/non-party, and regardless of the persons insolvency, ability to pay, immunity by statute, including, but not limited to, the provisions of LA R.S. 23:1032. et seq. In part, this revision was designed to permit employer fault to be considered by the jury.

LA R.S. 23:1104 was also reenacted in 1996 and changed the law regarding quantification of employer fault. Under this statute, persons immune from suit under LA R.S. 23:1032 (e.g., employers) shall be assessed a percentage of the aggregate fault of all persons causing or contributing to the employee's injury. Thus, employer fault must be quantified by the trier of fact. The amount of fault allocated to the employer will reduce the plaintiff's recovery as the plaintiff is unable to recover in tort from his employer. The employer's percentage of fault will not be reallocated to any other person or party. In addition, the employer/intervenor's recovery from the tortfeasor of sums paid to or on behalf of the plaintiff/employee will be reduced by the employer's percentage of fault.

Can negligence of claimant driver be imputed to claimant passengers? Ordinarily, no. Louisiana's case law has consistently held that a driver's negligence is not imputed to a guest passenger. *See Adams v. Security Insurance Company of Hartford*, 543 So.2d 480, (La.1989). However, exceptions do exist for guest passengers who expose themselves to known risks by entering the vehicle, such as crowding four persons into a two person vehicle or knowingly riding with an intoxicated driver. *See id.*. at485; *Cormier v. Royal Indemnity Insurance Company*, 279 So.2d 253 (La. App. 3rd Cir. 1973).

Can a joint venture be established? Yes. A joint venture requires a contract between two or more persons, a juridical entity or person, a contribution in determinate proportions of either efforts or resources, a joint effort, a mutual risk, and a showing of profits. To establish that a joint venture did exist the facts must show that the intent was carried out and that the venture was actually consummated. Intention alone is insufficient to establish the existence of a joint venture. *See Varnado v. Sanders*, 477 So.2d 1205 (La. App. 1st Cir. 1985).

Statute of Limitations: One year for both bodily injury and property damage claims. This prescription period commences from the day the injury or damage is sustained. *See* La. CC. art. 3492.

Must the adjuster notify parties of the Statute of Limitations? Under Louisiana law, an adjuster does not have an affirmative duty to notify the plaintiff of the applicable prescriptive period. However, under LA R.S. 22:1220 B(4) an adjuster and an insurer have an affirmative duty not to mislead a claimant as to the applicable prescriptive period. Where such a misrepresentation is proven, the claimant may recover any damage he has suffered as a result of the delay as well as a discretionary penalty of two times the damages sustained or $5,000.00, whichever is greater. *See* La. R.S. 22:1220. However, a claimant may not recover damages under both 22:658 and 22:1220.

**Punitive Damages:** Louisiana generally does not recognize punitive damages in personal injury actions and only allows for recovery of punitive damages under certain limited circumstances provided for by statute such as where the plaintiff's damages were caused by a defendant driver who was under the influence of alcohol. *See* La. C.C. art. 2315.4.

Covered by Insurance? Punitive damages are recoverable under a liability insurance policy unless the policy specifically excludes coverage for punitive damages. Louisiana courts have held that such exclusions are enforceable under Louisiana law. *See Fortier v. Hamblin*, 610 So. 2d 897 (La. App. 1st Cir. 1992); LA R.S. 22:680(1)(a)(l) which authorizes the exclusion of coverage for punitive or exemplary damages by the terms of the policy or contract for uninsured or underinsured motorist coverage.

Even if not covered, can these be pled and recovery made? Yes. La. CC. Art. 2315.4 does not require that the defendant be covered under an insurance policy. The article permits punitive/exemplary damages upon a showing that the injuries were caused by the "wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries."

Limitations on recovery of punitive damages**:** In 1996, the Louisiana Legislature repealed punitive damages (La. C.C. Art. 2315.3) for the storage, handling, and transportation of hazardous substances. However, as noted above, punitive damages are still recoverable where the tortfeasor is driving while under the influence

of alcohol (La. C.C. Art. 2315.4). While there is no cap on the amount of punitive damages than can be awarded, the Louisiana Court of Appeals for the Fourth Circuit has held that it is an abuse of discretion to award punitive damages in excess of the general damage award. *See Lacoste v. Crochet*, No. 99-CA-0602 (La. App. 4th Cir. 1/5/2000), 751 So.2d 998.

**Joint and Several Exposure:** Joint and several liability exists in Louisiana only under certain circumstances. In those cases arising after 1996, in solido or solidary liability exists only when two or more persons conspire to commit an intentional or willful act. Otherwise, liability for damages caused by two or more persons is a joint and divisible obligation. *See* La. CC. Art. 2324.

One effect of solidary liability is that as long as a plaintiff timely (within one year for tort claims) files suit against a liable defendant, he is entitled to name additional parties as defendants after the one year period has expired. Even in cases of joint and several liability, timely suit against one tortfeasor interrupts prescription as to remaining tortfeasors unless the timely named defendant is found free from fault at trial. Under that scenario, the entire claim against the defendants who were named after the one year period is prescribed.

**Worker's Compensation:**

Is WC subrogable in this state? Yes, worker's compensation carriers have a right to pursue any third party tortfeasor who may be responsible for causing injury to its employee. *See* LA R.S. 23:1101(B).

Any limitations? A worker's compensation carrier's recovery will be reduced by the percentage of fault assessed to the injured employee/plaintiff pursuant to a comparative fault analysis. *See* LA R.S. 23:1101(B). Furthermore, as a result of the legislative revisions to La. CC. Arts. 2323 and 2324(B) and (C), as well as LA R.S. 23:1104, employer fault, regardless of statutory immunity, shall reduce the recovery of any employer "or any other person having paid or having become obligated to pay compensation" by the percentage of fault attributable to the employer. *See* LA R.S. 23:1104 (effective date June 18, 1996). Thus, a worker's compensation intervention (even if subrogated) will be reduced by the percentage of fault assigned to the worker/plaintiff and employer.

How must WC be proved up and protected by the subrogating WC carrier? To protect its interest, the carrier is required to file an intervention, which serves to put all third parties on notice of the compensation lien. If an intervention has been filed, and a defendant settles with the plaintiff without securing the consent of the employer and the carrier, then the defendant is absolutely liable for the total amount of the intervention. *See* LA R.S. 23:1102(C)(1).

Does WC carrier have right of first recovery? Under Louisiana law, the worker's compensation carrier is entitled to the "first dollar" of any settlement or judgment received by the injured employee from a third party tortfeasor. *See* LA R.S. 23:1103(B).

Can WC claimant collect no fault benefits? This is not applicable since the principles of no fault do not apply in Louisiana.

Can a WC claimant make a successful UMBI claim under any applicable UM coverage through NUFI**?** The worker's compensation carrier can make a claim against an uninsured motorist policy as long as the uninsured motorist coverage was not purchased by the injured employee. If UM coverage is provided pursuant to a policy purchased by the employer, then a compensation carrier will be entitled to seek reimbursement from the carrier. *See Johnson v. Fireman's Fund Ins. Co.*, 425 So.2d 224 (La.1982); *Townsend v. Ford Motor Co. Inc.*, 569 So. 2d 238 (La. App. 1st Cir. 1990).

**Settlements/Judgments:**

Does Louisiana require an insurer, or the TPA, to protect the lienholder on any third-party settlement? Yes. There are both state and federal statutes on point.

Federal: Federal law provides that in any case in which the United States is authorized or required to furnish care to an injured person, under circumstances creating a tort liability upon some third person, the United States shall have the right to recover from said third person the reasonable value of the care and treatment. *See* 42 U.S.C. 2651. In enforcing the right, the government may either intervene in the veteran's tort action or it may bring a legal proceeding against the third person in state or federal court. The government has three years after the right of action first accrues to bring its claim for reimbursement. It is important to note that federal cases have held that even where a tortfeasor is found only 1% negligent, the defendant will have to pay the government the full value of the veteran's medical care. *See U.S. v. Theriaque*, 674 F. Supp 395 (D.Mass. 1987). Furthermore, a release signed by the veteran in favor of the tortfeasor will not bind the government, who as noted above, has an independent right of recovery against the tortfeasor.

- Federal law has also created a right of subrogation and reimbursement in the government's favor to cover expenses paid by Medicare. *See* 42 U.S.C. §1395y(b). Medicare has the right to pursue third parties, including attorneys, who receive payments of any sums which should be reimbursed to Medicare. *See* 42 U.S.C. §1395y(b); 42 C.F.R. §411.24(g) and 411.26. In accordance with the provisions of 42 U.S.C. 1396(a), Louisiana has established a similar right of subrogation reimbursement in favor of the State for the recovery of expenses paid by Medicaid. *See* LA R.S. 46:446-46:446.5.

- Medicare is subrogated to the rights of the Medicare beneficiary (injured party) and can recover benefits Medicare paid directly from the automobile or liability insurance company or self-insured plans as well as from any entity, including the beneficiary that was paid by the liability insurer.

Louisiana: Louisiana has created a right of subrogation in favor of state supported charity hospitals and veterans administration hospitals which provide treatment to individuals who have been injured at the hands of another. *See* L.A R.S. 46: 8-46:12. This right of subrogation is an independent cause of action in favor of the state supported provider. Thus, a patient's compromise of any claim with the tortfeasor or his insurer, whether made before or after the filing of the suit, shall not affect the right of any state supported charity hospital or veteran's administration hospital to recover their fees and charges. *See* LA R.S. 46:10. Further, the hospital is under no obligation to provide notice to the tortfeasor or his insurer of its subrogation claim. By contrast, the patient/plaintiff is obligated to serve a copy of the petition upon the hospital at least ten (10) days prior to trial. *See* LA R.S. 46:10. State supported hospitals and veterans hospitals must bring their independent claims for recovery of medical expenses within one year of the incident date. However, if the injured party filed suit against a third party, the hospital may intervene at any time prior to settlement or judgment to protect its interest.

- Pursuant to LA R.S. 9:4751-9:4755, Louisiana has also created a right of reimbursement in favor of ambulance services, hospitals, and other health care providers against the proceeds of any judgment or settlement for medical services provided to an injured plaintiff. This privilege is perfected upon the health care provider providing written notice prior to the payment of any judgment or settlement. Should an attorney who is responsible for disbursing proceeds fail to recognize the lien, he or she may become personally liable to the health care provider. *See* LA R.S. 9:4754; *Also, see Chrysler Credit Corporation v. Louisiana Insurance Guaranty Assoc.*, 514 So.2d 245 (La. App. 5th Cir. 1987), in which the insurer erroneously paid its insured for the total loss of her vehicle following an accident. The insured cashed the checked and stopped making her mortgage payments. Chrysler Credit, who had been named as a loss payee on the policy, sued the insurer. The insurer was ordered to pay the amount due under the mortgage. *See id*; *See also, McDonald v. Barker Auto Sales, Inc.*, No. 35,685 (La. App. 2d Cir. 2/27/02), 810 So.2d 1242, 1245; *Rushing v. Dairyland Ins. Co.*, 456 So.2d 599 (La.1984).

Interest - Pre Judgment/Post Judgment: Louisiana law specifically provides that legal interest is payable on all tort judgments from the date of judicial demand until paid in full. *See* La. R.S. 13:4203. Legal interest attaches automatically as soon as the petition is filed, even if it is not specified in the petition or mentioned in the court's judgment. *See Trentecosta v. Beck*, No. 95-0096 (La. App. 4 Cir. 02/25/98), 714 So.2d 721. The interest

rate is established each year (currently 8.5%) and a case that is pending over a number of years must use the interest rate from each of those years.

Additionally, pre-judgment interest is recoverable on an award for future economic losses. *See Louisiana Farms v. Louisiana Department of Wildlife & Fisheries*, No. 95-845 (La. App. 3d Cir. 10/09/96), 685 So.2d 1086.

The Louisiana Civil Code specifically allows for a suspensive appeal, an appeal that suspends the effect of a judgment, but if the appeal is unsuccessful, interest continues to accrue until it is paid. *See* La. Code Civ. P. Art. 2123; *Andras v. Acadia Dairy. Inc.*, 542 So.2d 1100 (La. App. 1st Cir. 1989).

Minor's Settlements: In Louisiana, a child remains under the authority of his father and mother until his majority, 18 years of age, or emancipation. *See* La. C.C. Art. 216. Because an unemancipated minor has no legal capacity, he may neither enforce nor relinquish rights and may only act through his parents, if both are alive and not legally separated or divorced, or through a tutor or tutrix. *See* La. C.C.P. Arts. 683, 732. However, in an effort to simplify settlements on behalf of minor children who are entitled to tutorship by nature, Louisiana has enacted a statute that dispenses with the need for court approval when the amount of the settlement is less than $10,000.00. *See* LA R.S. 9:196.

At what age can negligence be attributed to a minor? There is no specific age. In determining negligence or contributory negligence of a child, actions must be judged by his maturity and capacity to evaluate circumstances. *See Kontomitras v. New Orleans*, 314 So.2d 441 (La. App. 4th Cir. 1975). Note that in separate cases, a nine-year-old was capable of negligence while a six-year-old was not. The child's action must be judged by his maturity and capacity to evaluate the circumstances in any particular case, and he will be held to a standard only of what can be expected of a child of his age, intelligence, and experience. *See Trahan v. Gulf Ins. Co.*, 525 So.2d 1164 (La. App. 3 Cir. 05/11/88). There is no bright line test to determine when a minor can be assessed with fault, but in any event, his or her parents will be responsible. The parents of a child are responsible for their minor or unemancipated children. *See* LA CC. Art. 2318.

**Alcohol Issues:**

Legal limit of intoxication: Under Louisiana law, a driver can be charged with the crime of operating a vehicle while intoxicated when (1) the driver is under the influence of alcoholic beverages, or (2) the drivers blood concentration is 0.08% or more by weight based on grams of alcohol per one hundred cubic centimeters of blood, (3) the driver is under the influence of any controlled dangerous substance listed under the statute, or (4) the driver is under the influence of a combination of alcohol and one or more drugs which are not controlled dangerous substances and which are legally obtainable with or without a prescription. *See* LA R.S. 14:98. However, if the operator of the vehicle is under the age of 21, he can be charged with underage driving under the influence if his blood alcohol concentration is 0.02% or more by weight based on grams of alcohol per one hundred cubic centimeters of blood. *See* LA R.S. 14:98.1.

Are there varying degrees? Under Louisiana law, there is no threshold limit as to the amount of intoxication which is necessary for an award of damages in a civil case. Negligence is determined by the standard of whether the plaintiff was exercising ordinary care at the time of the accident, regardless of whether the plaintiff was intoxicated. *SeeMartin v. Louisiana Power and Light*, 546 F. Supp. 780 (D.C. La. 1982). Furthermore, La. C.C. Art. 2315.4 does not specify a minimum limit of intoxication in order to qualify for punitive damages. Instead, it merely provides that where the accident was caused by the wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries, then punitive damages are available.

Can the server of alcohol, etc., be held liable? In general, no. Pursuant to LA R.S. 9:2800.1, the legislature has declared that the consumption of intoxicating beverages, rather than the sale or serving or furnishing of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an intoxicated person upon himself or upon another person. In *Mills v. Harris*, No. 92-227 (La. App. 3d Cir.

3/3/93), 615 So.2d 533 the parents of a passenger killed in a one-car accident filed wrongful death and survival action against the owner of the tavern who served alcoholic beverages to the under aged driver of the vehicle. The court ruled that the tavern owner could not be held liable for the subsequent death of the passenger, in absence of an affirmative act by the tavern which increased the peril posed by the driver's intoxication. The serving of the alcohol was not an affirmative act required to impose liability. *See id.*

**Legal Age:** Although it is unlawful for any person under twenty-one years of age to purchase or have public possession of any alcoholic beverage, the term "public possession is defined by statute and the following exceptions apply:

"Public possession" does not include the following:

a) The possession or consumption of any alcoholic beverage:

    a. For an established religious purpose.

    b. When a person under twenty-one years of age is accompanied by a parent, spouse, or legal guardian twenty-one years of age or older.

    c. For medical purposes when purchased as an over the counter medication, or when prescribed or administered by a licensed physician, pharmacist, dentist, nurse, hospital, or medical institution.

    d. In private residences.

b) The sale, handling, transport, or service in dispensing of any alcoholic beverage pursuant to lawful ownership of an establishment or to lawful employment of a person under twenty-one years of age by a duly licensed manufacturer, wholesaler, or retailer of beverage alcohol.

*See* La. R.S. 14:93.10 & 14:93.12.

**Inter-Family and Spousal Immunity:** Under Louisiana, a spouse does have immunity from suit for personal injury. *See* LA R.S. 9:291. However, its effect is negated by Louisiana's Direct Action Statute which permits a suit against an insured's insurer without having to name the insured as a defendant. Thus, a wife injured because of the husband's negligence may not sue her husband, but may proceed directly against the husband's insurer. *See Guillot v. Travelers Indem. Co.*, 338 So.2d 334 (La. App. 1976); *Descant v. Administrators of the Tulane Educational Fund, No.* 93-3098 (La. 07/05/94), 639 So.2d 246. There is also parent-child immunity, and a child who is not emancipated may not sue either parent. *See* La. R.S. 9:571. After the marriage is dissolved, the child may sue the non-custodial parent and may sue either parent upon majority since prescription (statute of limitations) is suspended during the child's minority. *See* La. Civil Code Art. 3469.

**Seatbelt Defense:** Louisiana does not recognize the failure to wear a seatbelt as a defense to a tort action. Pursuant to LA R.S. 32:295.1(E) ("the failure to wear a seatbelt shall not be considered evidence of comparative negligence nor shall evidence of the failure to wear a seatbelt be admitted to mitigate damages").

**Wrongful Death:** Louisiana law allows the survivors of the deceased, whose death occurred due to the fault of another, to file suit to recover damages which they have sustained as a result of the death, i.e., loss of consortium, loss of support, loss of love and affection. La. CC. Art. 2315.2 establishes four classes of survivors who may bring a claim for wrongful death. In the event that a member within one class of survivors is available to bring the action, the members of the class(es) falling below it on the list do not have a cause of action. The classes are as follows:

1. The surviving spouse child or children of the deceased, or either the spouse or the child or children;

2. . The surviving father and mother of the deceased, if the deceased left no surviving spouse or child;

3. The surviving brothers and sisters of the deceased, if no spouse, child or p aren't surviving; and

4. The surviving grandfathers and grandmothers of the deceased, or any of them, if the deceased left no spouse, child, parent, or sibling surviving.

A wrongful death action prescribes one year from the death of the deceased. *See* La. C.C. Art. 2315.2.

**Survival Action:** Louisiana law also allows the survivors of the deceased, whose death occurred due to the fault of another, to file suit to recover damages that the deceased sustained prior to his death, i.e., bodily injuries, property damages. This statute also ranks the classes of survivors who may bring the survival action. The ranking is the same as that set forth above for a wrongful death action. Similar to the wrongful death statute, in the event that a member of one class is available to bring the action, the members of the class(es) below it do not have a cause of action. A survival action also prescribes one year from the date of the decedent's death. *See* La. C.C. Art. 2315.1.

**Business Use Exclusion:** Are business use exclusions against public policy in Louisiana and thus, void and unenforceable? This depends on the facts of the particular case. General business use exclusions are enforceable, with some exceptions, for use of a non-owned automobile in the business or occupation of the insured. *See Argonaut Ins. Co. v. Pacific Indem. Co.*, 256 So. 2d 858 (La. Ct. App. 3d Cir. 1972); *Parker v. American Guar. & Liability Ins. Co.*, 637 So. 2d 788 (La. Ct. App. 1st Cir. 1994) . However, business use exclusions have been held to be unenforceable as applied to automobiles owned by the insured. In *Marcus v. Hanover Ins. Co., Inc.*, 740 So. 2d 603 (La. 1999), the Supreme Court held that a business use exclusion was not enforceable to the extent that its exclusion of coverage for a covered auto conflicted with the public policy underlying the compulsory insurance law. That is, because the public policy underlying automobile insurance is protection of the injured claimant, rather than indemnification of the tortfeasor, the business use exclusion has been held to be inapplicable to vehicles owned by the insured.

**Permissive Use:** Louisiana recognizes the Initial Permissive Driver Rule which is codified in LSA-R.S. 32:900:

> B. Such owner's policy of liability insurance:
>
> (1) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted; and
>
> (2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs with respect to each such motor vehicle as follows:

The plaintiff has the burden of proving express or implied permission of the insured in order to obtain coverage under the omnibus clause. *Manzalla v. Doe*, No. 94-2854 (La. 12/8/95), 664 So.2d 398; *Chisley v. Coleman*, No. 42,750 (La. App. 2d Cir. 12/5/07) 972 So.2d 1221. Whether the name insured gave permission for the driver to use the vehicle, must be proven by a preponderance of the evidence. Such permission is not presumed. *Norton v. Lewis*, 623 So.2d 874 (La. 1993); *Barton v. U.S. Agencies Cas. Ins. Co.*, No. 41,950 (La. App. 2d Cir. 2/7/07), 948 So.2d 1267. Under the Initial Permission Rule, once consent, express or implied, is granted by the insured to use the vehicle, any subsequent changes in the character or scope of the use do not require additional specific consent of the insured. The Initial Permission Rule extends omnibus insurance coverage to those persons who operate a vehicle with the express or implied consent of the insured. The Initial Permission Rule effectively furthers the State's policy of compensating and protecting innocent accident victims from financial disaster. Such permission is given a wide and liberal meaning in determining

coverage. Absent express permission, implied permission generally arises from a course of conduct by the named insured involving acquiescences in, or lack of objection to, the use of the vehicle. *Pope v. All State Insurance Company*, No. 99-0494 (La. App. 5th Cir. 11/30/99), 751 So.2d 299; LSA-R.S. 32:900B(2). The Initial Permission Rule applies to persons using a vehicle with the name insured's permission. The Initial Permission Rule provides that the operator (first permittee) of a motor vehicle is covered under the omnibus clause so long as the operator had the named insured's permission to use the vehicle regardless of whether the operator's use of the vehicle was within the contemplation of the named insured at the time the permission was granted and even where the use is in violation of the specific instructions of the named insured. *Perkins v. McDow*, 615 So.2d 312 (La. 1993).

The "Second Permittee" scenario occurs in those instances where the first permittee allows another driver to drive the automobile. Generally, the party alleging coverage must prove that a non-owner used or operated the vehicle with the named insured's express or implied permission. It may be found the named insured impliedly permitted the third party driver to operate the automobile. Permission is implied where it is reasonably foreseeable that the first permittee would allow someone else to drive the vehicle. *Langston v. Shirley, No.* 28,815 (La. App. 2d Cir. 10/30/96); 682 So.2d 1281; *Wade v. Autoland, Inc.*, No. 32,903 (La. App. 2d Cir. 5/26/00), 767 So.2d 766, *writ denied*, No. 00-2180 (La. 10/13/00), 771 So.2d 651. Where the first permittee is allowed to use the vehicle as his own, the named insured does not prohibit the first permittee from allowing others to drive, the possibility that the first permittee might allow another to drive the vehicle is reasonably foreseeable. Still, there is no coverage where the third party drive uses the vehicle without the first permittee's expressed or implied consent.

> An exception, however, is provided by R.S. 32:900(L) which states:
>
> "An insurer and an insured may by written agreement exclude from coverage any named person who is a resident of the same household as the named insured."

The exception provided in subsection (L) allows an insured to pay a lower premium by entering into a bargain with the insurance company which precludes certain named drivers who reside in the same household as the insured from operating the insured vehicle and denies coverage if they do in fact operate the vehicle. *Joseph v. Dickerson, No. 99-1046 (La.1/19/00), 754 So.2d 912, 917*; *Filipski v. Imperial Fire & Cas. Ins. Co.*, No. 2009-1013 (La. 12/1/09), 25 So.3d 742.

# Maine

**Bodily Injury:** To be accepted as proof of financial responsibility, a motor vehicle insurance policy must provide coverage of at least $50,000 for bodily injury to or death of any one person and coverage of at least $100,000 for all bodily injury and death claims arising from one accident. ME. REV. STAT. ANN. tit. 29-A, §§ 1605(1)(C)(2) and 1605(1)(C)(3).

Additional minimum insurance requirements are:

(a) $350,000 combined single limit for rental vehicles, emergency vehicles, and vehicles for hire that transport freight or merchandise;

(b) coverages from $125,000 to $2,000,000, depending on the number of passengers for various sized vehicles transporting passengers for hire within the State of Maine;

(c) coverages from $1,500,000 to $5,000,000 for various sized vehicles transporting passengers to points outside the State of Maine;

(d) $500,000 for school buses transporting no more than 30 passengers and $1,000,000 for school buses transporting 31 or more passengers;

(e) $125,000 combined single limit for rental trucks with registered gross weights of 26,000 pounds or less and rented or leased for fewer than 30 days.

ME. REV. STAT. ANN. tit. 29-A, § 1611.

Maine has adopted the collateral source rule, so that a plaintiff who has been compensated in whole or in part for his damages by a source independent of the tortfeasor is nevertheless entitled to full recovery against tortfeasor. *Potvin v. Seven Elms,* 628 A.2d 115, 116 (Me. 1993). *See also Werner v. Lane,* 393 A.2d 1329 (Me. 1978).

**Property Damage:** To be accepted as proof of financial responsibility, a motor vehicle insurance policy must provide coverage of at least $25,000 for damage to property. ME. REV. STAT. ANN. tit. 29-A, §§ 1605(1)(C)(1).

Maine law limits damages for the rental of a replacement motor vehicle, including trucks and other commercial vehicles, to 45 days. ME. REV. STAT. ANN. tit. 14, § 1454. *See also Flynn Constr. v. Poulin,* 570 A.2d 1200, 1202 (Me. 1990).

**PIP (Personal Injury Protection) Coverage:** Maine does not require PIP coverage beyond the coverage for medical costs discussed immediately below.

**Medical Payments:** A motor vehicle liability policy issued for a motor vehicle registered or principally garaged in Maine must provide coverage in an amount equal to or greater than $1,000 per person for medical costs incurred as a result of injuries sustained in an accident involving the insured vehicle by the driver and passengers in that vehicle. This requirement applies only to medical costs incurred during the year following the accident. It does not apply to a policy insuring more than 4 motor vehicles or to any policy covering a garage, automobile sales agency, repair shop, service station or public parking place. ME. REV. STAT. ANN. tit. 29-A, §§ 1605(1)(C)(4) and 1605-A.

**Uninsured Motorist Coverage:** Uninsured/underinsured motorist coverage is mandatory for all motor vehicle liability insurance policies. ME. REV. STAT. ANN. tit. 24-A, § 2902. The amount of UM coverage

provided must be at least $50,000 per person/$100,000 per occurrence for bodily injury, $25,000 for property damage and $1,000 for medical payments. *See* ME. REV. STAT. ANN. tit. 29-A, §§ 1605(1)(C).

Maine does not allow stacking of uninsured motorist coverage on liability coverage, but it does allow stacking of uninsured and underinsured motorist coverages. *Connolly v. Royal Globe*, 455 A.2d 932 (Me. 1983). The insured claimant is limited to stated limits for uninsured motorist provisions even if the automobile liability insurance policy insured more than one vehicle. *Dufour v. Metropolitan Prop. & Liab. Ins. Co.*, 438 A.2d 1290 (Me. 1996).

**Statute of Limitations:** Unless an exception applies, the statute of limitations is six (6) years. ME. REV. STAT. ANN. tit. 14, § 752. Wrongful death actions must be brought within 2 years after the decedent's death. ME. REV. STAT. ANN. tit. 18-A, § 2-804. Most statutes of limitation are tolled for minors and for those who are mentally ill, imprisoned, or absent from the United States. ME. REV. STAT. ANN. tit. 14, § 853. A tort action accrues at the point when a wrongful act produces an injury for which the potential plaintiff is entitled to seek judicial relief, regardless of whether the plaintiff could have reasonably known of injury at time injury first arose. *See Williams v. Ford Motor Co.*, 342 A.2d 712 (Me. 1975).

**Comparative Negligence:** Maine has adopted the law of comparative negligence. A plaintiff may not recover if his fault is equal to or greater than that of the defendant. ME. REV. STAT. ANN. tit. 14, § 156. Thus, a plaintiff may not recover if he was 50% or more at fault. If he was 49% or less at fault, he may recover.

The negligence of a driver is not imputable to a passenger, *see Dansky v. Kotimaki*, 125 Me. 72, 130 A. 871, 874 (1925), unless the driver and passenger were engaged in a joint enterprise. *See Trumpfeller v. Crandall*, 130 Me. 279, 155 A. 646, 650 (1931). The test of a joint enterprise between the driver of a vehicle and a passenger is whether they were jointly operating and controlling the movements of the vehicle or had an equal right to do so. *Illingworth v. Madden*, 135 Me. 159, 164, 192 A. 273, 276 (1937).

**Punitive Damages:** Under Maine law deterrence of the tortfeasor is "the proper justification" for an award of punitive damages. *Foss v. Maine Turnpike Authority*, 309 A.2d 339, 345 (Me. 1979). Although Maine courts have questioned the continued vitality of the doctrine of punitive damages, see *Braley v.Berkshire Mut. Ins. Co.,* 440 A.2d 359, 361 n.4 (Me. 1982), punitive damages are available in tort cases when the plaintiff can establish by clear and convincing evidence that a defendant acted with malice in committing the tortuous conduct. *F.D.I.C. v. S. Prawer & Co.*, 829 F. Supp. 439, 453 (D. Me. 1993) (citing *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985)); *see also Kleinschmidt v. Morrow*, 642 A.2d 161, 165 (Me. 1994). Reckless conduct alone or mere negligence will not support an award of punitive damages.

Punitive damages are generally not available for breach of contract. *Forbes v. Wells Beach Casino,* 409 A.2d 646 (Me. 1979). They are also not recoverable against a municipality. ME. REV. STAT. ANN. tit. 14, § 8105(5). *See also Foss*, 309 A.2d at 345.

An insured claimant may not recover punitive damages from an insurer under uninsured

motorist coverage for the reckless conduct of uninsured motorists, since in that context punitive damages do not have the requisite deterrent effect. *Braley*, 440 A.2d at 362-363.

In wrongful death actions, a jury may award punitive damages not exceeding $75,000. ME. REV. STAT. ANN. tit. 18-A, § 2-804.

**Workers' Compensation:** The Workers' Compensation Act automatically vests in an employer who has paid or obligated himself to pay compensation to his injured employee a lien for the value of compensation paid on any damages later recovered against a liable third party. The employee shall receive any recovery in excess of the lien. ME. REV. STAT. ANN. tit. 39-A, § 107. The employer's lien extends to the entire amount of the employee's recovery against a third party tortfeasor for bodily injury, including those portions allocable to pain and suffering and loss of wages not compensable under the Workers' Compensation Act. *See Perry v.*

*Hartford Acc. & Indem. Co.,* 481 A.2d 133 (Me. 1984). The employer's lien does not extend to damages for loss of consortium recovered by a spouse from a third party tortfeasor. *Dionne v. Ford Co.,* 621 A.2d 414 (Me. 1993).

An insurance carrier's lien extends beyond compensation benefits paid to the date of judgment or settlement of the employee's action against third party. The carrier is entitled to recoup payments already made and to set off any future compensation payments until the amount so credited to the carrier equals the employee's net recovery from a third party. *See Liberty Mut. v. Weeks,* 404 A.2d 1006 (Me. 1979).

An employee who settles a claim against a third-party wrongdoer for work-related injuries may still proceed against the employer for workers' compensation benefits, but any award conferred by the Workers' Compensation Board is to be set off by the net amount of the settlement received from the third-party wrongdoer. *See Overend v. Elan I Corp.,* 441 A.2d 311 (Me. 1982).

A worker's compensation lien extends to the proceeds of uninsured motorist coverage paid by anyone except the employee's own insurer. *See Wallace v. South Portland*, 592 A.2d 1076 (Me. 1991).

**Minor Settlements:** Settlements of actions involving minors must have court approval in order to be valid. ME. REV. STAT. ANN. tit. 14, § 1605.

**Bad Faith:** Maine does not recognize the independent tort of bad faith. However, the breach of the implied contractual duty to act in good faith and deal fairly with the insured may be the basis of a claim, even in the absence of a third-party claimant. *Marquis v. Farm Family Mut. Ins. Co.*, 628 A.2d 644, 652 (Me. 1993).

Maine law does provide a statutory basis for an insured to bring a bad faith claim against the insurer. In the context of first party insurance, Maine imposes a penalty on an insurer who fails to pay an undisputed claim within 30 days following a proof of loss, unless the insurer requests reasonable additional information during the 30-day period. ME. REV. STAT. ANN. tit. 24-A, § 2436.

In addition Maine law authorizes a person to bring a civil action against the person's own insurer for the following offenses:

- Knowingly misrepresenting to an insured pertinent facts or policy provisions relating to coverage at issue;
- Failing to acknowledge and review claims, which may include payment or denial of a claim, within a reasonable time following receipt of written notice by the insurer of a claim by an insured arising under a policy;
- Threatening to appeal from an arbitration award in favor of an insured for the sole purpose of compelling the insured to accept a settlement less than the arbitration award;
- Failing to affirm or deny coverage, reserving any appropriate defenses, within a reasonable time after having completed its investigation related to a claim; or
- Without just cause, failing to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear.

ME. REV. STAT. ANN. tit. 24-A, § 2436-A.

An insurer acts without just cause if it refuses to settle claims without a reasonable basis to contest liability, the amount of any damages or the extent of any injuries claimed. *Id.*

**Alcohol:** A blood alcohol level of .08 constitutes prima facie evidence of intoxication. ME. REV. STAT. ANN. tit. 29-A, § 2411(1)(B).

Under the Maine Liquor Liability Act a server who negligently sells, gives or otherwise provides liquor to a minor or visibly intoxicated individual is liable for damages proximately caused by that individual's consumption of the liquor. ME. REV. STAT. ANN. tit. 28-A, § 2506. Service of liquor to a minor or to an intoxicated individual is negligent if the server knows or should know that the individual being served is a minor or is visibly intoxicated. *Id.* In actions for damages permitted by the Act, the award of damages for all losses, except expenses for medical care and treatment, against both a server and the server's employees and agents, may not exceed $ 250,000 for any and all claims arising out of a single accident or occurrence. ME. REV. STAT. ANN. tit. 28-A, § 2509.

**Legal Age:** In Maine the age of majority is 18. ME. REV. STAT. ANN. tit. 1, § 72(1) and (11)(B). *See also Baril v. Baril*, 354 A.2d 392, 396 (Me. 1976).

The legal drinking age is 21. ME. REV. STAT. ANN. tit. 28-A, §§ 2(20) and 2051.

**Spousal Immunity and Intrafamily Immunity:** Maine has abrogated the doctrine of interspousal immunity. In *MacDonald v. MacDonald*, 412 A.2d 71, 71 (Me. 1980), the court held that "a person injured by the tortious conduct of another person is not precluded from asserting liability against the tortfeasor in a civil action solely because the tortious conduct occurred while they were married to each other." Maine has also abrogated the doctrine of parent-child immunity. *Black v. Solmitz*, 409 A.2d 634, 635-36 (Me. 1979). However, an auto insurance policy may exclude coverage for claims by members of the insured's household. *Meiners v. Aetna Casualty & Surety Co.*, 645 A.2d 9 (Me. 1994).

**Seat Belts:** In an accident involving a motor vehicle, the nonuse of seat belts by the operator or passengers or the failure to secure a child is not admissible in evidence in a civil or criminal trial, except in a trial for violation of the seat belt statute. ME. REV. STAT. ANN. tit. 29-A, § 2081(5).

**Wrongful Death:** In wrongful death actions, the jury shall award damages to compensate the decedent's survivors for their pecuniary injuries resulting from the death, as well as damages to compensate the estate of the deceased for conscious pain and suffering and for reasonable medical and funeral expenses. In addition the jury may award damages not exceeding $400,000 for the loss of comfort, society and companionship of the deceased, including any damages for emotional distress. ME. REV. STAT. ANN. tit. 18-A, § 2-804.

A wrongful death action cannot be maintained under the Wrongful Death statute for the death of a viable fetus. *Milton v. Cary Medical Ctr.,* 538 A.2d 252, 256 (Me. 1988).

**Permissive Use:** Under Maine law, whether a person is a "permissive user" is dependent upon the policy language and whether the person's operation of the vehicle was within the scope of the permission given by the owner. For example, Maine courts have found that an insured's fiancee, who was the record owner of the vehicle and who financed it, did not possess a reasonable belief that he had permission to operate the insured's vehicle, and as such, the fiancee was not an "insured" under an automobile policy defining "insured" to include any person using the covered automobile and excluding from coverage any person using the vehicle without a "reasonable belief" that he is entitled to do so. Craig v. Barnes, 710 A.2d 258 (Me. 1998). In this case, the insured kept the vehicle at her home, registered it in her name, contracted with the carrier to insure it, and was the only person to drive it. Id.

Maine does not follow the "initial permission" rule in determining whether automobile liability policy covers an injury occurring at a time when someone other than the owner is driving an automobile that the owner originally permitted the other person to drive. Rather, an automobile is used with "permission" of the owner where an injury occurs from a use that is the primary purpose for which permission was given and there are no more than minor deviations as to the time and place of operation. Savage v. American Mut. Liability Ins. Co., 158 Me. 259, 182 A.2d 669 (Me. 1962). For instance, Maine courts have found that a motorist was not

operating an automobile with "permission" of the owner within the insurance policy, and policy thus did not cover an injury to the automobile's occupant, where the motorist was authorized to borrow the automobile at about 9:30 a. m. for use in town for not over one and one-half hours, and the injury occurred while motorist was driving at about 7 p. m. on a highway several miles from the owner's home. Id.

# Maryland

**Bodily Injury:** Maryland Code Insurance §19-501 *et seq*. governs motor vehicle insurance. Every motor vehicle liability policy sold or delivered in the State is required to provide minimum coverage for damages for which the insured is liable due to bodily injury to others of $30,000 per individual or $60,000 aggregate per accident. Md. Code Transportation §17-103. Effective October 1, 2020 (2020 HB 144), the Uninsured Motorist Provisions of Md. Code Insurance §19-509 and 19-509.1 are amended to include uninsured coverage for property damage, including loss of use of the insured vehicle, and providing that the uninsured limits under Md. Code Transportation § 17-103 apply to bodily injury and property damage.

**Property Damage:** The minimum amount of liability insurance coverage required for damage to property of others for which the insured is liable is $15,000. Md. Code Transportation §17-103.

**Settlements with Minors:** A next friend, if a parent or guardian of the minor, can settle a tort claim on behalf of a minor without court approval. Md. Code Transportation §19-113. If the next friend is not a parent, they must obtain approval from the parent. If both parents are deceased, the court must approve the settlement. See Md. Code Courts & Judicial Proceedings §6-405.

Settlements that result in a net payment to the minor of $5,000 or more are governed by Md. Code Estates & Trusts §13-401 *et seq*., which requires that the payment be made to a trustee for the benefit of the child. The trustee is responsible for investing the funds for the child's benefit until the child reaches 18. The funds cannot be withdrawn prior to that time without court approval.

**Personal Injury Protection (PIP):** No-Fault PIP coverage is required, unless waived, in automobile policies issued in Maryland. If not waived by the first named insured expressly and in writing, the insurer *must* provide coverage of at least $2,500 for all reasonable expenses arising from the accident for necessary medical, hospital, and disability benefits, which can include up to 85% of documented lost income. Md. Code Insurance §19-505. PIP is available to the named insured, listed drivers, residents of the insured's household, anyone injured while using or riding in the insured vehicle, and pedestrians injured in an accident involving the vehicle. Payment of a PIP claim cannot be subrogated. However, if PIP is available and paid from two or more sources, the PIP provider who is secondarily liable may be entitled to a refund of the payment made. Insurers providing PIP coverage can limit the time period during which an application for PIP must be made to one year following the date of the accident. Md. Code Insurance §19-508. Many insurance policies contain this limitation, but some insurers have done away this limitation. There are several available exclusions to PIP coverage allowed by statute, some of which include: a person who intentionally causes the accident, a person who is a non-resident of Maryland who is a pedestrian struck by a motor vehicle outside of the state, and a person injured while driving or riding in a car he knows to be stolen or while committing a felony. Md. Code Insurance §19-505.

**Medical Payments:** Medical Payments coverage or "med pay" typically provides no-fault payments of medical expenses arising out of a covered accident (like PIP), but does not provide lost income payments (unlike PIP). Med Pay is not required under Maryland law.

**Uninsured/Underinsured Motorist Coverage (UM) For Bodily Injury and Property Damage:** Effective October 1, 2020 (2020 HB 144), every motor vehicle liability policy issued in Maryland must provide uninsured motorist (UM) coverage for personal injury and property damage, including loss of use of the insured vehicle resulting from the operation of an uninsured motor vehicle. Md. Code Insurance §19-509 (as amended). The coverage limitations must be equal to the amount of liability coverage provided under the insured's policy unless waived in writing by the insured, in which event the UM coverage must be at least equal to the statutory minimum - $30,000 per person or $60,000 per accident for personal injury and $15,000 for property damage.

An uninsured motor vehicle is defined as one whose ownership, maintenance, or use has resulted in the bodily injury or death of an insured, and for which the sum of the limits of liability under all valid and collectible liability insurance policies is less than the amount of coverage required under the statute. Any provision in an insurance policy that attempts to limit coverage to less than that required by statute is void. Md. Code Insurance §§19-509, 19-510.

Mandatory UM coverage is primary to any right to recover from the Maryland Automobile Insurance Fund (MAIF) under Md. Code Insurance §20-601. MAIF was established by the State legislature to provide the minimum insurance coverage requirements to drivers unable to obtain coverage from commercial insurers.

**Underinsured:** By providing coverage for situations where the sum of the limits of liability under all available policies is "less than the amount of coverage provided under the subsection," the Maryland Insurance Code in effect provides coverage for both uninsured and underinsured motorists. The Code was amended effective October 1, 2017 to specifically address the purchase by insureds of enhances "underinsured motorist coverage." Md. Code Insurance §19-509.1 defines an "underinsured motor vehicle" as a vehicle that has liability coverage in an amount less than, more than or equal to the uninsured coverage provided under the insured's motor vehicle liability policy. Insurers are generally required to offer enhanced underinsured motorists coverage at the time of purchase of a private motor vehicle liability policy. An insured may elect enhanced underinsurance coverage rather than the uninsured coverage required under §19-509. The amount of enhanced underinsured motorist coverage shall equal the amount of liability coverage under the policy. Under §19-509.2, a final judgment in an action for personal injury protection does not preclude a subsequent action for enhanced underinsured motorist coverage arising out of the same accident or occurrence. Pursuant to §19-511, the settlement procedures applicable to uninsured motorist coverage do not apply if the insured has obtained enhanced underinsurance motorist coverage.

The insurer with UM coverage on the involved vehicle provides primary UM coverage. When a person is injured in an accident involving a vehicle that does not have UM coverage, benefits are to be paid by the injured person's own insurer (less any benefits collectible from the insurer of the motor vehicle).

UM coverage benefits must be reduced by any worker's compensation benefits received by the insured.

**Negligence:** Negligence is the basis for most, if not all auto claims. To succeed on a claim of negligence, the plaintiff must prove that the (1) defendant owed a duty to the plaintiff; (2) defendant breached that duty; and the breach was (3) the proximate cause of (4) plaintiff's injury. Maryland common law requires all drivers to exercise ordinary, reasonable care. *See Kafft v. Moran*, 233 Md. 473, 477-78, 197 A.2d 240, 242 (1964). Violation of a vehicle law, statute or regulation does not constitute negligence per se, but it may constitute prima facie evidence of negligence, shifting the burden of proof to the defendant. *See Norris v. Wolfensberger,* 248 Md. 635, 640, 237 A.2d 757 (1968).

The owner of the vehicle alleged to have caused the accident at issue might also be held liable to the plaintiff under the doctrine of negligent entrustment. If a vehicle owner knows or should have known that the particular driver is incompetent because of youth, inexperience or otherwise, the owner has a duty to withhold the vehicle from the driver. *See Rounds v. Phillips*, 168 Md. 120, 177 A. 174 (1935).

Available defenses in Maryland include the doctrines of unavoidable accident, sudden emergency, assumption of risk and contributory negligence. Maryland is one of four remaining states that adhere to the doctrine of contributory negligence, under which a plaintiff cannot recover at all if his negligence is a cause of his injury. In 2012 the Maryland Court of Appeals had the opportunity to abrogate the defense of contributory negligence in favor of some form of comparative negligence but declined to do so, finding that the General Assembly's repeated failure to pass legislation abrogating the defense is "very strong evidence" that the legislative policy in Maryland is to retain the defense. *See Coleman v. Soccer Ass'n of Columbia*, 432 Md. 679, 69 A.3d 1149 (2013). A child under the age of five cannot be contributorily negligent or assume risk as a matter of law, but a child

"of tender years" is bound only to use that degree of care which ordinarily prudent children of the same age, experience and intelligence are accustomed to use under the same or similar circumstances. *See State for Use of Taylor v. Barlly,* 216 Md. 94, 140 A.2d 173 (1958).

In response to a defense of contributory negligence, a defendant can assert the doctrine of last clear chance, under which the injured person who negligently placed himself in a position of danger can still recover if he or she can prove that the defendant was aware of the impending harm and had the last clear chance to avoid the accident or prevent the injury. *See Wooldridge v. Price*, 184 Md. App. 451, 966 A.2d 955 (2009).

**Statutes of Limitations:** A civil action must be brought in Maryland within three years of the date it accrues. Md. Code Courts & Judicial Proceedings §5-101. A tort claim accrues at the time of the wrong. See Benjamin v. Union Carbide Corp., 904 A.2d 511, 394 Md. 59 (2005). A minor's cause of action does not accrue until the minor reaches the age of majority (18). Md. Code Courts & Judicial Proceedings §5-201.

Depending on the policy, the time for asserting a claim under the no-fault PIP provision may be limited to one year from the date of the accident. Md. Code Insurance §19-508.

**Licensing Requirements:** Operators of commercial vehicles having a gross vehicle weight of 26,001 or more pounds and designated to carry 16 or more passengers (including the driver) are required to hold a valid Commercial Driver's License, issued under Maryland's Commercial Driver's License Act. Md. Code Transportation §16-801 *et seq.*

A person may not operate a motorcycle on the highways in the State unless he holds a Class M driver's license issued under Md. Code Transportation §16-104.1. Motorized bicycles and mopeds can be operated by anyone holding any class driver's license. A person may operate a moped without a license under Md. Code Transportation §16.104.2, if he/she is 16, has lawful status, a valid Social Security Number and passes an examination.

A "public adjuster" must be licensed in the State of Maryland. A public adjuster is any person that solicits business or represents itself to the public as an adjuster of first party insurance claims, or who adjusts or advises an insured about insurance claims and losses arising under insurance contracts that insure the real or personal property of the insured. A person who investigates, adjusts or appraises claims for loss or damage covered by a motor vehicle insurance policy is not a public adjuster. Md. Code Insurance §§10-401 and 10-403.

**Punitive Damages:** Punitive damages are available in Maryland as a means of punishing and deterring wrongful conduct. However, to be entitled to punitive damages, the plaintiff must plead in her complaint (and subsequently prove) facts sufficient to show actual malice and make a specific demand for punitive damages. "Actual malice" is difficult to prove in Maryland and requires a showing, by clear and convincing evidence, of intentional or deliberate conduct motivated by "evil or wrongful motive, intent to injure, ill will, or fraud." *See Montgomery Ward v. Wilson,* 339 Md. 701, 733, 664 A.2d 916 (1995). There must also be an award of compensatory damages (for actual injury) before punitive damages can be awarded.

**Joint and Several Liability:** Maryland is a joint and several liability state. A plaintiff injured by more than one tortfeasor may sue any or all of them for his or her damages. Joint and several liability is applicable both where the tortfeasors act in concert to achieve the harm caused, and where tortfeasors act independently but their acts combine to cause a single, indivisible harm. *See Consumer Protection Div. v. Morgan*, 387 Md. 125, 874 A.2d 919 (2005) (discussing difference between concerted and concurrent liability).

The Maryland Uniform Contribution Among Joint Tortfeasors Act establishes a right of contribution among joint tortfeasors, defined as "two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them." Md. Code Courts &

Judicial Proceedings §3-1401 *et seq.* Under the Act, a judgment against or a release as to one tortfeasor does not discharge the other unless provided for in the release.

**Workers' Compensation:** Employers are required to carry workers' compensation insurance to cover accidental injuries suffered by covered employees in the course of their employment. Md. Code Labor & Employment §9-101 *et seq.* An employer is responsible to provide such coverage regardless of fault. §9-501.

Workers' compensation is an exclusive remedy, barring any suit by the injured employee against his or her employer except in limited situations. However, the employee or the employer or its insurer can file an action against a third party where the third party is legally responsible for the injury. *See* §9-902. The employer/insurer can bring a lawsuit against the third party only after a claim is filed and compensation is awarded or paid to the employee under the workers' compensation statute, and if the employer/insurer recovers more from the third party than the amount of compensation paid or awarded to the employee, the employer/insurer must deduct its costs and expenses, and then pay the balance to the covered employee. The employer/insurer must bring its third party claim within two months after the Workers' Compensation Commission makes an award. If the employer/insurer does not do so within that exclusivity period, the employee (or his dependents) may bring the third party claim. If the employee is successful in the third party action, the employer/insurer is entitled to a lien against the employee's recovery for the amount of benefits paid pursuant to the Workers' Compensation Award.

Similarly, a person who is injured in a motor vehicle accident while in the course of his or her employment may be entitled to recover both under the workers' compensation law and a policy providing uninsured or underinsured motorist coverage. However, the employer/insurer is entitled to assert a lien on the proceeds of the uninsured or underinsured motorist policy. *Id.*

Under Md. Code Insurance §19-513, any payments made under PIP or UM coverage must be reduced by any benefits paid to the injured party under any workers' compensation laws, if the employer/insurer paying the workers' compensation benefits has not been reimbursed.

**Bad Faith:** Insurers owe a duty of good faith and fair dealing when resolving claims. "Good faith" means an informed judgment based on honesty and diligence supported by evidence that the insurer knew or should have known at the time the insurer made a decision on a claim. *See State Farm Mut. Auto. Ins. Co. v. White*, 248 Md. 324, 236 A.2d 269 (1967). If an insurer fails to investigate a claim in good faith (thereby acting in bad faith), the insured has several available remedies at common law and by statute.

Maryland has long permitted plaintiffs to recover damages and legal expenses under third party bad faith claims, which arise when a liability insurer fails to settle a tort claim against its insured, resulting in a judgment in excess of the insured's policy limits. Until October 2007, Maryland did not permit first party bad faith claims, which arise when an insurer refuses to pay the claim of its own insured. Now such claims are permitted under Md. Code Courts & Judicial Proceedings §3-1701. The statute does not apply to claims under $5,000 (within the small claims jurisdiction of the district courts) or to commercial insurance policies with liability limits exceeding $1 million. A first party claim permitted under this Subtitle must first be brought before the Maryland Insurance Administration under Md. Code Insurance § 27-1001, unless both parties waive the administrative procedure. Damages are limited to the insured's policy limits, and attorneys' fees are limited to one-third of actual damages. By amendment (2020 SB 801) effective October 1, 2020, obligees are now authorized to institute first party claims against a surety under a surety policy.

Under the Unfair Trade Practices Act, Title 27 of the Maryland Insurance Code, the State legislature has enumerated specific actions that constitute insurance fraud and certain "unfair practices," which include, among others: misrepresentation of facts or policy provisions relevant to the claim at issue; refusal to pay a claim for an arbitrary or capricious reason; settlement of a claim based on an application that is altered without notice to or consent of the insured; failure to include with any claim paid to an insured a statement of coverage

under which the payment is being made; failure to settle a claim when liability is reasonably clear, and failing to act in good faith as defined by §27-1001. Md. Code Insurance §27-303. Violations of this Act subject the insurer to administrative penalties and fines levied by the Maryland Insurance Commissioner.

**Alcohol**: A person may not operate a motor vehicle in the State while under the influence of alcohol, under the influence of alcohol *per se* or impaired. Md. Code Transportation §21-902.

A driver is "under the influence per se" if their blood alcohol level is .08 or more. Md. Code Transportation §11-174.1. A conviction of driving under the influence per se is subject to a penalty not exceeding $1,000 or up to 1 year imprisonment, or both for the first offense, and up to $2,000 and not exceeding 2 years imprisonment, or both for a second offense. Driving while impaired is subject to a maximum penalty not exceeding $500 or up to 2 months imprisonment, or both for the first offense. Md. Code Transportation §27-101.

A person cannot be compelled to submit to a test for the presence of alcohol or a controlled substance, however, the refusal to submit to a test is admissible in evidence at trial under Md. Code Courts and Judicial Proceedings § 10-309. The Motor Vehicle Administration can suspend a driver's license for 180 days following a test indicating a blood alcohol level of .08 g/ml or more for a first or second offense, and if the person was involved in a motor vehicle accident that resulted in the death of another, for 6 months for a first offense or 1 year for a second offence. If the test indicates a level of .15 or higher, the license will be suspended for 180 days (first offense) or 270 days (second offense), and if the person was involved in a motor vehicle accident that resulted in the death of another, for 1 year for a first offense and the driver's license may be revoked for a second or subsequent offense. If the driver refuses to take the test, the MVA will suspend the driver's license for 270 days for a first offense and for 2 years for a second or subsequent offense. A driver may request to participate in the Interlock System Program for a period of 180 days in lieu of a suspension or revocation if the test result indicates a blood alcohol level of.14 or less, and for a period of 1 year if the blood alcohol concentration is .15 or greater or if the driver refused to take the test. Md. Code Transportation § 16-205.1.

Licenses issued to drivers under age 21 carry a notation "Under 21 Alcohol Restricted." Maryland Code of Regulations 11.17.15.03. A driver under age 21 will be found guilty of driving under the influence of alcohol if testing reveals a blood alcohol level of .02 or more.

Code of Maryland Regulations 11.17.15.02; Md. Code Transportation §21-902. A driver under age 21 convicted of driving under the influence is subject to a license suspension of one year for the first offense. Md. Code Transportation §16-205.

**Intra Family** & **Spousal Immunity:** Maryland recognizes the doctrine of parent-child immunity, under which parents and their children cannot assert civil claims against one another. There are three exceptions: a minor who suffers harm as a result of his parent's cruel or outrageous conduct is permitted to bring an action against his parent (*see Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923 (1951)); an emancipated minor can sue his parent once he reaches the age of majority (*see Waltzinger v. Birsner*, 212 Md. 107, 128 A.2d 617 (1957)); and a child can sue a parent's business partner for negligence committed in the operation of the parent's partnership *(see Hatzinicolas v. Protopapas,* 314 Md. 340, 550 A.2d 947 (1988)). A child is also permitted to bring a wrongful death action against one parent based on the parent's intentional killing of the other parent. *See Eagan v. Calhoun,* 347 Md. 72, 698 A.2d 1097 (1997). An action by a parent or the estate of a parent against a child, or by a child or the estate of a child against a parent, for wrongful death, personal injury or property damage arising out of the operation of a motor vehicle may not be restricted by the doctrine of parent-child immunity or by an insurance policy, up to the limits of motor vehicle liability coverage or uninsured motor coverage. Md. Code Courts & Judicial Proceedings § 5-806.

Maryland has abrogated the general rule of spousal immunity, under which a tort by one spouse did not give rise to a cause of action in favor of the injured spouse. *See Boblitz v. Boblitz,* 296 Md. 242, 462 A.2d 506 (1983). Actions between spouses are entertained on a case-by case basis.

The "family purpose" doctrine, under which the head of a family who owns a car for the general use of the family is liable for the negligence of a member of the family driving the vehicle, does not apply in Maryland. The owner can only be liable for the negligence of the family member driver if the driver was acting as agent or servant of the owner at the time of the accident. *See Toscano v. Spriggs,* 343 Md. 320, 681 A.2d 61 (1996).

**Seat Belt Defense:** Although seat belts are required under State vehicle laws, the fact that a plaintiff failed to use a seatbelt is not admissible as evidence of negligence or contributory negligence, to limit an insurer's liability, or to diminish recovery for damages arising out of the ownership, maintenance or operation of a motor vehicle. Md. Code Transportation §22-412.3.

**Rental Coverage:** A person cannot rent a vehicle in Maryland to a person who does not hold a valid driver's license (inspected and verified by the lessor) or who is under the influence of alcohol or drugs. Md. Code Transportation §§18-103, 18-105. The rental agreement can expressly bar anyone other than the person renting the vehicle (lessee) from operating the vehicle. However, this provision does not relieve the lessor of a financial responsibility for the negligence of a driver operating the motor vehicle with the consent of the lessee. §18-102; *Enterprise Leasing Co. v. Allstate Ins. Co.,* 341 Md. 541, 671 A.2d 509 (1996).

If an insurer issues a policy that includes collision coverage, the motor vehicles insured under that coverage shall include any rental vehicle rented by an insured for a period of 30 days or less. Md. Code Insurance §19-512.

An owner of a vehicle offered for rent must carry at least the minimum insurance coverage required by Maryland law for all motor vehicles. Md. Code Transportation §18-102.

If a motor vehicle insurance policy is issued for a vehicle that is specially equipped for the transportation of or operation by an individual with a disability, and the policy provides for reimbursement of renting a replacement vehicle, the insurer must provide a daily reimbursement rate of up to $100 (maximum of $1,500 per period) to allow the insured to rent a motor vehicle that is equipped similarly to the covered vehicle. Md. Code Insurance § 19-516.

**Releases**: It is advisable but not required for the insurer to be named on a release between the insured and the injured party, unless the insurer is a named party in the action being settled by the release.

**Wrongful Death:** An action is available in Maryland against a person whose wrongful act causes the death of another. Md. Code Courts & Judicial Proceedings §3-901 *et seq*. The action is brought for the benefit of the husband, wife, child and parent of the deceased person. Damages are not limited by the pecuniary loss rule. Damages can include compensation for mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education where applicable for the death of a spouse, a minor child (or a child who is not a minor but is under age 21 and unmarried), or a parent of a minor child.

In contrast to the wrongful death action, the estate of a person killed as a result of another's negligence can bring a survival action. In this proceeding, damages are limited to compensation for the deceased's pain and suffering and his or her economic losses sustained after the injury and before death. The estate may also recover funeral expenses. Md. Estates & Trusts §7-401. Future lost earnings are recoverable in a wrongful death action but not in a survival action. *See Jones v. Flood*, 351 Md. 120, 716 A.2d 285 (1998). A survival action accrues during the decedent's lifetime, at the time the injury occurs. Therefore, an estate can be barred by the three-

year statute of limitations if the decedent knew of his injury for more than three years before his death and failed to file a suit.

**Personal Injury Damages Cap:** Maryland has a cap on non-economic damages available in personal injury or wrongful death actions, which was established at $500,000 for injuries occurring after October 1, 1994 and before September 30, 1995. For each year thereafter, the cap is increased by $15,000. Md. Code Courts and Judicial Proceedings §11-108. For example, the cap is $770,000 on causes of action arising on or after October 1, 2012 and before October 1, 2013. In case of two or more claimants in a wrongful death action, the award for noneconomic damages cannot exceed 150% of the limitation, regardless of the number of claimants sharing in the award. The cap does not apply to verdicts in health care malpractice claims arising on or after January 1, 2005 and brought under Md. Code Courts and Judicial Proceedings §3-2A-01, and there is a separate cap for medical malpractice claims.

**No Fault:** See Personal Injury Protection, above.

**Liens:** A hospital providing medical services to a person injured in a motor vehicle accident that is not covered under the Maryland Workers' Compensation Act has a statutory lien on 50% of the amount recovered by the injured person through judgment or settlement. A hospital's lien is subordinate only to an attorney's lien. Md. Code Commercial Law §16-601.

Health insurers that have paid for medical care arising out of the accident can assert a lien against a damage award or settlement to the extent that the expenses paid exceed PIP benefits.

If Medicare makes payments for medical services rendered to an insured as a result of a personal injury, Medicare holds a "super lien" on any recovery received by the insured under federal law.

If the State Medical Assistance Program (Medicaid) makes payments for medical expenses arising out of a personal injury, the Program has a right to subrogate, but only if the Program provided written notice of its subrogation interest to the recipient or his or her attorney. Md. Code Health General § 15-120.

**Permissive Use:** Under Maryland law, whether a person is a "permissive user" is dependent upon the policy language and the circumstances surrounding the user's operation of the vehicle in question - the use must be within the scope of the permission granted under the policy. *See National Grange Mut. Ins. Co. v. Pinkney,* 284 Md. 694 (1979). The permissive user language usually is contained in the insurance policy's omnibus clause. Maryland has not adopted any of the three rules of interpretation for omnibus clauses that are recognized in various states: the "liberal" or "hell-or-high-water" rule, the "conversion" rule, and the "minor deviation" rule.

Insurers in Maryland may exclude coverage for non-permissive use, and this will be enforced by the courts. For example, under the policy at issue in *National Grange Mut. Ins. Co. v. Pinkney,* 284 Md. 694, 399 A.2d 877 (1979), the court stated that "for coverage to exist Pinkney not only was required to have "the permission of the named insured (for use of the van, but) his actual operation (must have been) within the scope of such permission." The court held that if the owner gave Pinkney permission to operate the vehicle for a limited purpose, and the accident occurred while Pinkney was operating the vehicle for a purpose other than for which permission was given, coverage may be denied. *Id.* at 706-707.

Permissive use is presumed in Maryland; the burden of proving that a use is non-permissive is on the vehicle's owner/insurer. *Empire Fire and Marine Ins. Co. v. Liberty Mutual Ins. Co.*, 117 Md. App. 72, 699 A.2d 482 (1997); *State Farm Mut. Auto Ins. Co. v. Martin Marietta Corp.,* 105 Md. App. 1, 657 A.2d 1183 (1995). Permission to use a vehicle may be express or implied. *Bond v. Pennsylvania National Mut. Cas. Ins. Co.*, 289 Md. 379, 424 A.2d 765 (1981).

# Massachusetts

**Bodily Injury:** The Massachusetts Compulsory Motor Vehicle Liability Insurance Law requires proof of motor vehicle liability insurance or evidence of equivalent financial responsibility prior to registration of any vehicle. MASS. GEN. LAWS ch. 90, § 34A. The law makes exceptions for vehicles owned by a person, firm or corporation licensed as a common carrier or subject to the control of the Department of Public Utilities, as well as vehicles owned by the Commonwealth, ambulances and police and fire department vehicles. *See* MASS. GEN. LAWS ch. 90, § 1A.

The minimum required limits of the policy or bond are $20,000 for the injury or death of one person and $40,000 for the injury or death of two or more persons in one accident. *See* MASS. GEN. LAWS ch. 90, § 34A. Compulsory coverage applies only to accidents occurring within the state and does not apply to a "guest occupant" of the vehicle or to an employee of the responsible party entitled to recover Massachusetts Workers" Compensation benefits as a result of the accident. MASS. GEN. LAWS ch. 90, §§ 1A, 34A. *See Service Mut. v. Aronofsky*, 308 Mass. 249, 31 N.E.2d 837 (1941).

A threshold of $2,000 applies to tort actions brought as a result of bodily injury, sickness or disease arising out of the ownership, operation, maintenance or use of a motor vehicle. MASS. GEN. LAWS ch. 231, § 6D. *See also Cobb v. Gosnell*, 2003 Mass.App.Div. 21, 2003 WL 328855 (2003). The threshold applies only to damages for "pain and suffering" and does not apply to special damages, which are generally covered, up to certain limits, under Massachusetts no-fault laws. Therefore, if the claimant is from another state and is not entitled to recover no-fault benefits, he or she may recover special damages without having to reach the threshold, but is still unable to recover damages for pain and suffering unless the threshold is met.

Massachusetts motorcyclists do not need to meet the threshold in order to recover for pain and suffering. *See Murphy v. Bohn*, 377 Mass. 544, 387 N.E.2d 119 (1979). In addition, the $2,000 threshold need not be met if the injury causes death or involves total or partial loss of a body member, permanent or serious disfigurement, loss of sight or hearing, or a fracture. MASS. GEN. LAWS ch. 231, § 6D.

**Property Damage:** The Compulsory Motor Vehicle Liability Insurance Law also requires liability coverage of at least $5,000 per accident for property damage. MASS. GEN. LAWS ch. 90, § 34O.

Massachusetts has no statute providing for abandonment of salvage. Salvage is usually handled per agreement of the parties involved. Generally, the claimant retains his or her property and is compensated based on the property's actual cash value less its salvage value. Loss of use of the damaged property is also included within this category and may include such expenses incurred in connection with the total loss of a vehicle, at least until such time as payment for the damaged vehicle has been made to the claimant. Tax, title and license fees would generally be considered only in those instances where salvage is retained by the insurer.

**Personal Injury Protection:** Massachusetts is a no-fault state and, therefore, requires Personal Injury Protection ("PIP"). MASS. GEN. LAWS ch. 90, § 34A. PIP pays the insured, members of his household, guests and pedestrians up to $8,000 per person for medical expenses, lost wages and replacement services regardless of fault.[1] *Id.* Insurers may, however, exclude from PIP benefits anyone who was operating a motor vehicle while under the influence of alcohol or a narcotic drug; committing a felony or seeking to avoid arrest by a police officer; or specifically intending to cause injury or damage to himself or others. *Id.*

However, if the claimant has private health or disability insurance, the insurer's liability for reimbursement of medical expenses is limited to $2,000 plus any additional charges for services rendered which may fall outside of the scope of coverage provided by the claimant's health insurance (*e.g.*, chiropractic services). *Id.* The Division of Insurance has indicated that coverage under Medicare (or Medicaid) does not constitute private

health insurance for purposes of the PIP statute. Therefore, if an injured party‟s only health insurance is Medicare, the $2,000 limit on recovery of medical expenses does not apply, and the claimant can obtain a total of $8,000 in PIP reimbursements. The maximum weekly amount recoverable for lost wages benefits is 75% of the injured person's average gross weekly wage for the 52-week period immediately preceding the accident. *Id.*

No threshold applies to personal injury protection benefits, but the insured may elect a deductible of up to $8,000 for himself alone or for himself and household members. MASS. GEN. LAWS ch. 90, § 34M.

An insurer paying PIP benefits may subrogate to the rights of any party it pays and may bring an action in tort against any person liable for the damages incurred who is not exempt from liability. *Id.*

Anyone entitled to workers' compensation benefits under the terms of Massachusetts Workers‟ Compensation Act as a result of an accident is not eligible to receive PIP benefits, irrespective of whether his or her employer actually purchased workers‟ compensation coverage. *See Hanover Insurance Company v. Ramsey*, 405 Mass. 1101, 539 N.E.2d 537 (1989).

Only medical expenses incurred within two years of the accident are recoverable. MASS. GEN. LAWS ch. 90, § 34A.

**Medical Payments:** Not required. Medical payments coverage is completely optional and covers the named insured, members of his or her household, and occupants of the insured vehicle for medical and funeral services incurred as a result of an accident. Lost wages benefits are not recoverable under this coverage part. Although no threshold applies to the ability to recover under medical payments coverage, it does not cover any expenses which are payable or which would have been payable, except for a deductible elected by the insured, under personal injury protection coverage.

Coverage need not be specifically rejected in writing, and medical payments benefits are not subject to subrogation. Persons entitled to workers‟ compensation benefits as a result of an accident may receive medical payments benefits, unless the injured person was employed by the named insured and was injured in the course of his or her employment by the named insured. In such cases, coverage is excluded. Medical payments benefits may not be considered in calculating amounts recoverable under bodily injury claims. Finally, medical payments benefits only cover expenses incurred within two years of the accident.

**Uninsured/Underinsured Motorist Coverage:** Uninsured motorist ("UM") coverage is mandatory for all motor vehicles, trailers and semitrailers registered in Massachusetts. MASS. GEN. LAWS ch. 175, § 113L(1). Purchase of underinsured motorist coverage is optional, but insurers must offer it. MASS. GEN. LAWS ch. 175,

§ 113L(2). "UM benefits apply only when the *motor vehicle* is uninsured. Under the statute, UM benefits must be provided when (1) the insured is legally entitled to recover damages for certain injuries from the owner or operator of a motor vehicle and (2) the motor vehicle responsible for the accident is uninsured. *Massachusetts Insurers Insolvency Fund v. Safety Ins. Co.*, 439 Mass. 309,313, 787 N.E.2d 555, 558 (2003) (emphasis in original).

The mandatory limits for uninsured motorist coverage are $20,000 per person and $40,000 per accident. MASS. GEN. LAWS ch. 175, § 113L(1); MASS. GEN. LAWS ch. 90, § 34A. An insurer must also offer additional coverage of at least $15,000 per person and $40,000 per accident, MASS. GEN. LAWS ch. 175, § 113C, but the insurer has no obligation to notify the insured of this optional coverage. *Robinson v. Charles A. Flynn Insurance Agency, Inc.*, 39 Mass.App.Ct. 902, 653 N.E.2d 207 (1995). Coverage under multiple policies may not be stacked. MASS. GEN. LAWS ch. 175, § 113L(5).

The uninsured motorist provisions of the householder's policy also protect members of the insured's household. MASS. GEN. LAWS ch. 175, § 113L. However, where a household member has his own

Massachusetts motor vehicle insurance policy, he may not recover under the higher underinsurance motorist coverage provided in the policy of another household member. *Goodman v. American Casualty Co.*, 419 Mass. 138, 643 N.E.2d 432 (1994).

An injured occupant's first recourse is to his own insurance policy or to the policy of a resident relative. *Only* when no uninsured or underinsured motorist coverage is available under either of these will an injured occupant be able to recover benefits from the policy covering the vehicle in which the injury occurred. *Mercadante v. Worcester Ins. Co.*, 62 Mass.App.Ct. 293, 301, 816 N.E.2d 145, 151 (2004). *See also Skinner v. Royal*

*Insurance Co.*, 36 Mass.App.Ct. 532, 633 N.E.2d 432 (1994).

The exclusivity provision of the Workers" Compensation Act bars an employee from recovering uninsured or underinsured benefits from an employer for an injury in the course of employment. *Berger v. H.P. Hood. Inc.*, 416 Mass. 652, 655, 624 N.E.2d 947, 949 (1993). However, preclusion of a claim against an employer does not necessarily bar a claim against a subsidiary of the employer. *Berger*, 416 Mass. at 658, 624 N.E.2d at 950.

**Negligence:** Massachusetts has adopted a modified comparative fault rule. A plaintiff may recover when his negligence "was not greater than the total amount of negligence attributable to the person or persons against whom recovery is sought," but his damages are reduced by the percentage of his negligence. MASS. GEN. LAWS ch. 231, § 85. Thus, if a plaintiff is more than 50% responsible for his own injuries, his conduct will bar any recovery. *See Shantigar Foundation v. Bear Mountain Builders*, 441 Mass. 131, 135 f.4, 804 N.E.2d 324, 328, n.4 (2004). *See also Savers Property & Cas. Ins. Co. v. Admiral Ins. Agency, Inc.*, 61 Mass.App.Ct. 158, 807 N.E.2d 842, *review denied*, 442 Mass. 1105, 810 N.E.2d 1230 (2004). The comparative negligence statute is not applicable to intentional or willful, wanton or reckless conduct. *Zeroulias v. Hamilton American Legion Associates, Inc.*, 46 Mass.App. 912, 705 N.E.2d 1164, 1166 (1999).

Violation of a criminal statute is evidence of negligence, but does not constitute negligence *per se*. *See* Richmond v. Warren Institution for Savings, 307 Mass. 483, 30 N.E.2d 407 (1940). See also MASS. GEN. LAWS ch. 231, § 85.

Massachusetts has abolished the defense of assumption of risk. *Id.*

The negligence of the operator of the vehicle in which the claimant was a passenger may not be imputed to the passenger. *Thibodeau v. Webster*, 312 Mass. 363, 44 N.E.2d 647 (1942).

**Statute of Limitations:** In general, actions in tort and actions in contract to recover for personal injuries must be brought within 3 years of the date of loss. MASS. GEN. LAWS ch. 260, § 2A.

In general, other actions in contract must be brought within 6 years after the cause of action accrues. MASS. GEN. LAWS ch. 260, § 2. Insurance policies may provide for a limitations period of less than 6 years, but not less than 2 years. MASS. GEN. LAWS ch. 175, § 22.

The statute of limitations for presenting an uninsured motorist claim is six (6) years from the date the insurer breached the insurance contract:

The basis of an insurer's obligation to pay underinsured motorist benefits "is not its actions resulting in personal injury but, rather, its contractual promise to indemnify against such injury." *Royal-Globe Ins. Co. v. Craven*, 411 Mass. 629, 638 (1992). Hence, "an action on an uninsured motorist policy is an action in contract for indemnification," and the applicable limitations period is the six-year period prescribed by G. L. c. 260, § 2 (1994 ed.). *Id.* at 636. *Berkshire Mutual Ins. Co. v. Burbank*, 422 Mass. 659, 660, 664 N.E.2d 1188, 1189 (1996).

Generally, the statute of limitations begins to run for minors once the minor has reached 18, the age of majority.

MASS. GEN. LAWS ch. 260, § 7.

**Licensing Requirements:** Anyone other than an attorney who, for compensation, directly or indirectly seeks to represent the insured in connection with the assessment of damages, negotiation, settlement or appraisal of a loss under an insurance policy is deemed a public insurance adjuster (MASS. GEN. LAWS ch. 175, § 172) and must be licensed (MASS. GEN. LAWS ch. 175, § 162). Private adjusters need not be licensed.

**Punitive Damages:** The general rule in Massachusetts is that punitive damages are not recoverable unless specifically authorized by statute. *See USM Corp. v. Marson,* 392 Mass. 334, 353, 467 N.E.2d 1271, 1284 (1984). Statutory remedies include punitive damages for unfair insurance claims practices and wrongful death.

In an action to recover on an insurance policy, a court may award punitive damages, in addition to the amount of the claim, up to 25% of the claim if the court finds that the party seeking to recover on the insurance policy has been damaged by unfair methods of competition or unfair or deceptive practices in the business of insurance. MASS. GEN. LAWS ch. 176D, § 7.

Punitive damages of at least $5,000 are generally available in wrongful death actions where the defendant's gross negligence or "malicious, willful, wanton or reckless conduct" caused the decedent's death. MASS. GEN. LAWS ch. 229, § 2.

Whether punitive damages may be covered under liability insurance is presently not settled in Massachusetts. However, they are not recoverable as an element of damages under uninsured or underinsured motorist coverage. *See Santos v. Lumbermans Mutual*, 408 Mass. 70, 556 N.E.2d 983 (1990).

**Joint and Several Liability:** Massachusetts is a pure joint and several liability state. Under the Massachusetts system of joint and several liability, "a plaintiff injured by more than one tortfeasor may sue any or all of them for her full damages." *Shantigar Foundation v. Bear Mountain Builders*, 441 Mass. 131, 141, 804 N.E.2d 324, 332 (2004). Thus, any defendant named in the judgment is liable to the plaintiff for the entire amount without regard to his share of the fault. Tortfeasors who pay more than their *pro rata* share of the damages may then seek partial reimbursement, or contribution, from other joint tortfeasors. MASS. GEN. LAWS ch. 231B, § 1.

**Workers' Compensation:** The Workers" Compensation Act provides a right to sue a person other than the insured where the injury was caused under circumstances creating a legal liability in the third party. MASS. GEN. LAWS ch. 152, § 15. Either the employee or the insurer may file an action against a third party. However, before filing, the insurer must not only pay the compensation, but also wait until 7 months have passed following the injury. *Id.* "[A]ny money recovered in any action against a third party „shall be for the benefit" of the workers" compensation insurer, and . . . any amount recovered which exceeds the amount due the compensation insurer „shall be retained by" the employee. The purpose of this provision is to prevent double recovery by the employee, that is, „once by way of compensation and once by way of damages."" *CNA Ins. Companies, Inc. v. Semedo-Anacleto*, 39 Mass.App.Ct. 271, 274, 655 N.E.2d 630, 632 (1995).

A settlement by agreement of the parties requires approval by the Industrial Accident Board, or, if made during trial, by the presiding justice. MASS. GEN. LAWS ch. 152, § 15. The employee and the insurer must have the opportunity to be heard on the merits of the settlement and on the amount, if any, to which the insurer is entitled out of the settlement by way of reimbursement. *Id.*

An insured under the Massachusetts Compulsory Motor Vehicle Liability Insurance Law, MASS. GEN. LAWS ch. 90, § 34A, may not receive PIP (no-fault) benefits if he is entitled to payments or benefits under the provisions of the Workers" Compensation Act. *See Flaherty v. Travelers Ins. Co.*, 369 Mass. 482, 340 N.E.2d 888 (1976); *Mailhot v. Travelers Ins. Co.*, 375 Mass. 342, 377 N.E.2d 681 (1978). Similarly, an employee injured on the job by an underinsured third person may not recover UM benefits provided under a standard policy by an employer's motor vehicle insurer. *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Figaratto*, 423 Mass. 346, 667

N.E.2d 877 (1996). Further, a workers' compensation setoff provision in a UM policy is enforceable, since it does not contravene MASS. GEN. LAWS ch. 175, § 113L(4), the statute providing that insurer is entitled to reimbursement from proceeds of judgment or settlement obtained by the insured from tortfeasor. In addition the Wrongful Death Statute precludes any civil action for the wrongful death of an employee who is subject to the provisions of the workers‟ compensation laws. *Peerless Ins. Co. v. Hartford Ins. Co.*, 48 Mass. App. 551, 723 N.E.2d 996 (2000).

**Settlement of Claims of Minors:** The most effective way to ensure that a settlement in a case involving personal injury to a minor will withstand a subsequent challenge by the minor when he reaches the age of majority is to petition the court for approval of the settlement. Although this procedure is not compulsory in Massachusetts, any party to the action may petition the court for approval of a settlement involving the claim of a minor. MASS. GEN. LAWS ch. 231, § 140C½. The court may appoint a guardian or guardian ad litem and/or hold an evidentiary hearing before approving the settlement. *Id.* Because this procedure is available only for "any case before the court," court approval of the settlement of a minor claim not yet in litigation will requires the commencement of a "friendly suit" between the parties. *Id.*

A child is not held to the same standard of care as an adult. Rather, the negligence of a child is "judged by the standard of behavior expected from a child of like age, intelligence, and experience." *Mathis v. Massachusetts Elec. Co.,* 409 Mass. 256, 263, 565 N.E.2d 1180, 1184 (1991).

**Unfair Practices:** Unfair methods of competition and unfair or deceptive acts and practices in the business of insurance include:

1. misrepresentations with respect to nature, contents or benefits of insurance policy,
2. discrimination between individuals of same class and risk, and
3. various practices with respect to settlement of claims. MASS. GEN. LAWS ch. 176D, § 3

Consumers may bring actions against insurers for unfair and deceptive acts and practices under the consumer protection statute. MASS. GEN. LAWS Ch 93a for violations of ch. 176D. *See Dodd v. Commercial Union,* 373 Mass. 72, 365 N.E.2d 802 (1977). Willful or knowing violations, bad faith and unfair claim settlement practices may lead to awards for treble damages plus attorneys‟ fees and costs. MASS. GEN. LAWS ch. 93A, § 9.

The most commonly cited unfair claim settlement practices include:

1. failure to acknowledge or communicate concerning claims promptly;
2. refusal to pay claims without conducting a reasonable investigation;
3. failure to affirm or deny coverage within a reasonable time;
4. failure to promptly settle claims once liability has become reasonably clear; and
5. failure to promptly provide a reasonable explanation for denying or compromising a claim. MASS. GEN. LAWS ch. 176D, § 3(9).

At least 30 days before filing an action under Chapter 93A, claimants must send a demand letter to any prospective respondent. MASS. GEN. LAWS ch. 93A, § 9(3). If the respondent replies with a reasonable offer of settlement within 30 days, no multiple damages may enter. *Id.* The demand requirements do not apply to counterclaims or cross-claims or if the prospective respondent does not maintain a place of business or keep assets within the Commonwealth. Such respondents can avoid multiple damages by making a written offer of

relief and paying the rejected tender into court as soon as practicable after receiving notice of the commencement of an action. *Id.*

**Alcohol:** A driver is presumed to be operating under the influence (OUI) of alcohol if he has a blood alcohol content (BAC) of .08. MASS. GEN. LAWS ch. 90, § 24(1)(a)(1). The BAC limit for minors is .02. MASS. GEN. LAWS ch. 90, § 24N. Drivers arrested for OUI are deemed to have consented to submission to a breath or blood test. MASS. GEN. LAWS ch. 90, § 24(1)(f)(1). A driver arrested on an OUI charge who refuses to submit to a such a test shall have his license suspended for a period of 180 days (3 years if the driver is under 21 years of age or has been convicted of OUI once previously, 5 years if the driver has been convicted of OUI twice and for life if the driver has been convicted of three or more OUI violations).

Massachusetts has not enacted a Dram Shop statute. However, violations of various liquor control laws, particularly sections 34 and 69 of Chapter 138 of the Massachusetts General Laws, and the principles of common law negligence can serve as the basis for holding commercial sellers and individuals liable for alcohol related accidents.

**Legal Age:** The age of majority in Massachusetts is 18. MASS. GEN. LAWS ch. 4, § 7.

**Inter-Family/Spousal Immunity:** Massachusetts has abolished both inter-family and inter-spousal immunity doctrines. Family members and spouses are thus free to file claims against one another. *See Lewis v. Lewis*, 370 Mass. 619, 351 N.E.2d 526 (1976).

**Seat Belt Defense:** Not presently available. With certain exceptions, Massachusetts requires the use of seat belts. MASS. GEN. LAWS ch. 90, § 13A. "Failure to wear a properly fastened safety belt shall not be considered as contributory negligence or used as evidence in any civil action." GL c.90 sec 13A

**Wrongful Death:** According to the Massachusetts wrongful death statute, the legal representative of the decedent's estate may bring a civil action against a person whose negligence or "willful, wanton or reckless" conduct caused the death. MASS. GEN. LAWS ch. 229, § 2. A common carrier is liable for negligence and for willful, wanton or reckless conduct that causes the death of a passenger. *Id.* A breach of warranty that results in injury that causes death is also actionable under the statute. *Id.*

The statute does not cap the amount of damages that the estate may recover. Recoverable damages include:

1. the fair monetary value of the decedent to the persons entitled to receive the damages recovered, including, but not limited to, compensation for the loss of the reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel and advice of the decedent to the persons entitled to the damages recovered;

2. the reasonable funeral and burial expenses of the decedent;

3. punitive damages in an amount of not less than $5,000 where the gross negligence or malicious, willful, wanton or reckless conduct of the defendant caused the decedent's death. *Id.*

A viable child who is killed while in the mother's womb is a "person" for whom a right of action exists. *Mone*

*v. Greyhound Lines, Inc.*, 368 Mass. 354, 331 N.E.2d 916 (1975). A non-viable fetus which is born prematurely and lives for a couple of hours is a "person" for whom a wrongful death action may be brought. *Torigian v. Watertown News Co.*, 352 Mass. 446, 225 N.E.2d 926 (1967).

An action to recover damages under the wrongful death statute shall be brought within 3 years of the date of death, or within 3 years from the date when the deceased's executor or administrator knew or should have

known of the factual basis for a cause of action. MASS. GEN. LAWS ch. 229, § 2. However, the saving provisions set forth in MASS. GEN. LAWS ch. 260 apply.

**Liens:** A hospital providing health services to a person injured in an accident has a lien against monies recovered by the injured person as a result of judgment or settlement. MASS. GEN. LAWS ch. 111, § 70A. However, underinsured motorist benefits are not "damages," but rather contractual obligations, and thus are not subject to the hospital lien statute. *Meyers v. Bay State Health Care,* 414 Mass. 727, 610 N.E.2d 303 (1993). The statute does not require the lien holder to pay any portion of the plaintiff's fees and costs incurred in recovering a judgment from a tortfeasor. *Pierce v. Christmas Tree Shops, Inc.,* 429 Mass. 91, 706 N.E.2d 633 (1999).

A health insurer that has paid medical expenses as a result of an auto accident may assert a lien against a damage award or settlement from a third-party tortfeasor, to the extent expenses paid exceed PIP benefits. *Creswell v. Medical West Community Health Plan,* 419 Mass. 327, 644 N.E.2d 970 (1995).

Payments of $500 or more under an insurance contract are subject to liens for past due child support. Insurers have a duty to ascertain whether such liens exist prior to paying the claims. MASS. GEN. LAWS ch. 175, § 24D.

**Collision Waiver:** The motor vehicle rental agreement statute, MASS. GEN. LAWS ch. 90, § 32E½, is designed to benefit consumers who rent private passenger cars by notifying them that the purchase of a collision damage waiver (CDW) might duplicate coverage already provided by their automobile insurance. *Roberts v. Enterprise Rent-A-Car Co. of Boston, Inc.*, 438 Mass. 187, 192, 779 N.E.2d 623, 627 (2002). Although the statute provides for civil fines and a public enforcement action brought by the Commonwealth, private relief for violations of that statute is available under MASS. GEN. LAWS ch. 93A, the consumer protection law. *See Hershenow v. Enterprise Rent-A-Car Co. of Boston, Inc.*, 445 Mass. 790, 795, 840 N.E.2d 526, 531 (2006).

**Permissive Use:** Under Massachusetts statutory law, where it is shown that a motor vehicle was registered to the defendant at the time of the injury complained of, this is prima facie evidence that the vehicle "was then being operated by and under the control of a person for whose conduct the defendant was legally responsible." M.G.L.A. 231 § 85A.[2]

The burden of proving he was not legally responsible is upon the defendant, by the terms of the statute, and he must affirmatively plead such lack of responsibility. The statute does not make the defendant prima facie liable for every accident in which his vehicle is involved, such as where the operator had no authority to invite the plaintiff guest into the vehicle. Gallo v. Veliskakis, 357 Mass. 602 (1970); Feltch v. General Rental Co., 383 Mass. 603 (1981).

Aside from cases involving unauthorized guests, proof of registration of the vehicle in the defendant's name is sufficient to create a question of fact on the matter of the defendant's vehicle, and ordinarily it cannot be said that the registered owner has as a matter of law sustained the burden of proving the absence of such responsibility. Similarly, because the statute shifts the burden of proof to the defendant registered owner, in order to prevail on summary judgment, it is not enough for the owner to argue that the record contains no evidence of her control, since the owner must affirmatively eliminate any genuine issue of material fact regarding her power to control the operator's conduct. Covell v. Olsen, 65 Mass. App. Ct. 359 (2006).

In a case where evidence tended to show the defendant's vehicle was driven by a repairman, this did not as a matter of law overcome the prima facie case created by proof of registration in the defendant's name, and the plaintiff did not waive the benefits of the prima facie case by introducing testimony on the subject of the agency. Smith v. Freedman, 268 Mass. 38, 167 N.E. 335 (1929); Haun v. Le Grand, 268 Mass. 582, 168 N.E. 180 (1929).

Where a plaintiff-passenger testified that at the time of the accident she was returning from a nightclub with the lessee-driver, her testimony warranted a finding that at the time of the accident the lessee-driver was not

operating for the purpose of nor under the control of the lessor-registered owner, thereby creating a fact question sufficient to overcome the prima facie effect of M.G.L.A. c. 231, § 85A. Cheek v. Econo-Car Rental System of Boston, Inc., 393 Mass. 660 (1985)

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[1] Note, however, that the Commissioner of Insurance has promulgated a regulation that provides that although motorcycle insurance policies must afford personal injury protection to pedestrians struck by motorcycles, insurance companies are not required to provide no fault protection for owners, operators or guests who suffer bodily injury while operating or riding on a motorcycle. Further, operators and guests may not recover PIP benefits from any other source. Operators and riders may, however, recover damages for pain and suffering under MASS. GEN. LAWS ch. 231, § 6D even if they have not reached the tort threshold in medical expenses or suffered any of the injuries specified. *See Murphy v. Bohn*, 377 Mass. 544, 387 N.E.2d 119 (1979).

[2] The full text of the statute reads: "In all actions to recover damages for injuries to the person or to property or for the death of a person, arising out of an accident or collision in which a motor vehicle was involved, evidence that at the time of such accident or collision it was registered in the name of the defendant as owner shall be prima facie evidence that it was then being operated by and under the control of a person for whose conduct the defendant was legally responsible, and absence of such responsibility shall be an affirmative defense to be set up in the answer and proved by the defendant." M.G.L.A. 231 § 85A.

# Michigan

## I. JOINT & SEVERAL LIABILITY

**A. Several liability** applies to almost all tort defendants, limited to defendant's own percentage of fault, per MCL 600.2956 & 2957. No dollar setoff for amounts paid in settlement, only percentage setoff for fault.

**Exceptions** - joint liability for:

- medical malpractice defendants. MCL 600.6304(6)(a).

- defendants convicted of an impairment-related crime.

MCL 600.6312(b).

- defendants convicted of a crime of gross negligence.

MCL 600.6312(a).

- common law dollar setoff available for amount of prior settlements. *Markley v Oak Health Care Investors of Coldwater, Inc,* 255 Mich App 245; 660 NW2d 344 (2003).

**B. Contribution** - only available for jointly liable defendants.

*Kokx v Bylenga,* 241 Mich App 655; 617 NW2d 368 (2000).

**C. Allocation of fault -** Fault of properly identified nonparties and uncollectible defendants reduces plaintiff's recovery - includes settled tortfeasors and (with required notice) nonparties, "regardless of whether they are or could be parties to the action provided that their fault caused or contributed to the injury." MCL 600.6304.

**D. Contributory negligence** - not a bar. MCL 600.2958.

**E. Modified comparative fault**, generally

- Plaintiff's percentage of fault reduces all forms of tort recovery per MCL 600.2959.

- Economic losses - almost always recoverable except by impaired plaintiffs, but recovery reduced by fault attributable to plaintiff and uncollectible tortfeasors / nonparties. MCL 600.2959 & 6304.

- Noneconomic losses (pain and suffering, loss of consortium, etc.) - not recoverable if plaintiff more than 50% at fault. MCL 600.2959.

- Impaired plaintiff - entire claim is barred (economic and noneconomic) if plaintiff was impaired by alcohol or controlled substances at the time of the accident to the point that the plaintiff had an impaired ability to function and as a result of that was 50% or more the cause of the "accident or event" which caused the injury. The statutory definition of "impaired" is any impairment which diminishes the plaintiff's ability to react and/or blood alcohol content of more than .08%, and plaintiff need NOT be convicted of an impairment-related offense. MCL 600.2955a. This can be invoked even by the host who served plaintiff, per *Piccalo v Nix,* 466 Mich 861; 643 NW2d 233 (2002).

## II. TORT DAMAGES, GENERALLY

**A. No punitive damages - only compensatory** unless authorized by statute. *Rafferty v Markowitz,* 461 Mich 265; 602 NW2d 367 (1999); *McAuley v General Motors Corp,* 457 Mich 513; 578 NW2d 282 (1998).

**B. Exemplary damages -** recoverable only for injuries maliciously, willfully, and wantonly inflicted, but still only compensatory. *McPeak v McPeak (On Remand),* 233 Mich App 483; 593 NW2d 180 (1999).

## III. NEGLIGENCE

**A. Modified comparative fault** (claim barred if fault more than 50%) for actions based on tort or another legal theory seeking damages for personal injury, property damage or wrongful death. MCL 500.2959.

**B. Impaired plaintiffs** - all claims for the death of an individual or for injury to a person or property are barred completely if the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. MCL 600.2955a(1).

## IV. WRONGFUL DEATH - MCL 600.2922 et seq

**A. Survival actions -** actions survive death and may only be brought by personal representative of the estate as appointed under Estates & Protected Persons Code (EPIC) for reasonable medical, hospital, funeral & burial expenses for which the estate is liable; reasonable compensation for the decedent's conscious pain & suffering & the beneficiaries' loss of financial support, society & companionship which they would have received from the deceased. No recovery for survivor grief.

**B. Beneficiaries -** spouse, children, descendants, parents, grandparents, brothers and sisters, children of deceased spouse, devisees, and, if none, intestate heirs.

**C. Minors -** Court order required for settlements and distributions, court approval for those involving minors (currently somewhat unclear).

**D. Tolling of SOL -** SOL extended if death occurs w/in 30 days of when SOL would have run - generally extended until 2 years after letters of authority are issued - MCL 600.5852.

## V. DRAMSHOP

**A. Potential plaintiffs -** MCL 436.1801(2) and (3) provide causes of action for spouse, child, parent, or guardian of that person injured due to sales to minors and visibly intoxicated persons.

**Exception -** Liability for a dramshop which sell to an underage minor is limited to those injured by that particular purchaser.

**B. Defendant dramshop's rights during litigation -** to have the alleged intoxicated person (AIP) named and retained as a defendant in the dramshop action, to full indemnity from the AIP, and to all defenses available to the AIP (including the plaintiff's failure to satisfy the no fault threshold of serious impairment).

## VI. STATUTES OF LIMITATION

- Negligence & torts, generally - 3 years - MCL 600.5805(10).
- Contract & other, non-tort personal actions - 6 years - MCL 600.5813.
- Med mal - 2 years - MCL 600.5805(6).
- Assault & battery - 2 years - MCL 600.5805(2) - (12).
- Employment discrimination - 3 years -

- *Mair v Consumers Power Co,* 419 Mich 74; 348 NW2d 256 (1984).

- Dramshop - 2 years with preliminary notice required w/in 120 days of entering into attorney-client relationship - MCL 436.1801(4).

- False imprisonment - 2 years - MCL 600.5805(2).

- Fraud / misrepresentation

  - 6 years if express contract - MCL 600.5813.

  - 3 years if no express contract & injury to persons or property - MCL 600.5805(10) &

  - *Case v Goren,* 43 Mich App 673; 204 NW2d 767 (1972).

- Libel & slander - 1 year - MCL 600.5805(9).

- Malicious prosecution - 2 years - MCL 600.5805(5).

- Malpractice in state-licensed profession (NOT med mal) - 2 years after defendant discontinues serving plaintiff (no discovery rule) - MCL 600.5838a .

- Medical malpractice, generally - 2 years or 6 months after plaintiff discovered or should have discovered claim, whichever is later - MCL 600.5805(6) & MCL 600.5838(2) (but also see tolling periods in MCL 600.5805 and 5851) - significant and heavily litigated 182-day pre-suit notice provisions - MCL 600.2912b.

  - claim accrues at time of act or omission regardless of time of discovery.

  - fraud or reproductive system injuries - MCL 600.5838a(3).

  - minors - special tolling provisions - MCL 600.5851(7) & 5851(8).

- Products liability, generally - 3 years - MCL 600.5805(13).

- Surveyors - 6 years - MCL 600.5839(2).

- Wrongful death - depends on the specific cause of action alleged

  - *Hawkins v Regional Med Labs, PC,* 415 Mich 420; 329 NW2d 729 (1982).

- Wrongful death savings provision - 2 years after letters of authority are issued, if person dies before or w/in 30 days when SOL ran - MCL 600.5852.

- Uninsured motorist claim against claims fund - 3 years, but notice of intent to claim against fund must be filed within 6 months of time claim accrues - MCL 257.1128 and 1118.

- No fault - first-party claim for personal or property protection benefits - 1 year - MCL 500.3145(2) & (3) & tolling provisions do NOT apply, even during minority or incompetency - *Cameron v ACIA,* 263 Mich App 95; 687 NW2d 354 (2004); *Devillers v Auto Club Ins Ass'n,* 473 Mich 562, 702 NW2d 539 (2005).

- No-fault - insurer's action for indemnity - 1 year - MCL 500.3146.

- Collection of judgments - 10 years if rendered in US court of record, 6 years if not in court of record - MCL 600.5809(3).

- Claims against state

  - generally 3 years, but notices of intent to file claim may be due w/in shorter time periods (6 months - 1 year after claim accrues) if they are constitutional - MCL 600.6452(1)(2) & MCL 600.6431(1) & (3).

  - defective highways - 2 years - MCL 691.1411(2) but arguably unconstitutional notice of intent to sue due 120 days after claim accrues - MCL 691.1404(1).

- Claims by state and political subdivisions to recover cost of maintenance, care of treatment of persons in state institutions - no SOL.

- Whistleblowers' Protection Act - 90 days - MCL 15.361 & 363.

- Wrongful discharge - depends on theory alleged per *Romero v Paragon Steel Div, Portec, Inc.,* 129 Mich App 566; 341 NW2d 546 (1983).

- Tolling & special provisions -

  - disabilities (including minority & insanity) - w/in 1 year after disability ends

  - special rules for tolling in med mal - MCL 600.5851(1)

  - death before SOL runs or w/in 30 days thereafter - extends SOL until 2 years after letters of authority issued if filed w/in 3 years after SOL has run.

  - do NOT apply to first-party no fault claims per *Cameron v ACIA,* 263 Mich App 95; 687 NW2d 354 (2004); *Devillers v Auto Club Ins Ass'n,* 473 Mich 562, 702 NW2d 539 (2005).

  - do not apply to UM/UIM claims per *Rory v Continental Ins Co,* 473 Mich 457, 703 NW2d 23 (2005).

## VII. VENUE

**A. Unfavorable counties** for tort defendants:

Wayne, Genesee, Berrien, Muskegon.

**B. Tort -** MCL 600.1629 & 1641 sets forth a venue priority for claims in tort or other legal theory seeking damages for PI, PD or wrongful death.

(1) county where original injury occurred if ALL defendants reside / conduct business there. *Massey v Mandell,* 462 Mich 375; 614 NW2d 70 (2000).

(2) county where original injury occurred if plaintiff resides or conducts business there.

(3) County where BOTH plaintiff and defendants reside / conduct business.

(4) any county where the general and non-tort venue statutes (MCL 600.1621 or 1627) would permit .

"Original injury" occurs where injury takes place, not where death occurred. *Karpinski v St John Hospital-Macomb Center Corp,* 238 Mich App 539; 606 NW2d 45 (1999).

**C. Non-tort cases -** MCL 600.1621 sets venue priority:

(1) county where defendant resides, has place of business or registered agent or conducts business.

(2) county where plaintiff resides, etc.

(3) county where defendant fiduciary was appointed, if applicable.

**D. Default venue for all but contract actions** - where all or part of the cause of action arose. MCL 600.1627.

**E. Contract & other actions:** MCL 600.1621 creates venue hierarchy:

(1) county where defendant resides, has a place of business or registered agent or conducts business

(2) county where plaintiff resides, etc.

**F. Claims against state -** Jurisdiction and venue in Court of Claims in Ingham County (Lansing). MCL 600.6404.

Other governmental bodies: county where body exercises its authority. MCL 600.1615.

**G. Multiple theories (tort & contact, etc.)** - Must use tort venue if that is one theory, otherwise, any county where any cause of action could have been brought separately. MCL 600.1641.

**H. Products liability -** Defendant "conducts business" in any county in which its product is sold at retail. MCL 600.1629.

## VIII. OWNERS LIABILITY STATUTE

An owner or registrant of a vehicle is vicariously liable for damage to persons or property caused by negligent operation of the vehicle when the vehicle is being operated with the owner's knowledge or consent. MCL 257.401. The statute rebuttably presumes consent when the vehicle is operated by certain enumerated relatives, and common law rebuttably presumes consent for other drivers. *Roberts v Posey,* 386 Mich 656; 194 NW2d 310 (1972). Note: Different rules apply to owners who are commercial lessors.

## IX. AUTOMOBILE LAW

**A. No fault** - When an individual is involved in an automobile accident in Michigan, two types of legal actions typically follow: a first party claim for "No-Fault" benefits and/or a third-party automobile negligence claim. As to the first-party action, Michigan No-Fault insurance pays personal injury protection (PIP) benefits to an individual in the form of medical expenses, wage loss and household replacement services, regardless of who caused the subject accident to occur. A first party No-Fault claim is initiated when an individual and his or her No-Fault insurer disagree over which PIP benefits should be paid/received. As it pertains to a third-party action, an individual can seek monetary damages in the form of pain and suffering, and possibly, other non-economic losses. In order to receive said damages, that individual must show that the other driver was negligent in causing the accident to occur. The individual must additionally prove that he or she meets the statutory threshold requirement of having suffered death, permanent serious disfigurement or serious impairment of a body function.

Michigan auto law simply cannot be reduced to a short and concise statement. Litigation concerning first-party No-Fault and third-party automobile negligence claims is extremely complex and complicated.

**B. Tort threshold for recovering noneconomic losses -** "Serious impairment of body function" is defined as objectively manifested impairment of an important body function that affects the claimant's general ability to lead his or her normal life. MCL 500.3135(7). To be "serious," an injury need not be permanent, but it the injury must cause an impairment which changes the "course or trajectory" of the plaintiff's life. *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004).

Modified comparative fault applies to claims for noneconomic loss and bars all noneconomic losses if claimant's fault is more than 50%. MCL 500.3135(2)(b).

Impaired plaintiff penalty bars recovery of all losses, if applicable. MCL 600.2955a(1).

**C. Improperly uninsured owners or registrants** who are driving the improperly uninsured vehicle at the time of the accident are penalized:

fully liable in tort (no immunity)

may not collect first-party benefits or receive as tort damages

noneconomic loss claim barred if driving own uninsured vehicle at the time of the accident. MCL 5003135(2)(c).

may still recover excess economic losses (reduced by comparative fault)

**D. Property damage** - never recoverable in tort, only as first-party benefits, except for out of state losses. MCL 500.3121 & 3123.

**E. Excess economic losses** - always recoverable. MCL 500.3135.

Pure comparative fault applies to claims for excess economic loss. MCL 600.2959 & 6304. Impaired plaintiff penalty bars recovery of all losses, if applicable. MCL 600.2955a(1).

**F. No guest-passenger rule** - prior statute prohibiting suit by a guest passenger against an owner or operator except upon proof of gross negligence or willful and wanton misconduct was declared unconstitutional and subsequently repealed. See *Manistee Bank Trust Co v McGowan,* 394 Mich 655, 663; 232 NW2d 636 (1975), *overruled in part on other grounds* by *Harvey v Michigan,* 469 Mich 1, 14; 664 NW2d 767 (2003).

## X. AUTO COVERAGE ISSUES

**A. Mandatory coverages -** Vehicle owners & registrants required to carry no fault auto insurance with unlimited lifetime medical, 3 years of wage loss, limited replacement services and survivors' loss paid as first-party benefits Mandatory liability coverage of $20,000 / $40,000 for injuries involving death, permanent serious disfigurement and serious impairment of body function (defined in MCL 500.3135(7)).

**B. Verbal, not monetary, threshold for recovery of noneconomic damages. MCL 500.3135 -** must show either death, permanent serious disfigurement or serious impairment of body function, defined in § 3135(7) to mean "an objectively manifested impairment of an important body function which affects the person's ability to live his or her normal life."

**C. No rule of reasonable expectations** - Any clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy. *Raska v Farm Bureau Mutual Ins Co,* 412 Mich 355; NW2d 440 (1982).

The courts may not refuse to enforce the terms of an insurance policy based on unreasonableness because that function is committed by the state constitution to the Commissioner of Insurance. *Rory v Continental Ins Co,* 473 Mich 457; 703 NW2d 23 (2005).

**D. No mandatory stacking -** anti-stacking provisions upheld. *State Farm Mut Auto Ins Co v Tiedman,* 181 Mich App 619; 450 NW2d 13 (1989).

**E. UM and UIM coverages optional** & need not be offered.

**F. No fault liability coverage need not be "portable"** - insurer may exclude coverage when owner drives anything except insured vehicle. *Husted v Auto-Owners Ins Co,* 459 Mich 500, 508; 591 NW2d 642 (1999).

**G. Statutes of limitations -** "one year back rule" - All first-party claims under mandatory no fault coverages must be submitted to the insurer within one year of the accident or the date the expense was incurred. MCL 500.3145(1).

The period for filing suit against an insurer based on refusal to pay a first-party claim is not tolled while the insurer considers whether to approve the claim. *Devillers v Auto Club Ins Ass'n,* 473 Mich 562; 702 NW2d 539 (2005).

Contractual limitations periods for optional coverages (UM, UIM, homeowners, etc.) are enforceable unless declared unreasonable by the Michigan Commissioner of Insurance. *Rory v Continental Ins Co,* 473 Mich 457; 703 NW2d 23 (2005). With some exceptions, contractual limitations periods of less than 3 years in UM or UIM policies have been declared by the Commissioner to be unreasonable.)

**H. Examinations Under Oath (EUO's) -** No fault (auto) insurers may not require them for mandatory coverages, but fire & casualty insurers may require them. *Yeo v State Farm Ins Co,* 219 Mich App 254; 555 NW2d 893 (1996).

## XI. OTHER COVERAGE ISSUES

**A. Pollution exclusions - enforceable.** *McGuirk Sand & Gravel, Inc v Meridian Mut Ins Co,* 220 Mich App 347; 559 NW2d 93 (1996).

**B. Mold exclusions - enforceable.** *Hayley v Allstate Ins Co,* 262 Mich App 571; 686 NW2d 273 (2004), *lv den* 472 Mich 923; 697 NW2d 155 (2005).

## XII. BAD FAITH

**A. First-party bad faith breach of an insurance contract** - no claim for exemplary damages recognized, per *Kewin v Massachusetts Mut Life Ins Co,* 409 Mich 401, 423; 295 NW2d 50 (1980), but in no fault auto cases, there are statutory interest penalties which accrue without regard to the insurer's fault. MCL 500.3142.

**B. Bad faith failure to settle within policy limits -** the insured's cause of action is recognized, per *Commercial Union Ins Co v Liberty Mut Ins Co,* 426 Mich 127; 393 NW2d 161 (1986) and *Wakefield v Globe Indemnity Co,* 246 Mich 645; 225 NW 643 (1929), but recovery is limited to the amount which would have been collectible from the insured. *Frankenmuth Mut Ins Co v Keeley (On Rehearing),* 436 Mich 372; 461 NW2d 665 (1990).

## XIII. PREMISES LIABILITY:

Open and obvious defense negates any duty to warn or protect against risks (including snow and ice) which are so open & obvious that a person of ordinary intelligence would discover them upon casual inspection unless special aspects of condition make it unreasonable dangerous & create high likelihood of harm. *Lugo v Ameritech Corp, Inc,* 464 Mich 512; 629 NW2d 384 (2001); *Novotney v Burger King Corp (On Remand),* 198 Mich App 470; 499 NW2d 379 (1993); *Corey v Davenport College of Business (On Remand),* 251 Mich App 1; 649 NW2d 392 (2002) (snow & ice).

Where a dangerous condition is open and obvious, the premises owner is protected from liability for harm caused by that condition so long as there are no special aspects of the condition that make even an open and obvious risk unreasonably dangerous. *Lugo v Ameritech Corp, Inc,* 464 Mich 512, 516; 629 NW2d 384 (2001)

An open and obvious condition is one for which an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand),* 198 Mich App 470, 475; 499 NW2d 379 (1993). The focus should be on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff. *Lugo, supra* at 524.

Whether a condition is open and obvious is measured objectively and depends on the characteristics of a reasonably prudent person and not the characteristics of a particular plaintiff. *Mann v Shusteric Enterprises, Inc,* 470 Mich 320, 329 n 10; 683 NW2d 573 (2004), citing *Bertrand v Allen Ford, Inc,* 449 Mich 606, 617; 537 NW2d 185 (1995).

## XIV. PRODUCTS LIABILITY

**A. Noneconomic damages** (pain & suffering, loss of consortium, etc.)

2-tier damage cap with index for inflation: MCL 600.2946.

Higher cap for death or permanent loss of a vital bodily function - adjusted annually - now $717,000

Lower cap for all other injuries - adjusted annually - now $401,500.

Exceptions to damage cap (no cap applies) -

Defendants found by jury to be grossly negligent. MCL 600.2949a(3)

Defendants found by court to have acted in willful disregard of actual knowledge that the product was defective and would likely cause injury. MCL 600.2949a.

**B. Economic damages**

-not capped but must be objectively verifiable. MCL 600.2945(c).

-if not readily ascertainable, limited to state average yearly median family income as adjusted by inflation, now $ 64,148, per MCL 600.2946a(4)

**C. Defenses** include misuse, alteration, voluntary assumption of risk, sophisticated user, inherently & necessarily dangerous products & open & obvious risk. MCL 600.2945.

- Duty to warn measured at time products leaves defendant's control. MCL 600.2948(3).
- No liability by mere seller of product unless separately negligent or warranty. MCL 600.2947(6).
- Compliance with relevant governmental standards raises rebuttable presumption of non-liability, but non-compliance raises no presumption of negligence. MCL 600.2946(4).
- Compliance and non-compliance with relevant non-governmental standards in effect at time product left defendant admissible on issue of due care. MCL 600.2946(1).
- Plaintiffs must prove economically & technologically feasible safer alternative existed at time product left defendant. MCL 600.2946(2).
- FDA approved drugs presumed not defective absent fraud in approval process which results in FDA rescinding approval. MCL 600.2946, as interpreted by *Garcia v Wyeth-Ayerst Laboratories,* 385 F3d 961 (CA 6 2004).

## XV. INDEMNIFICATION: Michigan recognizes 3 types of indemnification:

**A. Common-law indemnity** - indemnitee must prove freedom from active fault, so rarely available. *Minster Machine v Diamond Stamping Co,* 72 Mich App 58; 248 NW2d 676 (1972).

A vehicle owner held liable under the owners liability statute, MCL 257.401, is entitled to indemnity from the negligent driver.

*Dale v Whiteman,* 388 Mich 698; 202 NW2d 797 (1972).

**B. Contractual indemnity** - Permitted so long as the intent to indemnify for one's own negligence is unambiguous expressed

**Exception -** Construction indemnity statute prohibits and voids all agreements to indemnify the indemnitee for damages arising out of bodily injury or property damage based on the SOLE negligence of the indemnitee of his agents or employees in contracts relating to the construction, alteration, repair, or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith. (Not enforceable unless the indemnitor is also at fault.) MCL 691.991.

**A. Implied contractual indemnity** - (rare) - agreement to indemnify can be implied from the circumstances of the transaction / special relationship between the parties or a course of conduct whereby one party undertakes to perform a certain service and impliedly assures indemnification. *Palomba v City of East Detroit,* 112 Mich App 209, 217; 315 NW2d 898 (1982).

**XVI. MISCELLANEOUS:** Michigan's Supreme Court is very conservative and highly predictable, although likely to overrule precedent with which it does not agree. The Courts of Appeal are moderately conservative and more likely to rule in favor of plaintiffs.

**Permissive Use:** Michigan law on permissive use is generally governed by MCL 257.401(1), which states:

> Sec. 401. (1) This section shall not be construed to limit the right of a person to bring a civil action for damages for injuries to either person or property resulting from a violation of this act by the owner or operator or a motor vehicle or his or her agent or servant. The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by the common law. The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge. It is presumed that the motor vehicle is being driven with the knowledge and consent of the owner if it is driven at the time of the injury by his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the family.

Generally, as to the burden of establishing that an automobile was being driven with the consent and permission of the owner, the plaintiff is entitled to the benefit of a presumption that the driver of the automobile at the time of the accident was driving with the consent and knowledge of the owner; and the evidence necessary to make that presumption disappear has to be positive, unequivocal, strong and credible. *Detroit Auto Insurance Exchange v Gordon*, 115 Mich App 41 (1968).

Michigan Courts have concluded that the presumption of permissive use, taken together with allegations in an underlying tort suit, is significant and sufficient to impose on an insurer a duty to defend in the underlying suit, even when the issue of permissive, use is contested. Michigan recognizes that the duty to defend is broader than the duty to indemnify and an insurer has a duty to defend its insureds if the allegations in the underlying action arguably fall within the coverage of the policy.

In the area of trucking exposure, Michigan also recognizes exposure as to "Placard Liability". The carrier lessee of a truck tractor is liable as the owner of the tractor for injuries sustained by a third person as a result of the negligence of a driver, where the lessee fails to remove its identifying placards and to request in

accordance with the ICC regulations the return of its identifying placards. *Paul v Bogle*, 193 Mich App 479 (1992).

Issues can, however, arise when permissive use arises in the context of a claim for personal injury protection insurance liability (Michigan No Fault Act), rather than a third party negligence claim. Under the Michigan No Fault Act, an owner of a motor vehicle includes a person having use of the motor vehicle for a period that is greater than 30 days. MCL 500.3101(2)(G)(i). Michigan Courts have provided that the sporadic use of a vehicle fails to establish ownership under the statute for purposes of no-fault benefits, but a regular pattern of unsupervised, nearly exclusive use of a vehicle for more than 30 days is sufficient to establish ownership. The Michigan statute provides that an owner of a vehicle includes, "[a] person renting a motor vehicle or having use thereof, under a lease or otherwise, for a period that is greater than 30 days". The Michigan Court of Appeals has recognized that a person "having the use" of the vehicle means using the vehicle in ways that comports with concepts of ownership and is thereby obligated to maintain personal injury protection insurance for that vehicle.

If an individual's right use a vehicle is for a limited time and limited purpose, then he most likely will not be classified as an owner under this statute for personal injury protection benefits. On the other hand, if the person's use is regular and unsupervised for a period of 30 days, the person will most likely be considered an owner of the vehicle for the purpose of a potential exclusion of personal injury protection benefits if the individual has not purchased insurance as mandated by MCL 500.3101 et seq.

# Minnesota

**Bodily Injury Liability Coverage:** Bodily injury liability coverage is required in Minnesota. The minimum limits required are $30,000 per person and $60,000 per occurrence. Minn. Stat. § 65B.49. A claimant may not recover non-economic damages in a tort action unless medical expenses exceed $4,000, exclusive of diagnostic X-rays, or an injury results in permanent disfigurement, permanent injury, death, or disability for sixty days or more. Minn. Stat. § 65B.51.

**Property Damage Liability Coverage:** Property damage liability coverage is required. The minimum limit is $10,000. Minn. Stat. § 65B.49, subds. 1, 3.

**First Party Claim Handling and Bad Faith:** In a first-party claim for loss of use of a vehicle, the Minnesota Unfair Claims Practices Act, Minn. Stat. § 72A.201, governs how loss of use of a vehicle must be handled. If the policy provides for the adjustment and settlement of total loss, the insurer must provide a cash settlement, comparable automobile, or the cost of a comparable automobile, along with all applicable fees associated with property transfer. Deviations from this standard must be documented and explained to the insured. Minn. Stat. § 72A.20l, subd. 6. If an insurer acquires ownership of a late-model or high-value vehicle by damage payment, the insurer must apply for a salvage certificate and notify the registrar of motor vehicles within forty-eight hours. Minn. Stat. § 168A.151, subd. 1. There is no private cause of action for violation of the Minnesota Unfair Claims Practices Act. *See Star Windshield Repair, Inc. v. W. Nat'l Ins. Co.*, 768 N.W.2d 346, 349 n.5 (Minn. 2009) (quoting *Morris v. Am. Family Ins. Co.*, 386 N.W.2d 233, 238 (Minn. 1986)). Nevertheless, in an action involving first-party insurance coverage, Minn. Stat. § 604.18 allows an insured to move the court for taxable costs and attorney fees, not to exceed $350,000 combined, based on an insurer's alleged bad-faith if there is an absence of a reasonable basis for denying benefits. Minnesota Statutes § 604.18, however, does not provide for an independent cause of action for bad-faith.

**No Fault/Personal Injury Protection:** Minnesota is a no-fault state and requires basic economic loss benefits to any person suffering loss from injury caused by a motor vehicle accident within the state. The minimum limits of coverage are $20,000 for medical expense loss for injury to any one person, and a total of $20,000 for all other economic loss benefits. Minn. Stat. §§ 65B.44, subd. 1; 65B.46, subd. 1.

Basic economic loss benefits include medical expenses, income loss (85% of income with a maximum of $500 per week), replacement services, rehabilitation, funeral and burial expenses, survivor's economic loss benefits, and survivor's replacement loss services. Minn. Stat § 65B.44. Basic and optional economic loss benefits are deducted from recovery in a negligence action. Minn. Stat. § 65B.51, subd. 1.

A basic no-fault insurer is subrogated to all rights of the person to whom benefits are paid if the insurer pays basic economic loss benefits which another insurer is obligated to pay. Minn. Stat. § 65B.47, subd. 6. Further, a basic no-fault insurer that pays or is obligated to pay economic loss benefits is subrogated to the extent of its obligations to the injured person against the person whose negligence in another state causes injury giving rise to payment, but only to the extent necessary to prevent duplication of benefits or reimbursement. The same is true for an insurer that pays or is obligated to pay optional economic loss benefits. Minn. Stat. § 65B.53, subd. 2. An insurer that pays or is obligated to pay basic economic benefits is subrogated to a claim involving intentional tort, strict or statutory liability, or negligence other than negligence in maintenance or use of a motor vehicle. Minn. Stat. § 65B.53, subd. 3.

Indemnity is available against an insurer of a commercial vehicle with a curb weight greater than 5,500 pounds, other than a bus. Minn. Stat. § 65B.53, subd. 1. An indemnity right may only be asserted through arbitration and based on the percentage of fault of the commercial vehicle. Minn. Stat. § 65B.53, subd. 4.

Coverage priorities are as follows:

1. Where an injured person is the driver or an occupant of the vehicle, other than a bus, used for transport of person or property, first priority is given to coverage for the occupied vehicle, and if none, then to coverage where the injured person is an insured. Minn. Stat. § 65B.47, subd. 1.

2. Where an injured person is an employee driving or occupying the vehicle, first priority is given to coverage for the occupied vehicle, and if none, then to coverage under which the injured person is an insured. Minn. Stat. § 65B.47, subd. 2.

3. Where an injured person is not the driver or an occupant of the motor vehicle, first priority is given to coverage for the involved vehicle, and if none, then to coverage under which the injured person is an insured. Minn. Stat. § 65B.47, subd. 3.

4. In any other case, first priority is given to coverage for an insured. For a driver, occupant of a vehicle, or person not otherwise covered, priority is given to coverage for the vehicle. Minn. Stat. § 65B.47, subd. 4.

**Uninsured and Underinsured Motorist Coverage:** Uninsured and underinsured motorist coverage are required. The required minimum limits are $25,000 for injury to or the death of one person and $50,000 for injury to or the death of two or more people. Minn. Stat. § 65B.49, subd. 3a(1). Uninsured and underinsured motorist coverage do not provide recovery for basic economic loss benefits. Minn. Stat. § 65B.49, subd. 3a(4). The uninsured and underinsured coverages for two or more vehicles cannot be added together to determine the coverage limits to an injured person. Minn. Stat. § 65B.49, subd. 3a(6).

**Seat Belt Defense:** Evidence of the use or failure to use seat belts is not admissible to limit the extent of damages for property damage or personal injury. Minn. Stat. § 169.685, subd. 4.

**Allocation of Liability:** Minnesota is a modified comparative-fault state, and contributive negligence does not bar a party from recovering damages due to death, injury to person or property, or economic loss, so long as the contributory fault was not greater than the fault of the person against whom recovery is sought. Therefore, if a plaintiff is 51% or more at fault, there is no recovery for that party. Damages are reduced in proportion to the amount of fault attributable to the recovering person. Minn. Stat. § 604.01. Deduction of basic economic loss benefits must be made prior to the reduction of damages based on contributive negligence. Minn. Stat. § 65B.51.

The negligence of a driver cannot be imputed to a claimant passenger. *Kalland v. City of Brainerd*, 169 N.W. 475, 475 (Minn. 1918).

For claims involving accidents occurring on or after August 1, 2003, when two or more parties contribute to an injury, they are severally liable in proportion to the percentage of fault attributable to each. But the following parties are jointly and severally liable for the entire amount: (1) a person who is more than 50% at fault, (2) two or more people involved in a common scheme or plan, or (3) a person that commits an intentional tort. Minn. Stat. § 604.02, subd. 1 (2008).

Claims involving accidents prior to August 1, 2003, are subject to a different method of liability allocation. Because claims relating to accidents occurring prior to August 1, 2003, are past the six-year statute of limitations, *see* Minn. Stat. § 541.05, the former allocation method is likely only relevant to pre-August 1, 2003 accidents that involved minors. Insurers faced with a claim involving a minor in an accident occurring prior to August 1, 2003, should consult the 2002 version of Minn. Stat. § 604.02 if the statute of limitations was tolled. See Minn. Stat. §§ 541.05 and 541.15 to determine if the statute of limitations was tolled for an accident involving a minor.

**Punitive Damages:** For civil actions, punitive damages are available only if there is clear and convincing evidence of deliberate disregard for the rights or safety of others. Minn. Stat. § 549.20. A complaint cannot seek punitive damages. A party must bring a motion seeking punitive damages and allege the relevant legal basis for awarding damages. Minn. Stat. § 549.191. In general, directly assessed punitive damages are not insurable. *Rosenbloom v. Flygare*, 501 N.W.2d 597, 602 (Minn. 1993).

**Statutes of Limitations:** Bodily injury/property damage claim: six years. Minn. Stat. § 541.05.

Wrongful death: three years from the time of death, not to exceed six years from the act or omission causing death. Minn. Stat. § 573.02.

Claims of minors: within one year of reaching age eighteen, or within six years from the time the action accrues, whichever is greater. Minn. Stat. §§ 541.05; 541.15.

No-fault benefits claim: six years from the date of denial of benefits.

Minn. Stat. § 541.05; *Entzion v. Ill. Farmers Ins. Co.*, 675 N.W.2d 925, 929 (Minn. Ct. App. 2004).

Underinsured motorist claim: six years from the date of settlement with or judgment against the tortfeasor. Minn. Stat. § 541.05; *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 402 (Minn. 2000).

Uninsured motorist claim: six years. Minn. Stat. § 541.05; *Miklas v. Parrott*, 684 N.W.2d 458, 460-61 (Minn. 2004).

**Rental Vehicles:** An insured's personal automobile insurance policy covering a private passenger motor vehicle must provide the same coverage to vehicles the insured rents. But for rental vehicles, the required minimum limit on property damage is $35,000, and coverage cannot be contingent on fault or negligence. Another form of insurance cannot be sold with the rental of a vehicle unless the insured signs a written acknowledgment. Minn. Stat. § 65B.49, subd. 5a.

**Minors' Settlements:** Minnesota Rule of Civil Procedure 17.02 requires an unrepresented minor to have a guardian ad litem provided. Settlement with a minor must be through a specific process as outlined in Minn. Gen. R. Prac. 145.

**Workers' Compensation:** An employer's liability is limited to paying workers' compensation benefits. Minn. Stat. § 176.031. An employer not insured or self-insured in accordance with Minn. Stat. ch. 176 is still liable and may be assessed penalties. Minn. Stat. § 176.183. An injured employee that is a minor or incapacitated must have a guardian or representative to represent his or her interests in obtaining compensation.

Where a third party other than an employer is legally liable for damages due to injury or death, an injured employee or a decedent employee's dependents may recover under worker's compensation and against the third party, although the employer is entitled to recover statutorily circumscribed subrogation rights against the third party or from the proceeds of the worker's tort recovery. *See Zurich Am. Ins. Co. v. Bjelland*, 710 N.W.2d 64, 65-66 (Minn. 2006).

**Bad Faith:** Although Minnesota does not recognize an independent cause of action in tort for an insurer's bad faith, in an action involving first-party insurance coverage, an insured may move the court to award taxable costs and limited attorney fees, capped at $350,000 combined. To be awarded costs and attorney fees, the insured must establish lack of a reasonable basis for denying benefits and that the insurer knew of the lack of reasonableness for denying benefits or acted in reckless disregard of such lack of reasonableness. Such an award is discretionary with the court. Minn. Stat. § 604.18.

**Alcohol:** The legal limit of intoxication is .08% blood alcohol concentration. It is illegal to drive or operate a motor vehicle when under the influence of alcohol. In addition, it is illegal to refuse to submit to testing of blood, breath, or urine to detect alcohol. Minn. Stat. § 169A.20. Any person who operates a motor vehicle in Minnesota must consent to a chemical testing of blood, breath, or urine to determine the presence of alcohol when a law enforcement officer has probable cause to believe the vehicle operator was impaired while operating the vehicle. Minn. Stat. § 169A.51. Refusal to submit to testing may result in revocation of the person's license. Minn. Stat. § 169A.52, subd. 3.

In Minnesota, the legal drinking age for the consumption of alcohol is twenty-one. Minn. Stat. § 340A.503, subd. 1.

Under the Minnesota Civil Damages Act, any spouse, child, parent, employer or other person that suffers injury to person, property, means of support, or other pecuniary loss due to the intoxication of another person has a cause of action for damages against the person that caused the intoxication by illegally selling alcohol. Minnesota Statutes § 340A.801 expressly provides that the Minnesota Civil Damages Act does not "preclude[] common law tort claims against any person 21 years old or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years." Minn. Stat. § 340A.801.

**Intra-Family and Spousal Immunity:** In Minnesota, there is no intra-family or spousal immunity. *See Anderson v. Stream*, 295 N.W.2d 595, 600-01 (Minn. 1980); *Beaudette v. Frana*, 173 N.W.2d 416, 420 (Minn. 1969).

**Wrongful Death:** Where the wrongful act or omission of a person causes death to another person, a trustee may bring an action for wrongful death if the decedent might have brought an action had the decedent lived. Recovery is any amount the jury determines is fair and just for the pecuniary loss caused by the death. The court apportions the amount for pecuniary loss to persons entitled to recovery, but first deducts funeral expenses. A party may also seek punitive damages. Minn. Stat. § 573.02.

All non-personal injury claims, including contractual claims, survive to the personal representatives. In Minnesota, with two exceptions, a claim for personal injuries dies with the plaintiff. Minn. Stat. § 573.01. First, if the decedent dies after commencing a personal injury action, a trustee may convert the action to a wrongful death action for the exclusive benefit of the surviving spouse and next of kin. Minn. Stat. § 573.02, subd. 1. But even where such a personal injury action is converted into a wrongful death action, general pain and suffering damages are not recoverable. *Beaudry v. State Farm Mut. Auto. Ins. Co.*, 518 N.W.2d 11, 12 (Minn. 1994), *overruled in part on other grounds, Oanes v. Allstate Ins. Co.*, 617 N.W.2d 40 (Minn. 2000). Second, where injury is caused to a person by the wrongful act or omission of any person and the injured person later dies from unrelated causes, a trustee may maintain an action for special damages arising out of the injury from the wrongful act or omission, if the decedent might have maintained an action had the decedent lived. Minn. Stat. § 573.02, subd. 2. "Special damages" are damages to which a precise dollar amount can be assigned, such as lost wages or medical expenses to date of death. *Beaudry*, 518 N.W.2d at 12 n.1.

**Releases:** Minnesota permits *Pierringer* releases, which allow a plaintiff to discharge a portion of a cause of action equal to the percentage of the settling defendant's assigned fault, while preserving the remainder of the plaintiff's cause of action against non-settling defendants. *See Frederickson v. Alton M. Johnson Co.*, 402 N.W.2d 794, 797 (Minn. 1987); *Frey v. Snelgrove*, 269 N.W.2d 918, 920-22 (Minn. 1978).

**Lien for Medical Services:** Minnesota provides that hospitals operating within the state have a lien for the reasonable charges for hospital care to an injured person upon any cause of action accruing to the person receiving services, subject to any attorney's lien. Minn. Stat. § 514.68. A hospital perfects its lien by filing, within ten days after the discharge of the person receiving services, a statement with the office of the court administrator in the hospital's county. Within one day of filing its claim, the hospital must mail a copy to all parties liable for the damages. Minn. Stat. § 514.69.

**Permissive Use:** Under Minnesota's Safety Responsibility Act, an owner of a motor vehicle operated within the state may be held liable for damages caused by a person operating the vehicle with the owner's express or implied consent. Minn. Stat. § 169.09, subd. 5a. When interpreting omnibus clauses in liability insurance policies, the Minnesota Supreme Court has treated "permission" and "consent" as synonyms. *Taylor v. Allstate Ins. Co.*, 176 N.W.2d 266, 270 (Minn. 1970).

Minnesota follows the initial permission rule, "which provides that when a named insured initially gives another permission to use a vehicle, subsequent use, short of conversion or theft of the vehicle, remains permissive even though the use is outside the initial grant of permission." *Christensen v. Milbank Ins. Co.*, 658 N.W.2d 580, 582 (Minn. 2003). Under this rule, the scope of permission is irrelevant when determining liability, and "ludicrous" or negligent uses are considered permissive if they do not constitute theft or conversion. *Id.* at 587 (quoting *Raitz v. State Farm Mut. Auto. Ins. Co.*, 960 P.2d 1179, 1187 n.15 (Colo. 1998)). Accidental destruction of a vehicle in a collision is insufficient to establish the requisite intentional dominion or control necessary to constitute conversion. *Id.* at 582.

Because the scope of permission under the rule is irrelevant, it is appropriate to focus on whether the owner initially gave permission to another to operate a vehicle. In analyzing whether an owner gave permission to another, "permission . . . may be inferred from all the facts and circumstances." *Taylor*, 176 N.W.2d at 269-70. "The burden of proving lack of consent is upon the named insured and requires a strong showing that the automobile was being used without the owner's knowledge and contrary to his *explicit* instructions." *Mut. Serv. Cas. Ins. Co. v. Lumbermens Mut. Cas. Co.*, 287 N.W.2d 385, 386 (Minn. 1979). Even if an accident occurs outside of Minnesota, making Minn. Stat. § 169.09, subd. 5a, inapplicable, Minnesota's initial permission rule may still apply when determining liability and the applicability of an omnibus clause. *See State Farm Mut. Auto. Ins. Co. v. Budget Rent-A-Car Systems, Inc.*, 359 N.W.2d 673, 675-76 (Minn. Ct. App. 1984).

# Mississippi

**Coverage:** Mississippi's compulsory insurance statutes are contained in the "Mississippi Motor Vehicle Safety Responsibility Law," Miss. Code Ann. § 63-15-43, et seq. The mandatory minimum liability insurance limits for bodily injury in the State of Mississippi are as follows:

- $25,000 because of bodily injury to or death of one (1) person in any one (1) accident;
- $50,000 because of bodily injury to or death of two (2) or more persons in any one (1) accident; and
- $25,000 because of injury to or destruction of property of others in any 1 accident.

Miss. Code Ann. § 63-15-43.

**Bodily Injury:** An injured employee may bring a tort suit against a third party whose negligence caused or contributed to the injury. Miss. Code Ann. §71-3-71 grants the workers' compensation carrier a statutory lien entitling the carrier to reimbursement of all wage benefits and medical payments. Under the current version of the statute, the judgment or settlement proceeds from an employee's third party tort suit are disbursed in the following order of priority: (1) plaintiff's costs of collection, (2) satisfaction of the worker's compensation carrier's lien; and (3) remainder to the plaintiff.

The settlement of an employee's third party tort claim requires approval either by the Miss. Workers' Compensation Commission prior to the filing of a suit, or after suit is filed by the court in which the action is pending.

**Property Damage:** Auto policies must provide liability insurance for injury to or destruction of property of others with minimum limits of $25,000.00. Miss. Code Ann. §63-15-3(j). Loss of use is generally allowed until a replacement vehicle can be secured. Tax, title and usage fees may be included as damages. In the event of a total loss, the insurer shall receive title to the vehicle.

**Personal Injury:** Personal injury coverage is "theory-based insurance coverage." The coverage is triggered by the nature of the claims or theories of liability alleged and not by the nature of the alleged injuries or damages. This distinguishes personal injury coverage from property damage coverage. The latter is triggered by the nature of the damages alleged. *Great Northern Nekoosa Corp. v. Aetna Cas. & Sur. Co.*, 921 F. Supp. 401, 416 (N.D. Miss. 1996).

**Medical and Lost Wages:** Mississippi statutes do not at present require automobile insurance policies to include coverage for medical payments. Where such coverage is issued at the request of the insured, the insurer may be subrogated to the rights of the insured against third parties whose negligence caused the subject injuries and resulting medical payments. The med pay insurer is not required to pay for medical treatment covered and paid for by workers' compensation insurance. Benefits received through medical payments coverage are generally recoverable by the insured in addition to amounts the insured receives through the assertion of bodily injury liability claims. The statute of limitations for a claim for medical payments coverage is the same as for bodily injury claims. When an injured occupant of an insured vehicle is entitled to recover under both the medical payments coverage and bodily injury liability coverage in a single policy, the carrier may credit medical payments against the liability payments. Unambiguous medical payments coverage provisions which prohibit stacking are enforceable. *Mississippi Farm Bureau Casualty Insurance Company v. Britt*, 826 So.2d 1261 (Miss.2002).

**Uninsured/Undersinsured Motorist Coverage:** Mississippi law requires that uninsured/underinsured motorist coverage be provided in an automobile policy in amounts "no less than those set forth in the Mississippi Motor Vehicle Safety Responsibility Law." Miss. Code Ann. § 83-11-101. Thus, uninsured motorist coverage must provide at least $25,000 for bodily injury to or death of one person in any one

accident, $50,000 for bodily injury to or death of two or more persons in an accident, and $25,000 for injury to or destruction of property of the insured in any one accident. An uninsured motorist endorsement may provide for coverage in greater amounts than those statutorily required. However, uninsured motorist coverage limits for bodily injury and property damage may not exceed the insured's liability insurance limits for those same coverages. Therefore, it is essential to refer to the policy declarations to determine the UM coverage limits available to the insured in any particular case.

Miss. Code Ann. § 83-11-101 provides that the limits of uninsured motorist coverage shall be identical to the limits of bodily injury liability coverage in the policy. However, the named insured may select lower UM limits in writing, but not less than the required by the Mississippi Motor Vehicle Safety Responsibility Law. Similar provisions will go into effect with regard to property damage coverage. Further, an insured who rejects uninsured motorist coverage for bodily injury may not obtain uninsured motorist coverage for property damage.

Mississippi insureds may "stack" uninsured motorist coverage under a single policy which covers multiple autos, *Hartford Acc. & Indem. Co. v. Bridges*, 350 So.2d 1379 (Miss. 1977), or under separate policies issued by the same insurer covering different autos. *Southern Farm Bureau Cas. Ins. Co. v. Roberts*, 323 So. 2d 536 (Miss. 1975), or under separate policies issued by different insurers and insuring different autos. *Wickline v. United States Fidelity & Guaranty Co.*, 530 So.2d 708 (Miss. 1988)(overruled on other grounds).

Anti-stacking provisions are unenforceable as to non-fleet automobile policies. Aggregation of UM coverages for each vehicle covered under a policy is "mandated" regardless of the number and/or amount of premiums paid by the insured. *United States Fidelity & Guaranty Co. v. Ferguson,* 698 So.2d 77 (Miss. 1997).

The named insured in an automobile liability policy covering four (4) or more vehicles is permitted to elect to purchase single-limit, non-stacking uninsured motorist insurance coverage. The single limit must be no less than the liability limits required under the Mississippi Motor Vehicle Safety Responsibility Law for four (4) vehicles combined. The single limit may be stacked or aggregated with uninsured motorist coverage available from other policies. Miss. Code Ann. § 83-11-102.

Under Mississippi's uninsured motorist statute, Class I insureds, *i.e.*, the named insured, will be allowed to stack coverage regardless of whether one policy is issued covering multiple vehicles or separate policies are issued. Class II insureds, permissive users or guest passengers in a vehicle, may only stack the named insured's UM coverage if the policy provides for multi-vehicle stacking under a single policy. If the policy covers only the vehicle involved in the accident, the Class II insured cannot stack the named insured's coverage under other policies.

Fleet Policies

Miss. Code Ann. § 83-11-102 permits an insured to purchase a "single-limit non-stacking UM insurance coverage" for policies providing coverage for four (4) or more vehicles. Single limit non-stacking UM coverage provided under a fleet policy may be stacked or aggregated with UM coverages provided under separate liability policies.

Statute of limitations on actions against insurer

The statute of limitations for suits against an insurer for breach of an insurance policy is three (3) years. Miss. Code Ann. § 15-1-49.

**Negligence:** Mississippi is a pure comparative negligence jurisdiction. A plaintiff may recover 1% of his/her damages even though the jury finds that the plaintiff was 99% at fault. Plaintiff's total damages, as found by the jury, are reduced in proportion to plaintiff's contributory negligence. Miss. Code Ann. § 11-7-15; *Thompson ex rel Thompson v. Lee County School District*, 925 So.2d 57 (Miss.2006). *See generally*, *Utz v. Running & Rolling*

*Trucking, Inc.*, 32 So. 3d 450 (Miss. 2010) (concerning proximate cause and the failure to comply with the FMCSR's).

Mississippi recognizes a spouse's claim for loss of consortium, which includes the "loss of services" of an injured spouse and loss or reduction of sexual relations. Loss of consortium is a derivative claim - if the underlying personal injury claim is dismissed the loss of consortium claim cannot stand on its own. *McCoy v. Colonial Baking Co., Inc.*, 572 So.2d 850, 852 (Miss.1990)

Statute of limitations on negligence actions

The statute of limitations for negligence actions is (3) three years. Miss. Code Ann. § 15-1-49. However, if the claimant is a minor (under age 21) the statute does not run until the minor reaches age 21. An action may be brought on the minor's behalf prior to age 21 by a parent as "next friend" or court appointed guardian. There is no statute or case decision in Mississippi requiring an insurance adjuster to inform a claiming party regarding the statute of limitations.

Statutory caps on tort damages

In all other civil actions filed on or after September 1, 2004, plaintiff shall not be awarded more than $1,000,000.00 for non-economic damages.

**Motor Vehicle License Requirements:** To receive a valid Mississippi driver's license, an individual must be 16 years of age, with no prior license revocation or suspension. Licenses will not be issued to "any person who is a habitual drunkard or who is addicted to the use of other narcotic drugs" or "to any person who would not be able by reason of physical or mental disability, in the opinion of the commission or other person authorized to grant an operator's license, to operate a motor vehicle on the highways with safety." Miss. Code Ann. § 63-1-9. An individual must be enrolled in school or have a diploma or equivalency certificate if he/she is under the age of 18 at the time of application. An individual must be at least 21 years of age before driving a school bus.

Effective August 1, 2009, a temporary driving permit may be issued to any person who is at least sixteen (16) years of age who otherwise meets the requirements of the statute. A regular driver's license may be issued to any person who is at least sixteen and a half (16 ½) years of age, who has held a temporary driving permit for at least 6 months without any conviction under Section 63-11-30 for operating a vehicle under the influence of alcohol or other impairing substances or of a moving violation. A conviction under Section 63-11-30 or a moving violation will restart the six-month requirement for holding a temporary driving permit before an applicant can re-qualify for a regular license.

**Punitive Damages:** Punitive damages may be awarded when it is shown that the defendant "acted with actual malice or gross negligence which evidences a willful, wanton, or reckless disregard for the safety of others, or committed actual fraud." Miss. Code Ann. §11-1-65. The statute provides for a bi-furcated trial. The first phase concerns compensatory damages. If the trial judge determines that punitive damages should be submitted to the jury, a second phase of the trial is conducted. The statute sets forth various factors governing a punitive damages award, including the defendant's net worth.

An insurance company's liability "for all damages arising from bodily injury" includes punitive damages. The limit of liability, however, is governed by the policy. Mississippi law does not prohibit an automobile insurer from excluding coverage for punitive damages by an endorsement to the policy. *Shelter Mut. Ins. Co. v. Dale*, 914 So.2d 698 (Miss. 2005).

Statutory caps on punitive damages:

Miss. Code Ann. §11-1-65(3)(a) sets forth the following limitations on punitive damages awards:

(i) $20,000,000.00 for a defendant with a net worth of more than $1,000,000,000.00;

(ii) $15,000,000.00 net worth more than $750,000,000.00 less than $1,000,000,000.00;
(iii) $5,000,000.00 net worth more than $500,000,000.00 less than $750,000,000.00;
(iv) $3,750,000.00 net worth more than $100,000,000.00 less than $500,000,000.00;
(v) $2,500,000.00 net worth more than $50,000,000.00 less than $100,000,000.00; or
(vi) 2% of the defendant's net worth for a defendant with net worth of $50,000,000.00 or less.

**Joint and Several Liability; Apportionment of Liability:** Tort reform legislation enacted in 2004 changed the rule of joint and several liability. The prior version of Miss. Code Ann. § 85-5-7 provided for joint and several liability if necessary for the plaintiff to recover up to 50% of his/her damages. Under the current version of the statute, liability for damages caused by two or more person is several only. As such, a joint tortfeasor shall only be liable for the amount of damages allocated to him in direct proportion to his fault. *See Borne v. Estate of Carraway*, 118 So.3d 571, 587 (Miss. 2013). The statute imposes joint and several liability on all who consciously and deliberately pursue a common plan or design to commit a tortious act or actively take part in it.

Mississippi case law permits the jury to apportion percentages of fault to defendants which have settled with the plaintiff prior to trial, as well as to non-sued tortfeasors. This "empty-chair" defense allows liability to be apportioned in cases with absent defendants, as well as cases with severed parties. Miss. Code Ann. § 85-5-7; *see also Estate of Hunter v. General Motors Corporation*, 729 So.2d 1264 (Miss. 1999). The empty-chair defense is barred when a plaintiff brings two distinct claims against different defendants. *Burnham v. Stevens*, 734 So.2d 256, 265 (Miss.Ct.App. 1999).

The negligence of a minor under the age of 17 when driving a motor vehicle is imputed to the person who signed the license or permit application and they are held jointly and severally liable for the negligent and willful acts of the minor. Miss. Code Ann. § 63-1-25.

**Workers' Compensation:** Mississippi's Workers' Compensation Act is codified at Miss. Code Ann. § 71-3-1 et seq. An action under the Act is an employee's exclusive remedy against an employer and co-employee for injuries arising out of the course and scope of employment. The employer is obligated to furnish all medical treatment which the injury requires. There is no limitation on medical expenditures. The employee receives 66 2/3% of his/her average weekly wage, not to exceed a state wide maximum weekly benefit for all employees. An employee is paid temporary total or temporary partial benefits until he/she reaches maximum medical improvement. After reaching maximum medical improvement, the employee can receive permanent total or permanent partial benefits for up to 450 weeks. There is an aggregate limit on the amount of wage benefits which the employee may receive. The Act contains both "scheduled member" benefits, *e.g.* loss of a finger, eye, or extremity, each "member" having a stipulated number of weeks of wage benefits, as well as non-scheduled "whole body injuries," most commonly back injuries.

**Minors' Settlements:** Miss. Code Ann. § 93-13-59 authorizes a duly appointed legal guardian to compromise doubtful or disputed claims of a minor. This is done by filing a petition for approval of the settlement in the Chancery Court, which has jurisdiction over probate and family matters. Miss. Code Ann. § 93-13-211 authorizes settlement of a claim for less than $25,000 by the minor's parent without necessity of establishing a formal guardianship, but the Chancery Court must nevertheless approve the settlement.

**Bad Faith:** Mississippi recognizes a cause of action arising out of an insurer's "bad faith breach of contract." The plaintiff must prove conduct on the part of the insurer which rises to the level of an independent tort, justifying an award of punitive damages. An insurer cannot be held liable for bad faith when it has a "legitimate or arguable" basis for its decision denying a claim. *State Farm Mut. Automobile Ins. Co. v. Grimes*, 722 So. 2d 637, 641 (Miss. 1998).

**Alcohol:** Drivers above the age of 21 who are found to have an alcohol concentration level in their breath, blood or urine of .08% or more are presumed to be under the influence of alcohol. Drivers under the age of

21 who are found to have an alcohol concentration level in their breath, blood or urine of .02% or more are presumed to be under the influence of alcohol. Drivers who operate commercial vehicles are presumed to be under the influence of alcohol if the alcohol concentration level in their breath, blood or urine is .04% or more. A holder of a liquor or beer license and/or the holder's employee may be held liable for selling or providing alcohol to persons who are visibly intoxicated, insane, or under the legal drinking age of 21. Miss. Code Ann. § 63-11-30. *See generally, Utz v. Running & Rolling Trucking, Inc.*, 32 So. 3d 450 (Miss. 2010) (concerning crystal meth and expert toxicology testimony).

**Legal Age:** The age of majority is 21. However, a person 18 or older has capacity to enter into a contractual relationship.

The negligence or willful misconduct of a minor under the age of 17 while driving a motor vehicle is imputed to the person who signed the minor's application for a permit. Miss. Code Ann. § 63-1-25. A property owner can recover damages not to exceed $5,000 plus necessary court costs from the parents of a minor under age 18 and over age 10 who maliciously and willfully damages or destroys property. Miss. Code Ann. § 93-13-2.

**Interfamily and Interspousal Immunity:** Interspousal and interfamily tort immunity was abrogated by Mississippi Supreme Court's decisions including *Burns v. Burns*, 518 So.2d 1205 (1988). However, "family member exclusions" in an auto insurance policy, excluding coverage for bodily injuries suffered by the insured's spouse and/or residents of the insured's household, have been held to be enforceable notwithstanding the abrogation of interfamily immunity. Mississippi has not joined other jurisdictions in finding family member exclusions vitiated by the adoption of compulsory insurance laws.

**Wrongful Death:** Mississippi's wrongful death statutes are codified at Miss. Code Ann. § 11-7-13. Only one action may be brought by a personal representative of the deceased person, or a wrongful death beneficiary, which shall inure to the benefit of all wrongful death beneficiaries. In enumerating the wrongful death beneficiaries, the statute essentially tracks the law of intestate succession, *i.e.*, if the decedent is survived by a spouse and children, they are all equal beneficiaries and, under Mississippi cases interpreting this statute, have "preferred" standing to bring the wrongful death action to the exclusion of the "deferred" class of wrongful death beneficiaries (namely, the decedent's parents and siblings). A wrongful death recovery goes directly to the beneficiaries and passes outside the decedent's estate. However, certain items of damage, as for example, funeral expenses and the decedent's pain and suffering prior to death, belong to the estate. Note, however, that although the wrongful death statute seems to plainly state that damages to the wrongful death beneficiaries shall be equally divided (and the Miss. Supreme Court consistently so held for 90 years).

**Salvage Vehicles and Titles:** An insurance company which obtains title to a motor vehicle as a result of paying a total loss claim resulting from collision, fire, flood or other cause must obtain a salvage certificate of title from the State Tax Commission. The insurer may dispose of such vehicles by endorsing the change in ownership on the certificate of title and without obtaining a salvage title. Miss. Code Ann. § 63-21-39.

**"No Fault" Threshold:** Mississippi does not have a "no fault" law.

**Releases:** Releases of civil claims are construed in accordance with the common law applicable to contracts. Mississippi law is not unique in this regard except with respect to settlement of minors' claims, discussed above. Releases in Mississippi frequently contain hold harmless, confidentiality and no admission of liability clauses. In Mississippi as throughout the United States, care must be exercised with regard to the recognition and proper satisfaction and discharge of Medicare and Medicaid liens.

**Permissive Use:** There is no presumption under Mississippi law that a person's operation of a motor vehicle is by permission of the vehicle owner. *State Farm Mut. Auto. Ins. Co. v. Eakins*, 748 So. 2d 765, 768 (Miss. 1999).

Permissive use of automobiles is divided into two categories under Mississippi law: restricted use and unrestricted use. *See Nationwide Mutual Ins. Co. v. Dunning*, 252 F.3d 712, 717-18 (5th Cir. 2001) (*citing Vaughn v. State Farm Mutual Auto. Ins. Co*., 359 So. 2d 339, 342 (Miss. 1978)(*overruled on other grounds)*; *State Farm Mutual Auto. Ins. Co. v. Mettetal,* 534 So. 2d 189 (Miss. 1988). Under the first category, permissive use is restricted to the boundaries set by the owner and the insured's policy will cover injuries resulting from the use of the vehicle provided it is "within the time, geographic and purpose limitations of the permission granted, and [constitutes] only a minor deviation from the permission granted." *Vaughn*, 359 So. 2d at 342 (*citing Travelers Indemnity Co. v. Watkins,* 209 So. 2d 630 (Miss. 1968)).

Under the second category, permissive use is unrestricted if expressly granted by the owner. See id. Even when an owner places some restrictions on the permittee's use of the vehicle, some courts have nonetheless found that the owner's permission is unrestricted when the permittee has "broad and unfettered domination" over the vehicle. *United States Fidelity & Guaranty Co. v. Stafford*, 253 So. 2d 388, 392 (Miss. 1971)(*overruled on other grounds*); *State Farm Mutual Auto. Ins. Co. v. Mettetal,* 534 So. 2d 189 (Miss. 1988). In *Stafford*, the Mississippi Supreme Court recognized the general rule governing operation of a vehicle by a second permittee with the permission of the original permittee:

> The "general rule" that a permittee may not allow a third party to "use" the named insured's car has generally been held not to preclude recovery under the omnibus clause where (1) the original permittee is riding in the car with the second permittee at the time of the accident, or (2) the second permittee, in using the vehicle, is serving some purpose of the original permittee. The courts generally reason that under such circumstances the second permittee is "operating" the car for the "use of the first permittee" and that such "use" is within the coverage of the omnibus clause.

*Id.* at 392 (quoting 7 AM.JUR. *Automobile Insurance* § 117 (1963)).

# Missouri

**REQUIRED AUTO COVERAGES:**

**Bodily Injury:** The minimum limit is $25,000 for bodily injury to one person and $50,000 for bodily injury to two or more persons. Motor Vehicle Financial Responsibility Law, *Missouri Revised Statutes* §303.020(10) (2019).

**Property Damage:** The minimum limit is $25,000. Motor Vehicle Financial Responsibility Law, *Mo. Rev. Stat.* §303.020(10) (2019).

**Medical Payments ("Med Pay"):** Coverage is not mandatory. *Cameron Mutual Insurance Co. v. Madden*, 533 S.W.2d 538, 545 (Mo. 1976). Med Pay is excess over health insurance except Medicare if the contract provides. *Id.* at 547. Med Pay is stackable if contract permits. *Id.* An insurance carrier cannot subrogate for Med Pay. *Id.*

**Uninsured / Underinsured:**

- Uninsured motorist bodily injury coverage is required by Financial Responsibility Law with limits of at least $25,000 / $50,000. *Mo. Rev. Stat.* §303.020(10) (2013). Underinsured motorist bodily injury coverage is not required. *Ritchie v. Allied Property & Cas. Ins. Co.*, 307 S.W.3d 132, 135 (Mo. banc 2009).
- Anti-stacking provisions in policy concerning uninsured coverage have been invalidated as against public policy. *Shepherd v. American States Insurance Co.*, 671 S.W.2d 777, 780 (Mo. banc 1984).
- Stacking of underinsured motorist coverage depends upon the policy language. *Rodriguez v. Gen. Acc. Ins. Co. of Am.*, 808 S.W.2d 379, 383 (Mo. banc 1991).

**OTHER ISSUES:**

**Prejudgment Interest**: If a claimant has made a demand for payment, and the amount of the judgment or order exceeds the demand, then prejudgment interest shall be awarded, calculated from a date ninety days after the demand or offer was received, as shown by the certified mail return receipt, or from the date the demand or offer was rejected without counter offer, whichever is earlier. *Mo. Rev. Stat.* § 408.040(3) (2019).

**Missouri is a Pure Comparative Negligence Jurisdiction:**

- The plaintiff can collect as long as his own negligence is less than 100%. *Gustafson v. Benda*, 661 S.W.2d 11, 15-16 (Mo. 1983); *Holst v. United States*, 755 F. Supp. 260, 265 (E.D. Mo. 1991).
- The age at which a child can be guilty of comparative fault is a jury question. *Lester v. Sayles*, 850 S.W.2d 858, 865-867 (Mo. 1993). Comparative fault for minors is based on the "reasonable child of same age" standard. *Root By and Through Root v. Mudd*, 981 S.W.2d 651, 655 (Mo. Ct. App. 1998).
- Negligence may be imputed to a passenger when the passenger knowingly gets into the vehicle of a drunk driver. 8 Am. Jur. 2d, Automobiles and Highway Traffic § 575.
- Punitive damages are not reduced by plaintiff's comparative fault. *Mo. Rev. Stat.* 537.765(2).

**Statute of Limitations**: For bodily injury or property damage involving adults age eighteen and older, the Statute of Limitations is five (5) years. *Mo. Rev. Stat.* §516.120 (2019). If a defendant is out of the state or departs after a cause of action commences, the statute of limitations begins to run upon the return of the defendant to the state. *Mo. Rev. Stat.* §516.200 (2019). For accidents involving minors under the age of 18, the Statute of Limitations is three years from the minor's 18th birthday. *Mo. Rev. Stat.* §516.030 (2019). The wrongful death statute of limitations is three years. *Mo. Rev. Stat.* §537.100 (2019).

**Collateral Sources:** Missouri follows the general rule that evidence of a collateral source is inadmissible. *Taylor v. Associated Electric Cooperative, Inc.*, 818 S.W.2d 669, 672 (Mo. Ct. App. 1991).

**Tort Threshold**: No minimum tort threshold is necessary for a bodily injury claim to be made.

**Joint and Several Liability**: Joint and several liability applies to all defendants who are found at least 51% at fault. *Mo. Rev. Stat.* §537.067(1) (2019). If a defendant is found less than 51% at fault, that defendant shall only be responsible for the percentage of judgment for which the defendant is held liable. *Id.*

**Minor's Settlement**: Court approval is required for all minors' settlements and are not valid unless approved by the court. *Mo. Rev. Stat.* §507.184(3) (2019). If the claim is a fairly minor injury, consider foregoing a minor hearing if the expense does not support. However, such a settlement is not enforceable, and there would be nothing to preclude the minor from bringing a cause of action at a later date. Off-sets are available for any amount previously paid. If the settlement exceeds $10,000, then there are additional safeguards imposed requiring parents to post a bond or open up a conservatorship for the minor child.

**Vexatious Refusal:** In the event of vexatious behavior, the insurer may be required to pay the amount owed under the policy as well as interest, reasonable attorneys' fees, and a statutory penalty of an additional 20% of the first $1,500 and 10% of all other damages thereafter along with a reasonable attorney's fee. *Mo. Rev. Stat.* §375.296 (2019); *Mo Rev. Stat.* §375.420 (2019). Because of the statute's penal nature, it is strictly construed and common law theories of recovery for vexatious refusal are preempted. *Thornburgh Insulation, Inc. v. J.W. Terrill, Inc.*, 236 S.W.3d 651, 658 (Mo. Ct. App. 2007).

**Worker's Compensation:** Worker's compensation benefits may be recovered by subrogation. *Mo. Rev. Stat.*

§287.150 (2019). Subrogating employer shall pay, from employer's share of the recovery, a proportionate share of the expenses of the recovery, including a reasonable attorney fee. *Mo. Rev. Stat.* §287.150(3) (2019). Carrier does not have a right of first recovery. Carrier's right to recover is pro rata.

**Legal Age:** The age of adulthood is 18. *Mo. Rev. Stat* §475.010(1).

**Inter-Family / Inter-Spousal Immunity:** Common law rule of inter spousal immunity is not a bar to a personal injury claim by one spouse against another during a marriage. *See Mo. Rev. Stat.* §451.290; *see also Townsend v. Townsend*, 708 S.W.2d 646 (Mo. banc 1986). Additionally, Missouri has abrogated parental immunity. *Hartman by Hartman v. Hartman*, 821 S.W.2d 852, 858 (Mo. 1991).

**Wrongful Death:** Cause of action exists only according to statutes and the limit is provided in those statutes. *Mo. Rev. Stat.* §§537.080 - 537.090 (2019). Damages may include pecuniary losses, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of those on whose behalf the suit may be brought have been deprived. *Mo. Rev. Stat.* §537.090 (2019). Damages are determined by the fact finder. *Sanders v. Ahmed*, 364 S.W.3d 195, 205 (Mo. banc 2012).

**Alcohol:** The Dram Shop Act holds a liquor licensee liable if the licensee is convicted of selling alcohol to a minor or selling to a person whom he or she knows to be intoxicated. *Mo. Rev. Stat.* §537.053 (2019). Social hosts cannot be held liable for torts committed by their intoxicated guests. *Coons v. Berry*, 304 S.W.3d 215, 222 (Mo. Ct. App. 2009).

**Salvage:** Missouri does not have a specific statute regarding disposal of salvage. A statute exists regarding resale of salvage parts and materials, however. *Mo. Rev. Stat.* §§301.217 - 301.218 (2019). A certificate of title may be issued for a salvaged vehicle at least twenty-five years old. The Department of Revenue may require the applicant to file a corporate surety bond in an amount equal to one and one-half times the value of the vehicle as determined by the department. *Mo. Rev. Stat.* §301.217(2).

**Value of Medical Treatment:** The dollar amount necessary to satisfy the financial obligation to health care providers, including those amounts which are paid by Medicare, constitute the value of medical treatment. *Mo. Rev. Stat. § 490.715*

**Dog Owners**: Missouri does not have a dog liability statute. Liability is reserved only for vicious propensities of which the owner or keeper knew or those which they should have known. *Savory v. Hensick*, 143 S.W.3d 712, 717 (Mo. Ct. App. 2004). However, violation of leash ordinance may make per se negligence. *See* local ordinance.

**Small Claims Court:** The limit for small claims court is $5,000. *Missouri Supreme Court Rules* 140 – 152.

# Montana

**Montana Bodily Injury:** Montana requires owners of vehicles registered and operated in Montana to maintain continuous motor vehicle insurance to cover against loss resulting from liability imposed by law for bodily injury or death or damage to property suffered by any person caused by maintenance or use of a motor vehicle. Mont. Code Ann. ' 61-6-301 (2009). The Montana Motor Vehicle Safety-Responsibility Act requires limits with respect to each vehicle in the following amounts: (1) $25,000 because of bodily injury to or death of one person in any one accident and subject to said limit for one person; and (2) $50,000 because of bodily injury to or death of two or more persons in any one accident.. Mont. Code Ann. 61-6-103 (2009).

**Property Damage:** Liability coverage for property damages is required in the amount of $10,000 per accident under the Montana Motor Vehicle Safety-Responsibility Act. Mont. Code Ann. 61-6-103 (2009). Reimbursements for total loss of a motor vehicle must be based on actual replacement value. Mont. Code Ann. ' 33-23-202 (2009). However, the book value can be used if the parties agree to use this value after damages arise. Mont. Code Ann. 27-1-306.

**Settlements With Minors:** A minor in Montana is any person under the age of eighteen. Mont. Code Ann. 41- 1-101. Settlements with minors must be court-approved.

**Personal Injury:** Montana is not a PIP state.

**Medical Payments:** Montana does not require an insured driver to carry medical payments coverage. In Montana, insurers and/or self-insureds have a duty to pay causally related medical expenses when liability is reasonably clear for an accident in advance of settlement or trial. *Ridley v. Guaranty Nat. Ins. Co.*, 286 Mont. 325, 951 P.2d 987 (1997) (*Ridley*). Insurers are required to pay a plaintiff's undisputed medical expenses up to the limits of their coverage and without the benefit of a settlement agreement. *Shilhanek v. D-2 Trucking*, Inc., 2003 MT 122, 315 Mont. 519, 70 P.3d 721 (Mont. 2003). This does not mean that a release can never be obtained. Rather, when the medical expenses or damages clearly exceed the limits of the policy an insurer may not demand a release of their insured in exchange for payment of policy limits. Montana has clear authority prohibiting subrogation by automobile insurers who provide medical benefits under policies. *See Allstate Ins. Co. v. Reitler*, 192 Mont. 351, 628 P.2d 667 (1981); *Youngblood v. American States Ins. Co.*, 262 Mont. 391, 866 P.2d 203 (1993).

**Lost Wage Payments:** In Montana, insurers and/or self-insureds have a duty to pay lost wages when liability is reasonably clear for an accident in advance of settlement or trial. *Dubray v Farmers Ins. Exch.*, 2001 MT 251, 36 P.3d 897; *Peterson v. St. Paul Fire and Marine Ins. Co.*, 2010 MT 187, 239 P.3d 904.

**Uninsured/Underinsured Motorist Coverage:** Uninsured motorist coverage must be included in Montana liability policies in amounts equal to the amounts set forth in Mont. Code Ann. 61-6-103: (1) $25,000 because of bodily injury to or death of one person in any one accident and subject to said limit for one person; (2) $50,000 because of bodily injury to or death of two or more persons in any one accident; and (3) $10,000 because of injury to or destruction of property of others in any one accident. Mont. Code Ann. ' 33-23-201. The insured, however, may reject the uninsured motorist coverage. *Id.* Montana allows an injured party to "stack" uninsured motorist coverages for all vehicles in their policy. *Hardy v. Progressive Specialty Ins. Co.*, 2003 MT 85, 315 Mont. 107, 67 P.3d 892 (Mont. 2003). Underinsured motorist coverage policies may also be stacked by the insured. *Mitchell v. State Farm Ins. Co.*, 2003 MT 102, 315 Mont. 281, 68 P.3d 703 (Mont. 2003).

**Negligence:** Montana adheres to a modified comparative negligence scheme wherein an injured party may recover so long as their negligence is not greater than the combined negligence of all persons against whom recovery is sought. Mont. Code. Ann. 27-1-702. The damages of the injured party will be reduced in proportion to the percentage of negligence attributable to the injured person. Id. If negligence of the injured person exceeds 50% of the combined negligence of all persons, then the injured person cannot recover

**Statutes Of Limitations:** The statute of limitations for tort actions for general or personal injuries is three years from the date of the loss. Mont. Code Ann. 27-2-204. The statute of limitations for minors begins to run when they reach the age of 18. Mont. Code. Ann. ' 27-2-401.

**Licensing Requirements:** A person may not sell, solicit, or negotiate insurance or act as an insurance producer in this state unless licensed as an insurance producer." Mont. Code Ann. 33-17-201. The requirements for a person to become licensed as an insurance producer are found at Mont. Code Ann. 33-17-211-212.

**Punitive Damages:** In Montana, punitive damages may be awarded only upon a finding of actual malice or actual fraud. Mont. Code Ann. 27-1-221. Punitive damage awards, aside from class action lawsuits, are capped at $10 million or 3% of the defendant's net worth, whichever is less. Mont. Code Ann. 27-1-220. Insurance policies may insure punitive damages but the policy must explicitly provide the coverage.

**Joint And Several Liability:** Each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of. However, a party whose negligence is determined to be 50% or less of the combined negligence of all persons is severally liable only and is responsible only for the percentage of negligence attributable to that party, unless one or more acted in concert in contributing to the damages or one acted as the agent of the other. The remaining parties are jointly and severally liable for the total less the percentage attributable to the claimant and to any person with whom the claimant has settled or who the plaintiff has released from liability. For purposes of determining the percentage of liability attributable to each party whose action contributed to the injury complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants, and third-party defendants. The liability of persons released from liability by the claimant and persons with whom the claimant has settled must also be considered by the trier of fact. A party found to be 50% or less negligent for the injury complained of is liable for contribution under this section only up to the percentage of negligence attributed to that party. A release of settlement entered into by a claimant constitutes an assumption of the liability, if any, allocated to the settled or released person. The claim of the releasing or settling claimant against other persons is reduced by the percentage of the released or settled person's equitable share of the obligation. A defendant who alleges that a person released by the claimant or with whom the claimant has settled is at fault in the matter has the burden of proving: (i) the negligence of the person who the claimant has released or with whom the claimant has settled; (ii) any standard of care applicable to the person who the claimant released or with whom the claimant settled; and (iii) that the negligence of the person whom the claimant has released or with whom the claimant has settled was a contributing cause under the law applicable to the matter. Mont. Code Ann. 27-1-703. This is an unsettled area of law in Montana and there is an contingent statutory scheme which will be implemented if the current statute is found unconstitutional. See Mont. Code Ann. 27-1-702-706.

**Workers' Compensation:** Workers' compensation claimants injured by the actions of a third party or intentional conduct of a fellow employee are not limited in their rights to initiate a cause of action against the third party or fellow employee. Mont. Code Ann. 39-71-412-413. Where the claimant seeks damages from a third party or fellow employee the workers compensation insurer has subrogation rights even though those rights are rarely pursued. Mont. Code Ann. 39-71-414. Montana applies the "Made Whole Doctrine" to the area of Workers' Compensation. *Hall v. State Comp. Ins. Fund*, 218 Mont. 180, 708 P2d 234 (Mont. 1985). This doctrine holds that "it is the public policy of Montana that an insured must be totally reimbursed for all losses as well as costs, including attorney fees, involved in recovering those losses before the insurer can exercise any right of subrogation, regardless of any contract language providing to the contrary." *Swanson v. Hartford Ins. Co. of the Midwest*, 2002 MT 81, 309 Mont. 269, 46 P.3d 584 (Mont. 2002) (applying the doctrine to ERISA claims).

**Extra Contractual Liability/Bad Faith:** Insurance companies cannot, with "such frequency as to indicate a general business practice," act in the following ways: (1) misrepresent pertinent facts or insurance policy

provisions relating to coverages at issue; (2) fail to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies; (3) fail to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies; (4) refuse to pay claims without conducting a reasonable investigation based upon all available information; (5) fail to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed; (6) neglect to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear; (7) compel insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds; (8) attempt to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application; (9) attempt to settle claims on the basis of an application which was altered without notice to or knowledge or consent of the insured; (10) make claims payments to insureds or beneficiaries not accompanied by statements setting forth the coverage under which the payments are being made; (11) make known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration; (12) delay the investigation or payment of claims by requiring an insured, claimant, or physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information; (13) fail to promptly settle claims, if liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; or (14) fail to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement. Mont. Code Ann. 33-18-201. Actionable claims for these violations are found at Mont. Code Ann. 33-18-242, but this section does not preempt a claim for the common law tort of bad faith. *Brewington v. Employers Fire Ins. Co.*, 1999 MT 312, 297 Mont. 243, 992 P.2d 237. The common law cause of action requires a showing that the insurer breached the implied covenant of good faith and fair dealing. *Tynes v. Bankers Life Co.*, 224 Mont. 350, 730 P.2d 1115 (Mont. 1986). The common law action is a tort action and a three-year statute of limitations applies. *Id.* A third party claimant may not file an action under 33-18-242 until after the underlying claim has been settled or judgment rendered in favor of the claimant on the underlying claim. Montana recognizes claims for first and third party bad faith. The first party insured must bring his claim within two years of the date of the violation of 33-18-201. Third parties must bring their claims within one year of the date of settlement of or the entry of judgment on the underlying claim.

**Alcohol:** Montana has a dramshop liability statute. Under this statute, furnishing an individual with alcohol cannot be the cause of damages, or a basis for liability of the furnishing entity, unless one of three exceptions applies: (1) the consumer was under the legal drinking age and the furnishing entity knew the consumer was underage or did not make a reasonable attempt to determine the consumer's age; (2) the consumer was visibly intoxicated; or (3) the furnishing person forced or coerced the consumption or told the consumer that the beverage contained no alcohol. Mont. Code Ann. 27-1-710(3). If one of these three exceptions applies, the jury or fact-finder may still consider consumption of the beverage in determining the cause of the injuries or damages inflicted upon a third party. Mont. Code Ann. ' 27-1-710(4). The statute also requires an individual bringing an action against a furnishing entity to give the entity notice of intent to file suit by certified mail within 180 days from the date of sale or service. Mont. Code Ann. 27-1-710(6). The 180 day notice requirement has been held to be constitutional by the Montana Supreme Court. *Rohlfs v. Klemenhagen, LLC.*, 2009 MT 440, 354 Mont. 133, 227 P.3d 42. The statute of limitations for these actions is two years from the date of sale or service. *Id.* Noneconomic and punitive damages are each capped at $250,000. Mont. Code Ann. 27-1-710(7)-(8). Finally, the statute allows admission of evidence of intentional or criminal activity by the person causing the injury. Mont. Code Ann. 27-1-710(9). A driver is presumed to be operating under the influence of alcohol if the driver has a blood alcohol content of .08. Mont. Code Ann. 61-8-401(4)(c). An individual who operates a vehicle on the State's roads and highways is considered to have given consent to have their breath or blood tested to determine the amount of drugs and/or alcohol in their body. Mont. Code Ann. 61-8-402.

**Intra-Family and Spousal Immunity:** The doctrine of interspousal tort immunity has been abolished as a defense in Montana. *Miller v. Fallon Co.*, 222 Mont. 214, 721 P.2d 342 (Mont. 1986).

**Seat Belt Defense:** This defense is not available in Montana. Evidence of compliance or failure to wear a seatbelt "is not admissible in any civil action for personal injury or property damage resulting from the use or operation of a motor vehicle, and failure to comply with Montana's Seatbelt Requirement Statute] does not constitute negligence." Mont. Code Ann. 61-13-106 (2009).

**Rental Coverage:** Rental vehicle entities may obtain insurance licenses as business entities, but there are training standards and other statutory requirements for these entities. Mont. Code Ann. 33-17-1501-1505.

**Release:** A release or covenant not to sue given to one of two or more persons liable in tort for the same injury, death, damage, or loss: (1) does not discharge any other tortfeasor from liability for that tortfeasor's several pro rata share of liability for the injury, death, damage, or loss unless the release or covenant not to sue provides otherwise; (2) reduces the aggregate claim against the other tortfeasors to the extent of any percentage of fault attributed by the trier of fact under [Montana's Joint and Several Liability Statute ' 27-1-703] to the tortfeasor to whom the release or covenant is given; (3) discharges the tortfeasor to whom it is given from all liability for contribution. Mont. Code Ann. 27-1-704.

**Wrongful Death/Survivorship:** In Montana, damages for the death of an individual broadly include survivorship damages and wrongful death damages. Mont. Code Ann.§§ 27-1-501 and 27-2-513.

Survivorship damages are personal to the decedent and include: (1) lost earnings from the date of injury to death; (2) loss of future earnings; (3) medical and funeral expenses; (4) pain and suffering; and(5) other special damages. *Id.*; *Swanson v. Champion Intern. Corp.*, 197 Mont. 509, 515, 646 P.2d 1166, 1169 (1982). Conversely, although derivative from the injury or wrongful death of another, wrongful death damages are personal to each wrongful death claimant and include (1) grief, sorrow, and mental anguish; (2) loss of consortium; and (3) reasonable contributions for support, education, training and care. *Id.* at 524, 646 P.2d at 1173-74, *see* also *State Farm Mut. Auto. Ins. Co . v. Freyer*, 2010 MT 191, ¶ 8, 357 Mont. 143, 239 P.3d 143. Montana does not statutorily identify those who may recover wrongful death damages. *In re Estate of Bennett*, 2013 MT 230, ¶ 11, 371 Mont. 275, 308 P.3d 63. Rather, Montana's common law identifies those who qualify as a wrongful death claimant. *Id.*

Montana has, over time, expanded the list of survivors who may recover wrongful death damages to include spouses and minor children (*Johnson v. Marias River*, 211 Mont. 518, 687 P.2d 668 (1984)); adult child of deceased parent, (*North Pacific Insurance Co. v.Stucky*, 377 Mont. 25, 338 P.3d 56 (2014)); parents of a deceased minor child (*Dawson v. Hill & Hill TruckLines*, 206 Mont. 325, 671 P.2d 589 (1983); and for parents of deceased adult child (*In re Estate of Bennett*, 371 Mont. 275, 308 P.3d 63 (2013).

**No Fault:** Montana has implemented a modified comparative negligence system which is described under the NEGLIGENCE heading.

**Liens:** Montana has a statute addressing Medicaid liens. Mont. Code Ann. 53-2-612. Liens however, are typically subject to the Made Whole Doctrine. See *Billedeaux v. Dept. of Pub. Health and Human Services*, Cause No. DV-98-33, 1211, Jud. Dist. (1999). The Made Whole Doctrine applies by statute to medical insurance whether people receiving benefits are covered by a private insurer or by a government insurer. Mont. Code Ann. 33-22-1601-1602; Mont. Code Ann. 33-30-1101-1102; Mont. Code Ann. ' 2-18-901-902. A hospital or medical service plan contract issued by a health service corporation may contain a provision providing that, to the extent necessary for reimbursement of benefits paid to or on behalf of the insured, the health service corporation is entitled to subrogation against a judgment or recovery received by the insured from a third party found liable for a wrongful act or omission that caused the injury necessitating benefit payment. Mont. Code Ann. 33-30-1101. When the insured institutes an action for damages they must give notice to the

health service corporation. Mont. Code Ann.  33-30-1102. The insured can request that the health service corporation pay a proportionate share of the reasonable costs of the third-party action, including attorney fees, but the health service corporation may elect not to participate in the cost of the action. *Id.* If such an election is made, the health service corporation waives 50% of any subrogation rights they would have had. *Id.* The health service corporation's right of subrogation may not be enforced until the injured insured has been fully compensated for his injuries. *Id.*

**Permissive Use:** Montana's Mandatory Liability Protection Act, MCA ' 61-6-301, requires the owner of a motor vehicle to continuously provide liability insurance for the operation of that vehicle or any permissive user of that vehicle. The Act does not impose vicarious liability on a third party. *Ulrigg v. Jones*, 274 Mont. 215, 220, 907 P.2d 937, 939 (1995)

# Nebraska

**Liability Coverage:** No fault insurance law does not presently exist in Nebraska.

The plaintiffs contributory negligence shall proportionately diminish plaintiffs damage recovery. Neb. Rev. Stat. §25-21,185.07 (1996). Contributory negligence will not be a bar unless plaintiffs negligence is equal to or greater than total negligence of all other parties. Neb. Rev. Stat. §25-21,185.09 (1996).

Neb. Rev. Stat. §60-534 (1996) requires that, for purposes of proof of financial responsibility, liability insurance policies must have mandatory minimums of $25,000/$50,000/$25,000.

**Bodily Injury:** As indicated above, individuals subject to the financial responsibility laws are required to maintain minimum liability insurance for bodily injury in the amount of $25,000/$50,000.

**Property Damage:** As indicated above, individuals subject to the financial responsibility laws are required to maintain minimum coverage for property damage in the amount of $25,000.

**Statute of Limitations:**

*Bodily injury:* 4 years

*Property Damage:* 4 years

*Minor:* Starts on the day before the claimant turns 21 (20 years, 11 months, 30 days), or, if the minor's death occurs before he or she turns 21, starts running on the day of minor's death.

- Intra-spousal abrogated by *Imig v. March.* 203 Neb. 537,279 NW2d 382 (1979).
- The legal age for alcohol consumption in Nebraska is 21 (twenty-one).
- Employee claims — self-insured are not covered by the statute. Neb. Rev. Stat. §44-6407. It would depend on wording of employee's policy.
- Subrogatable – Yes
- Wrongful Death - Within 2 years. Neb. Rev. Stat. §30-810.
- An adjuster does not have to notify of Statute of Limitations unless the adjuster is in the process of negotiating and has assured the insured of the continuation of negotiations; if the statute of limitations expires, insurer will be stopped from arguing that action is time barred.

**Personal Injury Protection:** The State of Nebraska does not require PIP coverage.

**Medical Payments:** The State of Nebraska does not have a separate statutory provision for medical payments. If included in the policy:

(1) Medical pay is subrogatable.

(2) Worker's Compensation recipients can receive medical payments.

(3) Medical payments cannot offset.

(4) Whatever policy provides, a suit on a contract must be commenced within 5 years.

**Uninsured/Underinsured:**

- Neb. Rev. Stat. §44-6401, et. seq.
- Minimum limits - UM - same as for bodily injury, $25,000 for 1 person, 1 accident;
- $50,000 for 2 or more persons, 1 accident. Neb. Rev. Stat. §44-6408.
- UIM - $25,000 per one person, one accident; $50,000 per two or more person, 1 accident. Neb. Rev. Stat. §44-6408.
- Maximum liability- amount of damages sustained by the insured less the amount paid to the insured by or for any person or organization that may be held legally liable for the accident. The maximum liability of the insurer shall not be more than the limits of the coverage provided. Neb. Rev. Stat. §44-6409.
- Statute of Limitations -5 years. Neb. Rev. Stat. §25-205 from date of breach.
- Employee Claims - self-insured are not covered by the statute. Neb. Rev. Stat. §44-6407. It would depend on wording of employee's policy.
- Subrogatable - yes.

**Negligence:** For causes of action accruing on or after February 8, 1992, comparative fault reduces the total recovery of a plaintiff by the amount of the plaintiffs percentage of fault. If plaintiff is 50% at fault or more, then recovery is barred. Neb. Rev. Stat. §25-21,185. Plaintiffs contributory negligence shall proportionately diminish plaintiffs damage recovery.

When two or more defendants act in a joint or common enterprise, the liability of each is joint and several.

In actions involving more than one defendant, the liability for economic damages (medical expenses, loss of earnings and capacity, funeral costs, loss of property, repair or replacement, loss of employment or business) shall be joint and several. The liability for non-economic damages (pain, suffering, inconvenience, mental and emotional distress, companionship, consortium, reputation, humiliation) shall be several and not joint. Non-economic damages are allocated in percentages to each defendant. Neb. Rev. Stat. §25-21,185.10.

**Punitive Damages:** Punitive damages are not recoverable under Nebraska Law. *Miller v. Kingsley.* 194 Neb. 123, 230 N.W. 2d 472 (1975).

**Liability of A Minor:** Neb. Rev. Stat. 43-801 states that parents shall be jointly and severally liable for the willful and intentional conduct causing damage to property or injury to the person. Damages shall be recoverable only to the extent of hospital and medical expenses incurred up to $1,000 for each occurrence. However, there is no limit on property damage. *Distinctive Printing & Packaging Co. v. Cox.* 232 Neb. 846, 443 N.W. 2d 566 (1989).

**Joint and Several Liability:** When negligence of two or more persons occurs, producing a single indivisible injury, such persons are jointly and severally liable. *Lindgren v. City of Gering.* 206 Neb. 360, 292 N.W. 2d 921 (1980). A right to contribution exists among judgment debtor jointly liable in tort for damages negligently caused which right becomes enforceable on behalf of any party when he discharges more than his proportional share of the judgment. *Royal Indem. Co. v. Aetna Cas. & Sur. Co.* 193 Neb. 752, 229 N.W. 2d 183 (1975).

However, if the parties are subject to the comparative fault statute and the plaintiff settles with one of the defendants, that defendant is out of the lawsuit and is not subject to suit for contribution or indemnity. *Tadros v. City of Omaha*, 273 Neb. 935, 735 N.W.2d 377 (2007).

**Worker's Compensation:** Subrogatable? – Yes Workers compensation carrier has statutory right to any and all sums recovered by insured worker from third parties to extent of benefits paid, regardless of whether injured employee has been fully compensated by tort-feasor or not. Neb. Rev. Stat. 48-118 (1996). *Neuman v. American Family Ins.* 5 Neb. App. 704 (1997).

**Minor Settlements:** All settlements require court approval. Settlements may be paid to the minor if they have reached the age of 19 prior to settlement date.

**Bad Faith:** The tort of bad faith is recognized in the State of Nebraska for an insurer's failure to negotiate fairly or pay within the policy limits.

**Alcohol:** Legal limits of intoxication? - .08% defined as concentration of eight-hundredths of one gram or more by weight of alcohol per one hundred milliliters of blood. Neb. Rev. Stat. §60-6,196.

**Legal Age:** Age of majority - 19 years of age. Age to consume alcohol - 21 years of age.

**Interspousal Immunity:** Common law doctrine of inter-spousal tort immunity abrogated. *Imig v. March.* 203 Neb. 537,279 N.W.2d 382 (1979)

S**eatbelt Defense:** As of January 1, 1993, no driver shall operate a motor vehicle upon a highway or street in the State of Nebraska unless the driver and each front-seat occupant in the vehicle are wearing occupant protection systems. Neb. Rev. St. §60-6,270. Any person operating a vehicle shall ensure that a child up to six years shall be transported in a child restraint system of a type which meets Federal Motor Vehicle Safety Standard 213 as developed by the National Highway Traffic Safety Administration as the standard existed on January 1, 2009, and correctly installed in the vehicle. *Id.* Any person who drives a motor vehicle in the state shall ensure that children ages six to eighteen wear an occupant protection system. *Id.*

Evidence that a person was not wearing an occupant protection system at the time injured shall not be admissible in regards to liability or proximate cause but may be admissible as evidence concerning mitigation of damages, but shall not reduce recover more than 5%. Neb. Rev. Stat. §60-6,273.

For cases prior to the effective date of the statute a referendum petition and election rejected the portion of the previous statute that required mandatory seatbelts. However, it may be argued that the section concerning the mitigation of damages up to 5% of recovery for a person not wearing a seat belt at the time of injury is still valid. See Neb. Rev. Stat. §39-6,103.08. In any case, after January 1, 1993, occupant protection systems are mandatory for front seat passengers and mitigation of damages up to 5% may be considered for the failure to wear an occupant protection system.

**Wrongful Death:** Neb. Rev. Stat. 30-809 (1996) governs wrongful death actions. Damages are limited to pecuniary loss to widow, widower, or next of kin. Pain and suffering are not recoverable in wrongful death action. *Nelson v. Dolan.* 230 Neb. 848,434 N.W. 2d 25 (1989). However, pain and suffering survives as a separate action.

**Loss of Consortium:** Cause of action for loss of consortium recognized. Anson v. Fletcher. 192 Neb. 317, 220 N.W. 2d 371 (1974). Minor child had no common-law cause of action for loss of consortium of non-fatally injured parent. *Guenther by Guenther v. Stollberg.* 242 Neb. 415, 495 N.W. 2d 286 (1993).

**Salvage:** Nebraska has no specific statute which covers salvaged vehicles. However, an abandoned vehicle is defined in Neb. Rev. Stat. §60-1901. If a vehicle is abandoned, the last-registered owner of the vehicle shall be liable to the local authority for the costs of removal and storage of such vehicle. Neb. Rev. Stat. §60-1910.

No person shall cause any vehicle to be abandoned. Neb. Rev. Stat. §60-1907.

**Lienholders and Settlements:** Nebraska does not have a specific law requiring that a TPA must protect the lien-holder on a third party settlement. As a precautionary measure, the lienholder should be included in the release for protection. Courts will enforce a valid lien where a lien-holder is not protected, enforce the lien regardless.

**Collision Waiver and Rental Vehicles:** Nebraska does not have a specific law related to requirements for providing rental vehicles to third parties, and the collision waiver of the rental car company. Nor does a specific law exist regarding the provision of a rental vehicle in the event of a loss. Optional coverage.

**Property Damage:**

**(A) Loss of Use:** Reasonable value of loss of use of personal property, for purpose of assessing damages, is generally the fair rental vale of property of a like or similar nature or the amount actually paid for rental, whichever is less. *Chlopek v. Schmall*, 224 neb. 78, 396 N.W. 2d 103 (1986).

**(B) Diminution of Value:** Measure damages for injury to personal property which cannot be restored to its condition before injury is difference in market value of property immediately before and after injury. *Jeffers v. Countryside Homes of Lincoln. Inc.* 220Neb. 26, 367N.W.2d 728 (1985).

**(C) Basis for Calculating Actual Cost Value:** Term "Actual Cash Value" as used in policy of property insurance, means market value, or that amount for which the property may be sold by a willing seller who is not compelled to sell it to a buyer who is willing but not compelled to buy it. *Erin Rancho Metals. Inc. v. U.S. Fidelity & Guar. Co.* 218 Neb. 9, 352 N.W. 2d 561 (1984).

**(D) Salvage:** Neb. Rev. St. §60-173 states that any insurance company taking possession of a vehicle that has been declared a total loss shall deliver the certificate of title to the county treasurer and apply for a salvage certificate title. The insurer shall take title that has been declared a total loss.

**Collateral Sources:** Yes. Under the collateral source rule, fact that party seeking recovery has been wholly or partially indemnified for loss by insurance or otherwise generally cannot be set up by wrongdoer in mitigation of damages. *First Nat. Bank of Omaha v. Chadron Energy Corp.* 236 Neb. 199, 459 N.W. 2d 736 (1990).

**Direct Action Suit:** Not allowed. Actions against liability insurance carriers based on negligence of insured are not permitted in Nebraska. *Western Nebraska Gen. Hosp. V. Farmer's Ins. Exch.* 239 Neb. 281, 475 N.W. 2d 901 (1991).

**Small Claims Court:** The small claims court shall have subject matter jurisdiction in all civil cases of any type when the amount of damages does not exceed $3600.00. Neb. Rev. Stat. 25-2802.

**Mandatory Arbitration:** Pre-dispute arbitration agrees oust Nebraska courts of jurisdiction and are therefore unenforceable on public policy grounds. *State v. Nebraska Ass. Of Pub. Employees*, 239 Neb. 563, 477 N.W.2d 577 (1991). However, when the contract "involves commerce" as used in the Federal Arbitration Act (FAA), the court must determine whether state law governs the finality for purposes of appeal of an order denying a motion to compel arbitration under the FAA, the court must first apply the state procedural rules to determine if the order is final for purposes of appeal, and then determine whether the result of that inquiry would undermine the goals and policies of the FAA. *Webb V. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004).

**Indepenent Medical Examinations:** Nebraska Discovery Rule 35, states that when the medical condition of a person is in controversy, the court may order the party to submit to the medical examination.

**Permissive Use:** Nebraska statutory language makes clear that a motor vehicle liability insurance policy must insure any person who has been given implied or express permission to use an insured's vehicle.

Nebraska Revised Statute § 60-534:

"Such motor vehicle liability policy shall…(2) insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the *express or implied permission* of such named insured." (emphasis supplied).

Nebraska law requires this "mandatory extension of coverage so the public may be protected from damages resulting from accidents caused by the negligent driving of irresponsible and noninsured drivers operating vehicles they do not own or insure." *State Farm Insurance Mutual Companies v. Amco Insurance Co*, 9 Neb.App. 872, 879, 621 N.W.2d 553, 560 (2001).

Nebraska has adopted the "hell or high water" rule for interpreting an insurance policy's omnibus clause. If permission is initially given to operate an automobile then "despite hell or high water, such operation is considered to be within the scope of the permission granted, regardless of how grossly the terms of the original bailment may have been violated." *State Farm Insurance Mutual Companies v. Amco Insurance Co*, 9 Neb.App. 872, 621 N.W.2d 553. Nebraska law extends the "hell or high water" rule beyond the relationship between the owner and initial permittee to the relationship between the initial permittee and third parties who have been given permission by the initial permittee to drive the owner's car. *State Farm Insurance Mutual Companies*, 9 Neb.App. 872, 621 N.W.2d. "As long as the first use is with the permission of the owner, later deviations are immaterial." *State Farm Insurance Mutual Companies*, 9 Neb.App. at 879, 621 N.W.2d at 560.

# Nevada

**Bodily Injury:** Automobile liability insurance policies must provide a minimum coverage of $25,000 for bodily injury to or death of one person in a single accident, and a minimum coverage of $50,000 for the bodily injury or deaths of two or more persons in a single accident. NRS 485.185 [as amended on June 1, 2017 by SB 308].

**Property Damage:** Automobile liability insurance policies must provide a minimum coverage of $20,000 for property damages from a single accident. NRS 485.185 [as amended on June 1, 2017 by SB 308].

**Settlements with Minors:** The custodial parent, or the parent with whom the child is living if there is no custody order, may settle a claim on behalf of a minor. NRS 41.200(1). A guardian or guardian of the estate of a minor may also settle a claim on behalf of a minor. NRS 41.200(1). Settlement is not effective until it is approved by the district court where the minor resides or, if the minor is not a resident of Nevada, where the claim was incurred. NRS 41.200(1).

The proposed compromise of claim must be set forth via verified petition, addressing each factor set forth in NRS 41.200(2)(a-h). If the claim involves personal injury of the minor, the petition must also set forth all relevant health care records to include treatment and billing records. NRS 41.200(3).

If the compromise is approved by the court, the court must direct the money to be paid to the minor's parent(s) or guardian. NRS 41.200(4). Upon receiving the proceeds, the parent(s) or guardian must establish a blocked financial investment for the benefit of the minor and provide the court proof. NRS 41.200(5). For amounts over $10,000, verified accounting reports must be submitted to the court annually. NRS 41.200(5). For amounts under $10,000, verified accounting reports must be submitted as ordered by the court.

The minor may obtain proceeds of the account upon reaching the age of 18, or upon other order from the court. NRS 41.200(6).

**Personal Injury:** Nevada is a "fault state," meaning the person determined to be at fault for the accident is responsible for the resulting damages or injuries. Consequently, it does not require personal injury protection (PIP), but PIP coverage may be offered or purchased.

**Medical Payments:** Nevada does not require insured drivers to carry medical payments coverage. Insurance carriers must offer insureds the option of purchasing coverage in an amount of at least $1,000 for the payment of reasonable and necessary medical expenses resulting from a crash. NRS 687B.145(3). The insurer is not required to reoffer the coverage to the insured in any replacement, reinstatement, substitute or amended policy, but the insured may purchase the coverage by requesting it in writing from the insurer. NRS 687B.145(3). Each renewal must include a copy of the form offering such coverage. NRS 687B.145(3).

**Uninsured/Underinsured Motorist Coverage:** An insurance company may not issue motor vehicle insurance coverage without providing protection for the insured from owners or operators of uninsured or hit-and-run vehicles. NRS 690B.020(1). The insured may reject the coverage in writing. NRS 690B.020(1). The amount of coverage may not be less than the minimum limits as set forth in NRS 485.185.

**Negligence:** Nevada follows a modified comparative fault approach. Under Nevada law, "the comparative negligence of the plaintiff or the plaintiff's decedent does not bar a recovery if that negligence was not greater than the negligence or gross negligence of the parties to the action against whom recovery is sought." NRS 41.141(1). A plaintiff may recover as long as the plaintiff's negligence did not exceed the defendant's negligence. The plaintiff's recovery is reduced by their percentage of negligence determined by the jury. NRS 41.141(2)(b).

**Statutes of Limitations:** Nevada law provides that a lawsuit to recover damages for injuries to a person or the death of a person must be commenced within two years. NRS 11.190(4)(e).

An action for injury to personal property must be commenced within three years. NRS 11.190(3)(c).

For an action based on an oral contract, the lawsuit must be commenced within four years; however, an action based on a written contract must be commenced within six years. NRS 11.190(1)-(2).

**Licensing Requirements:** In Nevada, an insurance adjuster must be licensed. NRS 684A.040.

Effective January 1, 2020, an adjuster is defined as "any person who, for compensation, including, without limitation, a fee or commission, investigates and settles, and reports to his or her principal relative to, claims: (a) Arising under insurance contracts for property, casualty or surety coverage, including, without limitation, workers' compensation coverage, on behalf solely of the insurer or the insured; or (b) Against a self-insurer who is providing similar coverage." NRS 684.020(1). [As amended on June 7, 2019 by SB 88 changing requirements for those exempt from licensure requirements].

**Punitive Damages:** NRS 42.500 governs punitive damages and permits recovery in actions not arising from contract where the "defendant has been guilty of oppression, fraud or malice, express or implied…" NRS 42.005(1). "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person. NRS 42.001(4). "Fraud" means an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his or her rights or property or to otherwise injure another person. NRS 42.001(2). "Malice, express or implied" means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others. NRS 42.001(3).

If a plaintiff claims punitive damages, the trier of fact will make a determination of whether they will be assessed. NRS 42.005(3). If the trier of fact makes that determination, then a subsequent proceeding will be held to determine the amount of punitive damages to be recovered. NRS 42.005(3). Punitive damages are limited to (a) three times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is $100,000 or more; or (b) $300,000 if the amount of compensatory damages awarded to the plaintiff is less than $100,000. NRS 42.005(1)(a-b).

Punitive damages are only awarded against an employer for the acts of employees when (a) The employer had advance knowledge that the employee was unfit for the purposes of the employment and employed the employee with a conscious disregard of the rights or safety of others; (b) The employer expressly authorized or ratified the wrongful act of the employee for which the damages are awarded; or (c) The employer is personally guilty of oppression, fraud or malice, express or implied. NRS 42.007(1). If the employer is a corporation, the employer is not liable for exemplary or punitive damages unless the elements of paragraph (a), (b) or (c) are met by an officer, director or managing agent of the corporation who was expressly authorized to direct or ratify the employee's conduct on behalf of the corporation. NRS 42.007(1).

**Joint and Several Liability:** In cases where comparative fault is asserted as a defense, Nevada's comparative fault statute provides for several liability unless certain exclusions are met. "Where recovery is allowed against more than one defendant in such an action, except as otherwise provided in subsection 5, each defendant is severally liable to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to that defendant." NRS 41.141(4).

When two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them. NRS 17.225(1). No tortfeasor is compelled to make contribution beyond his or her own equitable share of the entire liability. NRS 17.225(2). The total recovery is limited to the amount paid by the tortfeasor in excess of his or her equitable share. No tortfeasor is compelled to make contribution beyond his or her own equitable share of the entire liability. NRS 17.225(2).

**Worker's Compensation:** The Nevada Industrial Insurance Act provides the exclusive remedy for a worker who is injured in the course and scope of work. *See* NRS 616A-616D; *see also McAfee v. Garrett Freightlines, Inc.*, 95 Nev. 483 (1979).

**Bad Faith:** Nevada courts have recognized a tort action for the breach of the implied covenant of good faith and fair dealing with respect to insurance agreements. *Great American Insurance Co. v. General Builders, Inc.*, 113 Nev. 346 (1997). These actions require a special element of reliance or fiduciary duty, and Nevada courts have recognized these elements in the insurance context. *Id.*

"Tort liability for breach of the good faith covenant is appropriate where 'the party in the superior or entrusted position' has engaged in 'grievous and perfidious misconduct.'" *Id.* If liability is imposed, damages awards can go beyond ordinary contract damages to make the aggrieved party whole and punish the tortfeasor. *Id.*

With respect to punitive damages, Nevada follows the rule that proof of bad faith, by itself, does not establish liability for punitive damages. *United States Fidelity v. Peterson,* 91 Nev. 617, 620, 540 P.2d 1070, 1072 (1975). To recover punitive damages, plaintiff must also show clear and convincing evidence of "oppression, fraud, or malice, express or implied." NRS 42.010. *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 512, 780 P.2d 193, 198 (1989).

**Alcohol:** A person who drives while under the influence of intoxicating liquor and causes harm to another is subject to a category B felony. NRS 484C.430 (substituted in revision for NRS 484.3795 on May 19, 2017 by AB 135).

Punitive damages are permitted in cases involving damages caused by a person driving under the influence. "[W]here the defendant caused an injury by the operation of a motor vehicle… after willfully consuming or using alcohol or another substance, knowing that the defendant would thereafter operate the motor vehicle, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant." NRS 42.010(1). If a person is subject to these damages, the punitive damage limits set forth in NRS 42.005 are inapplicable. NRS 42.010(2).

**Intra-Family/Spousal Immunity:** In Nevada, the common law doctrine of inter-spousal immunity is not applicable to motor vehicle cases. *Rupert v. Stienne*, 90 Nev. 397, 404 (1974). A child may sue his or her parent in tort stemming from a motor vehicle case. *Id.*

If a vehicle owner gives a spouse, son, daughter, parent, brother, sister or other immediate member of a family permission to drive the vehicle, the owner shall be jointly and severally liable with such family member for any damages proximately resulting from such negligence or willful misconduct, and such negligent or willful misconduct shall be imputed to the owner of the motor vehicle for all purposes of civil damages. NRS 41.440.

Any negligence or willful misconduct of a minor under the age of 18 years when driving a motor vehicle upon a highway is imputed to the person who has signed the application of the minor for a permit or license and that person is jointly and severally liable with the minor for any damages caused by such negligence or willful misconduct. NRS 483.300. A parent or guardian's liability for willful misconduct is limited to $10,000. NRS 41.470.

**Seat Belt Defense:** Nevada has a requirement to wear a seat belt for any driver and any passenger that is 6 years old or older or weighs more than 60 pounds. NRS 484D.495(1) (substituted in revision for NRS 484.641 on May 16, 2019 by SB 134).

The law does not permit a violation of the law to be considered as negligence or causation in a civil action. NRS 484D.495(4) (substituted in revision for NRS 484.641 on May 16, 2019 by SB 134).

**Releases:** A release or covenant not to sue or not to enforce a judgment discharges the tortfeasor to whom it was given from all liability for contribution and equitable indemnity to any other tortfeasor as long as the release was given in good faith. NRS 17.245(1)(a). Such a release does not discharge other tortfeasors from liability unless the terms of the release specifically provide for the release of the other tortfeasors. NRS 17.245(1)(a).

**Wrongful Death:** When the death of any person, whether or not a minor, is caused by the wrongful act or neglect of another, the heirs of the decedent and the personal representatives of the decedent may each maintain an action for damages against the person who caused the death. NRS 41.085(2).

Actions for wrongful death must be commenced within two years. NRS 11.190(4)(e).

**No Fault:** Nevada is a "fault state," meaning the person determined to be at fault for the accident is responsible for the resulting damages or injuries.

**Permissive Use:** In general, a person who caused the injury is liable for damages. NRS 41.130. Absent a familial relationship or other theory of imputed liability, a vehicle owner cannot be held personally liable for accidents involving loaned vehicles under circumstances of permissive use. NRS 41.440.

However, a policy of liability insurance must insure any persons using the vehicle with the express or implied permission of the named insured against loss arising out of the use of the motor vehicle, subject to statutory limits set forth in NRS 485.185. NRS 485.3091. Coverage must extend to all persons who drive the insured's car with permission, regardless of whether the permissive driver has been explicitly excluded from coverage. *Federated American Ins. Co. v. Granillo*, 108 Nev. 560, 563 (1992).

With respect to employees/employers, an employer can be held vicariously liable for torts committed by an employee. "[W]here the person causing the injury is employed by another person or corporation responsible for the conduct of the person causing the injury, that other person or corporation so responsible is liable to the person injured for damages." NRS 41.130.

Vicarious liability can be assigned to the conduct of an employee operating a motor vehicle where (1) the accident occurs within the scope of employment, and (2) where the employee is found to be under the control of the employer. *Molino v. Asher*, 96 Nev. 814, 879 (1980).

Tortious conduct by an employee in transit to and from work will not ordinarily expose the employer to liability. *National Convenience Stores, Inc. v. Fantauzzi*, 94 Nev. 655, 691-692. (1978). Exceptions apply if the employee is engaged in a "special errand" and is a question for the jury. *Id.* at 692. This is known as the "going and coming" rule. *Id.* at 691.

# New Hampshire

**Bodily Injury/Minimum Limit:** New Hampshire does not require mandatory liability coverage. However, any policy issued must contain minimum bodily injury coverage in the amount of $25,000 per person and $50,000 per accident. There is no "threshold" before a bodily injury claim can be made. Collateral sources of payment cannot be used as an offset. Finally, New Hampshire is not a "no fault" state. With respect to property damage, there is no minimum limit required.

As noted above, although an owner operator need not obtain insurance coverage, any policies issued must contain limits of $25,000/$50,000. Although New Hampshire does not have "PIP" coverage, we do have medical pay. All policies issued must have medical pay in the minimum amount of $5,000. Med payments cannot be subrogated. The med payments are only available for those bills that were caused by the subject accident for a period of one year. There is no "threshold" to be met.

**Uninsured/Underinsured Motorist Limits:** Uninsured/underinsured motorist limits must match the liability coverage in automobile liability policies issued in this State. As noted earlier, the minimum amount is $25,000. The statute of limitations on uninsured motorist claims is the same with respect to other personal injury claims — three years.

**Negligence:** Under New Hampshire law, a plaintiff is barred from recovery if his or her negligence exceeds fifty percent. Otherwise, the damages are reduced by the percentage of negligence. The negligence of a claimant driver cannot be imputed to the passengers.

**Statute of Limitations:** As noted earlier, the statute of limitations of bodily injury property damage claims is three years. A minor has two years from the date of reaching the age of majority to institute suit. The age of majority is age eighteen. All minor settlements in excess of $10,000.00 must be approved by a superior court justice. Further, an appointment of guardianship must be taken out in the probate court. In the standard bodily injury claim, an adjuster need not notify the parties of the applicable statute of limitations, unless a partial payment has been made to that claimant.

**Punitive Damages:** Punitive damages are not allowed in State Court. However, New Hampshire does have so-called ("exemplary damages") where the conduct complained of is willful, wanton, etc.

By statute in New Hampshire, if a defendant is less than 50% at fault, then liability is several, and not joint and several. If the defendant is 50% or more at fault, then that defendant can be held liable for the entire verdict. The court will apportion fault among all defendants at trial, including settling defendants.

**Workers' Compensation:** Workers' compensation benefits can be subrogated in this State. If the claimant does not bring suit within six months, then the workers' compensation carrier has the right to institute suit in the claimant's name. Any settlements involving a workers' compensation lien must be approved by the court or the Department of Labor. The workers' compensation carrier is required to reduce its lien on a pro rata basis concerning out-of-pocket expenses.

**Minor Settlements:** With respect to minor settlements, it is presumed that once a child reaches the age of seven, he or she can be found negligent. As noted earlier, minor settlements in excess of $10,000.00 must be approved.

**Alcohol:** It is presumed that a driver is intoxicated where the Breathalyzer reading is .08. If the blood alcohol test is between .03 and .08, such evidence is admissible as evidence to prove that the operator was negligent. The server of alcohol can be held liable under both common law and by statute.

**Legal Age:** The legal age in New Hampshire is eighteen. There is no inter family or spousal immunity defense.

**Seatbelts:** Under New Hampshire law, there is no seat belt defense. It may not be brought out at trial.

**Permissive Use:** Permissive use of a motor vehicle (as interpreted under the terms of an insurance policy) is a question of fact. Allstate Ins. Co. v. Page, 105 N.H. 410 (1964). Instances exist in which a named insured gives permission for a second person to drive the vehicle, and against the wishes of the insured the second person allows a third party to drive the vehicle. Where that third party's trip is not for the use of the second person, the third party is not a "person insured." Government Employees Ins. Co. v. Johnson, 118 N.H. 899, 901 (1978).

Notwithstanding policy language, New Hampshire statutory law requires "that insurers extend liability coverage to persons who use an insured vehicle with the insured's permission." Progressive Northern Ins. Co. v. Concord General Mut. Ins. Co., 151 N.H. 649, 656 (2005); RSA 264:18, VI (2010). When interpreting this standard, New Hampshire uses the initial permission rules, whereby "once permission to use an insured vehicle is given in the first instance, any subsequent deviation is wholly immaterial and will not defeat coverage under an omnibus clause . . . unless the deviation . . . rises to the level of theft or conversion." Progressive Northern Ins. Co., 151 N.H. at 656-57.

# New Jersey

**I. Coverage:**

**A. Liability:**

1. **Bodily Injury:** Coverage is mandatory for all motor vehicles, including buses. Although New Jersey law now allows for "basic" coverage of less than the traditional $250,000, basic policies are not available to commercial vehicles such as buses. Consequently, with respect to commercial vehicles, pedestrian PIP coverage remains at $250,000. Collateral sources can be used as an offset. New Jersey offers a "verbal threshold," which limits an individual's right to sue to certain serious categories of injury, but verbal threshold benefits are not available to owners of vehicles that are not required to carry PIP. Consequently, all individuals involved in accidents with vehicles, such as commercial vehicles or buses, are deemed to have the "full tort" option and do not have any limit on their right to sue.

2. **Property Damage:** Coverage is mandatory for all motor vehicles. Minimum Limit - $5,000. Loss of use, loss of use on a totaled vehicle and tax, title and license fees recoverable.

**B. Personal Injury Protection:** Personal injury protection ("PIP") coverage is mandatory for all automobiles as that term is defined by the statute. A bus does not constitute an automobile for purposes of the PIP statute. N.J.S.A. 39:6A-4. However, any private passenger car used by Laidlaw for business or private purposes, rather than for public conveyance, would be required to maintain PIP coverage. Therefore, in most cases, a bus driver or passenger on a Laidlaw bus involved in a motor vehicle accident cannot recover PIP benefits from Laidlaw. However, a special statutory scheme has been enacted specifically to provide medical expense benefits to bus passengers. See p.3.

As noted above, PIP only applies to vehicles which meet the definition of "automobile" under the Statute (NJSA 39:6A-2) defined as follows: "A private passenger or station wagon type that is owned or hired and is neither used as a public or livery conveyance nor rented to others with a driver…"

As also noted above, NJSA 17:28-1.3 provides that PIP coverage for pedestrians struck by a vehicle ("Stranger Pedestrians") only applies to "motor vehicles" (such as commercial vehicles and buses) and not "automobiles" as defined by the Statute above.

**PIP Subrogation:** A PIP carrier has a right of subrogation (PIP Reimbursement claim) against:

(1) Those not required by statute to carry PIP coverage (i.e., commercial motor vehicles other than automobiles, such as buses, commercial establishments such as taverns or inns "dram shop;" hospitals for malpractice)

(2) Those who are required to carry PIP coverage, but do not (i.e., uninsured motorists).

Because buses and commercial vehicles are generally not required to carry PIP coverage, they would be subject to a subrogation claim by the PIP carrier for any passenger injured in a bus accident.

**Pedestrian PIP:** PIP coverage for pedestrians is required for all motor vehicles not subject to the mandatory PIP provisions of NJ.S.A. 39:6A-4, i.e., non- automobiles, including commercial vehicles and buses. Coverage is required to extend to those pedestrians hurt by the motor vehicle or an object propelled by or from the vehicle.

PIP benefits include:

(a) Medical expense benefits - not to exceed $250,000 per person per accident;

(b) Income continuation benefits - maximum option is $100 per week for a maximum of $5,200;

(c) Essential services - maximum option is $12 per day with a limit of $4,380;

(d) Death benefits – provides for the benefits otherwise falling under subsection (b) and (c) to go to the surviving spouse or children, if no children then benefits fall to the estate of the deceased;

(e) Funeral expense - maximum benefit is $1,000.

**Offset:** PIP benefits do not offset recovery in a bodily injury claim and PIP benefits paid or payable, including deductibles, co-pays and exclusions, are inadmissible in a civil BI action.

**Stacking:** PIP benefits cannot be stacked with the exception of pedestrian PIP to an out-of-state insured when it is then considered to be excess over any med pay benefits available to the pedestrian and interpreted as providing "the more generous benefit under New Jersey law to those individuals in our sister states who have minimum first-party coverage."

However, an insurer paying PIP benefits is entitled to recover its pro rata share of benefits from any other insurer owing coverage, but only through agreement or inter-company arbitration.

**Payment of PIP Benefits:** A PIP insurer has an obligation to pay claims Under the statute, the insurer is allowed 60 days in which to pay or deny a claim. Claims not paid within this time period are deemed overdue and subject to the payment of interest. A PIP claimant may bring suit or file for arbitration. Attorney fees may be awarded to prevailing plaintiff, and are commonly granted.

**Statute of Limitations on PIP Claims:**

(a) Not later than two years after claimant suffers loss or incurs any expenses when it was caused by the subject accident; or four years after the subject accident, whichever is earlier;

(b) If benefits have already been paid, not later than two years after the last payment of benefits;

(c) Actions for subrogation (PIP Reimbursement Claim) must be commenced within two years of the initial filing of a PIP claim ( Discovery rule applies, i.e., if subrogee has not received notice within two-year time period, statute runs from date carrier should have known of filing of PIP claim).

NJSA 39:6A-12 provides that any bills "paid or payable" by PIP are inadmissible in a civil action. As standard NJ policies were usually $250K a question arose as to what occurs if the plaintiff has a limited PIP policy such as $15K. Recent case law and statutory amendment has clarified that even if the injured party has a limited PIP policy any amounts that exceed the policy are not "paid or "payable" by PIP and, therefore, are admissible in a civil action.

**Medical Expense Benefits for Motor Bus Passengers:** Although there is no requirement to carry PIP coverage on buses under the PIP statute, New Jersey has enacted a statutory scheme for the payment of medical expense benefits for motor bus passengers. N.J.S.A. 17:28-1.1, et seq. For purposes of this chapter, the term "motor bus" does not include buses operated for the transportation of enrolled children and adults (chaperons only) to or from a school, school-related activity or other place of education. However, if the subject bus is being used for other purposes, commercial or private, the chapter requires the owner or operator of such a bus operating a regular route or casino, charter or special bus service to maintain medical expense benefits coverage on a no-fault basis for any passenger injured as a result of an accident while occupying, entering into or alighting from the bus. The coverage shall include the payment of reasonable medical expenses in an amount not to exceed $250,000 per person per accident.

In exchange for being required to provide such coverage, the owner, registrant and operator of a motor bus are exempt from tort liability for non-economic damages unless plaintiff meets the verbal threshold

requirements discussed below. However, an injured passenger has the right to sue for uncompensated economic losses, without regard to the verbal threshold. The amount of medical expense benefits paid or payable to an injured passenger are inadmissible in any action for damages against the owner or operator of a motor bus by that passenger.

**C. Uninsured/Underinsured Motorist Coverage:**

**Uninsured ("UM"):** $15 ,000/$30,000/$5,000 minimum mandatory coverage cannot be rejected, and insured may purchase up to at least $250,000/$500,000/ $100,000. Coverage cannot exceed an insured's elected BI and PD liability limits.

**Underinsured ("UIM'):** Must be offered as an option, but coverage is not mandatory. Insurer must offer options up to at least $250,000/$500,000. Coverage cannot exceed liability limits elected by insured.

**Stacking of UM/UIM:** Stacking is not allowed. If multiple policies are available, UM and UIM are treated differently. For both UM and UIM claims, the maximum recovery is limited to the highest per-person policy limit on any applicable UMJUT policy. In UM matters, recovery is pro-rated between the applicable coverages as the limits of each coverage bear to the total of the limits. For UIM claims, the responsibility of the insurers and self-insureds is governed by the Other Insurance Clauses of the insurance policies and the self-insured's contract terms. As a result, UM coverage is frequently shared among insurers, but there will usually be a primary/secondary relationship for UIM benefits.

In NJ, UIM policies, as opposed to UM, allow for a "step down" of coverage limits under circumstances where the claimant has his or her own and / or household coverage in a lesser amount. However, there is an exclusion to this where the claimant is an "employee" of a business which business is the named insured pursuant to NJSA 17:28-1.1 (f) which provides that a "step down" cannot be applied under such circumstances;

**Workers' Compensation:** Employees may recover UM Benefits from their own insurance policies, even if they received workers' compensation benefits from Laidlaw. The workers' compensation carrier is entitled to a lien against the employee's UM recovery for the benefits it paid, but only to the extent that the UM recovery, when added to the workers' compensation benefits paid, exceeds the full amount of plaintiffs damages. An injured Laidlaw employee may not recover UM damages from the New Jersey Automobile Full Insurance Underwriting Association if she receives workers' compensation benefits as well.

**Subrogation:** UM benefits are subrogable, subject to the statute of limitations applicable to the injured party: Two years on BI, and six years on PD. Because the statute of UM claims is six years (contract), if the claimant does not make a UM claim within two years from the date of the accident, subrogation is not available.

**Statute of Limitations:** Unless expressly set forth in the applicable insurance contract or an express statute providing otherwise, a six-year statute of limitations applies to all UM claims. However, once an insurer begins paying a UM claim, it has rights of subrogation against an uninsured tortfeasor, but no greater than those of the injured party. Therefore, on BI claims, the two year statute of limitations for BI claims may already have expired by the time the right to subrogation accrues.

**II. Tort Actions:**

**Tort Threshold Options:** The PIP statute permits insureds to choose one of two options regarding their ability to sue for non-economic damages (pain and suffering, inconvenience):

(1) Limitation on Lawsuit Option: Pursuant to NJSA 39:6A-8 (a) provides that, in exchange for lower premiums, the insured may not sue the owner, registrant, operator or occupant of an automobile for non economic damages unless he pleads and proves he qualifies for one of the six categories of significant types of injury for which recovery of non economic damages are permitted. The verbal

threshold limitation applies only to suits against the owners, registrants, operators and occupants of automobiles As discussed above, buses are not automobiles, and therefore the verbal threshold would not apply in an action brought against the owner or driver of a Laidlaw bus.

The six categories are as follows: "death; dismemberment; significant disfigurement or significant scarring; displaced fractures; loss of a fetus; a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement."

In order to satisfy this provision, plaintiff must submit a certification from a licensed or board-certified licensed physician within 60 days following the answer to the Complaint;

(2) Zero Tort Threshold - No limitation on actions for non-economic damages against tortfeasor, and correspondingly higher premium.

**Comparative Negligence (2A;15-5.1):** The contributory negligence of a plaintiff shall not bar recovery if plaintiffs negligence was not greater than the negligence of the tortfeasor or the combined negligence of multiple tortfeasors. Thus, plaintiff is barred from recovery only if his negligence is 51% or greater. If plaintiffs negligence is 50% or less as compared to that of the tortfeasor(s), plaintiffs damages will be reduced by the percentage of negligence attributable to him.

**Joint and Several Liability (2A:15-5.3):** If an individual tortfeasor is found:

- 60% or more responsible for total damages, plaintiff may recovery from that tortfeasor the full amount of damages, both economic and non-economic;

- 59% or less responsible for total damages, plaintiff may recover from that tortfeasor only that percentage of damages, both economic and non-economic, directly attributable to that tortfeasor.

A negligent social host or other party providing alcohol to the driver of a motor vehicle is treated as any other joint tortfeasor - not liable for any share of damages greater than that percentage of fault which is attributable to him. Any party compelled to pay more than her percentage share of damages may seek:

**Contributory Negligence of Infants:** *Under Age Seven Years:* There is a rebuttable presumption that a child under age seven is incapable of negligence. The burden of overcoming this presumption is upon defendant.

*Seven Years and Older:* Although a child seven years or older is capable of contributory negligence, conduct must be measured against the conduct of persons of similar age, judgment and experience, and not against that of an adult.

**Settlement of Infant's Claims:** All settlements in favor of an infant plaintiff should be approved by the court. Such a proceeding is called a "friendly hearing." The court must determine whether the settlement is fair and reasonable as to its amount and terms. Tithe gross amount of the settlement exceeds $5,000, the next settlement to the infant must be deposited with the surrogate of the county in which the infant resides until the age of 18.

**Statutes of Limitations:** *Property Damage:* Six years from when the cause of action accrued (N.J.S.A. 2A)

*Bodily Injury:* Two years from when the cause of action accrued, which is usually the date of the accident. However, under the New Jersey discovery rule, the statute of limitations begins to run on the date plaintiff "discovers" or should have discovered that he was injured as a result of the negligence of another. The discovery rule rarely applies to motor vehicle accidents. (N.J.S.A. 2A: 14-1).

*Minors:* The statute of limitations outlined above begins to run on the date the minor attains the age of 18, i.e., the age of majority.

**Legal Drinking Age:** 21 years of age.

**Intoxication:** A person with a blood alcohol concentration of. 08% or more is legally intoxicated.

Social hosts may be held liable to a third party for bodily injury or property damage sustained as a result of the negligent provision of alcoholic beverages to a person 21 years of age or order. A negligent social host is a joint tort-feasor, as outlined above. A negligent social host is not liable to the person of legal age, for any damages suffered to the intoxicated person because of the host's provision of alcohol to the person. N.J.S.A. 2A:15-5.7.

**Seat Belt Defense:** Drivers, front seat passengers, and passengers age 5 to 18 in automobile are required to wear seat belts. By its language, the statute does not apply to buses. The failure of an automobile-bound plaintiff involved in an accident with a Laidlaw bus to wear a seat belt is not negligence per Se it has been held admissible in product liability cases on the issues of whether non-use increased the extent and severity of a plaintiffs injuries and whether non- use was the sole proximate cause of the injuries. Waterson v. General Motors Corp 111 N.J. 238, 544 A.2d 357 (1988); Bary v. Mack Trucks. Inc. 261 NJ. Super. 35, 41, 617 A.2d 681, 684 (L. Div. 1992).

**Spousal Immunity and Parent-Child Immunity:** The doctrine of spousal immunity has been abandoned in tort actions in New Jersey. Merenhoff v. Merenhoff 76 N.J. 535 (1978). Parental immunity shields a parent from liability for only those determinations regarding the physical, moral, emotional or intellectual growth of a child, i.e., child-rearing decisions. Willful or wanton misconduct and even ordinary negligence are not immunized if determined to be outside the scope of "child-rearing decisions." Thus, where a parent leads a child into a busy Street and the child is struck by a motor vehicle, or where a parent negligently operates a motor vehicle, there is no parental immunity because the parent's conduct has nothing to do with child-rearing decisions and functions. Foldi v. Jeifries 93 N.J. 533 (1983).

**III. Workers' Compensation:** N.J.S.A. 34:15-40 permits an employer or its workers compensation carrier to institute proceedings against a third-party tortfeasor to recover damages for injuries and loss sustained by an employee or his dependents if the employee or his dependents, within one year of the incident, fail either to effect settlement with the tortfeasor, or his insurer, or to bring suit. The same statute requires the employer or its carrier to serve notice upon the tortfeasor or his carrier that the employee or his dependents have applied for worker's compensation in order to perfect a lien. Once notice is given, the tortfeasor or his carrier must inquire of the employer as to the amount of medical expenses incurred and compensation paid before making any payment to the employee. If the proceeds from the third party action are equivalent to or greater than the workers compensation payments, then the employer or its carrier is entitled to reimbursement of the lien amount, less the employee's expenses of suit and attorneys fees not in excess of 33 1/3%.

In the event the employer or its carrier brings suit against the tortfeasor after the employee failed to bring suit or settle within one year, the worker's compensation carrier can recover the entire amount of its lien, plus up to $200 in court costs. Any amount recovered in excess of the gross amount of lien must be paid to the injured claimant by the worker's compensation carrier.

A worker's compensation lien does not attach to the proceeds of an uninsured or underinsured motorist's recovery where such recovery, added to the compensation payments received, is less than the full amount of the injured employee's loss. If the recovery from both sources exceeds the full amount of the claimant's loss, the lien will attach to that portion which is in excess of the full amount of the loss.

Finally while an injured employee may collect PIP benefits immediately after an accident, the obligation to pay medical benefits is, in the first instance, that of the workers compensation carrier. Therefore, the PIP carrier is to be reimbursed those amounts it paid but which should have been paid under the worker's compensation coverage.

**IV. Punitive Damages:** Punitive damages are allowable only where the tortfeasor's conduct is wantonly reckless or malicious or intentional. There must be some positive element of conscious wrongdoing on defendant's part in order for punitive damages to be awarded. Although a plaintiff may plead and recover punitive damages, such damages are not covered by most insurance policies.

**Permissive Use:** New Jersey follows the initial permission rule. Under this rule, if a person is given permission to use a motor vehicle in the first instance, any subsequent use short of theft or the like while it remains in his or her possession, even though not within the contemplation of the parties, is a permissive use within the terms of a standard omnibus clause in an automobile liability insurance policy. Verriest v. INA Underwriters Ins. Co., 142 N.J. 401, 411 (1995). This requirement reflects a legislative purpose to ameliorate the effect of New Jersey's common-law rule against vicarious liability, by requiring car owners to pay the cost of liability coverage for permissive users to assure that compensation is available for their injured victims.

Under the initial permission rule, only two questions must be answered to determine coverage. First, was there permission to use the car initially? Second, did the subsequent use, while possession was retained, constitute theft or the like? Ferejohn v. Vaccari, 379 N.J. Super. 82, 87 (App. Div. 2005).

A person's deviation from the purpose for which he or she borrowed the vehicle does not annul the protection afforded to this person and other injured parties by the omnibus clause of an insurance policy. Proformance Ins. Co. v. Jones, 185 N.J. 406, 412 (2005). Moreover, a subsequent permittee's use of the vehicle beyond the original permission will not void coverage. Id. The courts have held that "a nearly unlimited range of conduct on the part of a driver or passenger, short of outright theft [of the vehicle], is within the scope of an insured or owner's permission." Jaquez v. Nat'l. Cont'l. Ins. Co., 178 N.J. 88, 93 (2003).

When the ultimate user, however, is not the original permitee, but rather a sub-permitee, i.e., one given permission by the original permitee, a person seeking coverage as a sub-permittee must show that he had the initial permittee's permission to use the vehicle. In a sub-delegation situation, the initial permittee stands in the shoes of the named insured, and a person seeking coverage as a sub-permittee must show that he or she had the express or implied permission of the initial permittee to use the vehicle. Atlantic States Group v. Skovron, 383 N.J. Super. 423, 428-29, 892 A.2d 683 (App. Div.2006).

The breadth of the rule is designed to assure that all persons wrongfully injured have financially responsible persons to look to for damages because a liability insurance contract is for the benefit of the public as well as for the benefit of the named or additional insured. Verriest, supra, at 414; Proformance Ins. Co., supra, at 413.

Notwithstanding the expansive application of the initial permission rule, the rule does not extend to every use of a car. Such use must rationally connect to the vehicle for the purpose of providing transportation or satisfying some other related need of the user. For instance, a person who operates a vehicle after being given the keys to obtain a pack of cigarettes does not qualify as a permissive user for purposes of liability coverage. See Jacquez, supra.

In the no fault context, an exclusion for non-permissive use has been codified. See N.J.S.A. 39:6A-7(b)(ii) (providing that an insurer may exclude personal injury protection benefits for any person having incurred injuries or death who at the time of an accident was occupying or operating an automobile without the permission of an owner or other named insured); See also, N.J.S.A.39:6-70(c).

# New Mexico

**Bodily Injury:** Vehicles must be insured or the owner must be financially responsible. N.M. Stat. Ann § 66-5-208. New Mexico has minimum bodily injury coverage of $25,000 for injury or death to one person in one accident, and $50,000 for injury or death to two people. This coverage is mandatory, and cannot be waived. There is no minimum damages requirement before a bodily injury claim may be made.

New Mexico has two levels of courts for different monetary value claims. Magistrate courts (Metropolitan Court in Bernalillo County/Albuquerque) hear claims up to $15,000. District courts have jurisdiction over claims of any amount.

New Mexico has adopted the collateral source rule. It is a general rule of damages. Under the collateral source rule a wrongdoer may not set up in mitigation or reduction of damages that the party seeking the damages has been wholly or partially compensated by another source. *Trujillo v. Chavez*, 76 N.M. 703, 417 P.2d 893 (1966).

New Mexico is not a no-fault jurisdiction.

One may provide evidence of financial responsibility by posting a surety bond or cash deposit in the total amount of $60,000. N.M. Stat. Ann. § 66-5-208 (1978, as amended).

**Property Damage:** New Mexico has established mandatory minimum property damage of $10,000. N.M. Stat. Ann. § 66-5-208(C). N.M. Stat. Ann § 16-1-4.16 defines salvage vehicle as a vehicle other than a non-repairable vehicle, of a type subject to registration, that has been wrecked, destroyed, or damaged to the extent that the owner, leasing company, financial institution or insurance company that insured or is responsible for repair of the vehicle considers it uneconomical to repair the vehicle, and it is subsequently not repaired by or for the person who owned the vehicle at the time of the event resulting in damage, or that it was determined uneconomical to repair the vehicle, whether or not it is subsequently repaired. A salvage title for such a vehicle is required.

**UM/UIM Coverage:** UIM is mandatory. N.M. Stat. Ann. § 66-5-301 (1983). However, an insured may reject UM/UIM coverage, but the form showing the insured's rejection of such coverage must be made part of the policy endorsement sheet, by attachment of the written rejection, or some other means which clearly and unambiguously calls the insured's attention to the fact that UIM coverage has been waived. Id. Section 66-5-301(C); *Romero v. Dairyland Insurance Co.,* 111 N.M. 154, 155, 803 P.2d 243, 244 (1990). Rejection of UM/UIM coverage must be in writing. *Marckstadt v. Lockheed Martin Corp*., 2010-NMSC-001, 147 N.M. 678, 228 P.ed 462.

Liability limits need not necessarily match UM coverage. However, when an insured chooses UM/UIM limits lower than bodily injury policy limits, an insurance company must obtain a signed, written, and specific rejection of UM/UIM limits lower than liability limits and to include such rejection in the insured's policy in some manner. *Farm Bureau Mutual Ins. Co. v. Jameson,* 472 F.Supp.2d 1272, 206 W.L. 4017060 (D.N.M. October 31, 2006).

New Mexico law provides that an insured may collect from an uninsured motorist carrier the difference between his uninsured motorist coverage and the tort feasor's liability coverage or the difference between his damages and the tort feasor's liability coverage, whichever is less. N.M. Stat. Ann. § 66-5-301(B); *Martinez v. Allstate Ins. Co.,* 1997-NMCA-100, ¶ 12, 124 N.M. 36, 946 P.2d 240 (citation omitted).

**Offsets For Payments From Third Parties:** An insurer is allowed to offset payments from third party tort feasors. *Manzanares v. Allstate Insurance Co.,* 2006-NMCA-104, 140 N.M. 227, 141 P.3d 1281, cert. denied, 2006-NM Cert-008, 140 N.M. 423, 143 P.3d 185.

**Stacking:** Subsections (A) and (C) of N.M. Stat. Ann. § 66-5-301, together suggest that insurance companies obtain the written rejection of each stacked coverage from its insureds in order to limit that coverage. *Montano v. Allstate Indemnity Co.,* 2004-NMSC-0020, 135 N.M. 681, 92 P.3d 1255. Insurance companies must obtain written objections of stacking in order to limit their liability based on an anti-stacking provision. Id. The public policy in support of stacking has always been tied to the notion that it is unfair not to allow stacking when multiple premiums are paid or when the policy is otherwise ambiguous. Id. An insured is entitled to stack under insured motorist policies for which separate premiums have been paid. *Konnick v. Farmers Inc. Co.,* 103 N.M. 112, 116, 703 P.2d 889 (1985).

**Substitution of Liability Insurer Settlement Offer:** New Mexico does not require that UM carriers consent to settlement, or alternatively, advance the settlement funds to the insured. However, for a UM carrier to justify foreclosing an insured's right to UM benefits when an insured settles without consent, the insurer must demonstrate it was substantially prejudiced by the insured's breach of the consent to settle provision in his policy. Although the insurer shall have the ultimate burden of persuasion to demonstrate substantial prejudice, a presumption of substantial prejudice arises from proof that an insured has breached a consent-to-settle provision. See, State Farm Mutual Auto Insurance Co. v. Fennema, 2005-NMSC-010, 137 N.M. 275, 110 P.3d 49 (holding that an insurance company must demonstrate substantial prejudice from the breach of a consent to settle provision before it can be relieved from paying uninsured motorist benefits.)

**Under Insured and Uninsured Coverages are Not Discrete:** In New Mexico, unlike other states, our "uninsured motorist statute includes underinsured motorist coverage as part of the uninsured coverage" and "underinsured and uninsured motorist coverage are distinct options available for an additional premium." *American States Ins. Co. v. Frost*, 110 N.M. 188, 190, 793 P.2d 1341, 1343, (1990).

**Punitive Damages:** For purposes of UIM coverage, New Mexico has characterized punitive damages as deriving from actual damages. *Stewart v. State Farm Mut. Auto. Inc. Co.,* 104 N.M. 744, 746-7, 726 P.2d 1374, 1376 (1986). Punitive damages are therefore included within an insured's UIM coverage.

New Mexico does not prohibit insurance coverage for punitive damages. Unless specifically excluded from coverage in a policy, insurance contracts cover punitive damages. *Baker v. Armstrong*, 106 N.M. 395, 744 P.2d 170 (1987); *Rummell v. St. Paul Surplus Lines Ins. Co.,* 1997-NMSC-042, 123 N.M. 767, 945 P.2d 985.

**Negligence**: New Mexico is a pure comparative fault jurisdiction. In any cause of action to which the doctrine of comparative fault applies, the doctrine of joint and several liability upon two or more wrongdoers whose conduct proximately caused an injury to any plaintiff is abolished, with limited exceptions. N.M. Stat. Ann. § 41-3A-1 (1978). The exceptions where joint and several liability still apply are to persons intentionally inflicting injury or damage, to vicarious liability, to strict liability, and to "situations not covered by any of the foregoing and having a sound basis in public policy." N.M. Stat. Ann. § 41-3A-1(C).

**Presumptive Level of Intoxication:** New Mexico has adopted a standard of .08 blood alcohol concentration as the presumption legal level of intoxication. A server of alcohol may be liable under New Mexico's Dram Shop statute, N.M. Stat. Ann. § 41-11-1, et. seq. The legal age for consumption of beer, wine, and alcoholic beverages in New Mexico is 21 years of age.

**Wrongful Death:** New Mexico has a wrongful death statute, N.M. Stat. Ann. § 41-2-1 (1978). Every action instituted under the wrongful death statute must be brought within three years after the cause of action accrues, which is the date of death. N.M. Stat. Ann. § 41-2-2 (1978 as amended). The action may be brought by a personal representative. There is no statutory cap on wrongful death damages.

**Statutes of Limitations:** New Mexico has a three year statute of limitations from the date of an accident with respect to negligence claims involving bodily injury. N.M. Stat. Ann. § 37-1-8. Property damage claims based on negligence have a four year statute of limitations. N.M. Stat. Ann. § 37-1-4.

**Permissive Use:** Since 2003, in New Mexico, permissive use arises out of the "Motor Vehicle Insurance Policy; Procedures" clause found at NMSA 1978 § 66-5-205.3 (2003) of the Mandatory Financial Responsibility Act, NMSA 1978 § 66-5-201 through 239 (the "Act"). Section 66-5-205.3(A)(2) provides that "[a] motor vehicle insurance policy shall . . . insure the person named in the policy and a person using any such motor vehicle with the express or implied permission of the named insured against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of the motor vehicle within a jurisdiction, subject to the requirement to provide evidence of financial responsibility pursuant to the [Act]." Similarly, Section 66-5-205.3(B) provides that "[a] motor vehicle insurance policy shall insure a person named as insured against loss from the liability imposed upon the person by law for damages arising out of the use, with the express or implied permission of the owner or person in lawful possession, of a motor vehicle that the insured person does not own. The policy shall insure the person within the same territorial limits and in compliance with the requirement of evidence of financial responsibility as set forth in the [Act] with respect to a motor vehicle insurance policy."

This statutory clause is substantially similar to its apparent precursor, located in the now-repealed statutory omnibus clause in NMSA 1978 § 66-5-221 (repealed in Laws 1998, ch. 34, § 19). For this reason, although there is no New Mexico case law regarding permissive use subsequent to the enactment of Section 66-5-205.3, case law from prior to that time, and which was decided under former Section 66-5-221, should still be controlling.

Under that case law, the permissive use requirement has been assumed to apply to all motor vehicle liability policies. *Allstate v. Jensen*, 109 N.M. 584, 586 n.2, 788 P.2d 340, 342 (1990). Any insurance that conflicts with the intent of the Act is void. *Chavez v. State Farm Mut. Auto Ins. Co.*, 87 N.M.327, 329, 533 P.2d 100, 102 (1975).

Absent notice to the contrary, a second permittee may claim coverage based on a logical inference that the first permittee had authority to allow the second permittee to operate the vehicle. *United Services*, 119 N.M. at 399, 891 P.2d at 540. The permissive use doctrine must be broadly interpreted because it is for the benefit of the public generally and the insured specifically. *Id.*; Hovet v. Allstate Insurance Co., 2004-NMSC-010, 19, 135 N.M. 397, 89 P.3d 69.

The permissive use doctrine extends coverage "to any subsequent permittee operating an insured vehicle so long as the named insured has given his or her initial permission to use the vehicle," *id.*, and "without regard given to any restrictions or understanding between the parties on the particular use for which the permission was given." *Jensen*, 109 N.M. at 587, 788 P.2d at 343.

The permissive use doctrine "does not suggest, however, that the owners' vehicle liability insurance was intended to extend to any and all persons who might come to operate the vehicle." *Allstate v. Jensen*, 109 N.M. at 588-89, 788 P.2d at 344-45. Unlawful taking such as theft are excluded from the reach of the permissive use doctrine. *Id.* Intentional destruction or "a state of mind which evinces an utter disregard for the return of the vehicle or for its safekeeping" are also excluded. *Id.*

# New York

**Bodily Injury:**

1. Bodily Injury coverage is mandatory. For non-fatal bodily injury, minimum limits are $25,000 per person, $50,000 per accident. (VTL §345(b)(3)) and $50,000 per person and $50,000 per accident for death.

2. For occupants of automobiles, pedestrians and bicyclists there is a tort threshold that must be reached before a claim for pain and suffering claim can be made (Insurance Law §5104(a) in a New York State accident lawsuit by a driver, passenger or pedestrian against the owner or operator of a motor vehicle. Plaintiff must suffer a "serious injury" as defined in Insurance Law §5102(d), or have a loss in excess of basic economic loss (see below under Personal Injury) generally surpassing the $50,000 basic economic loss limit.

   (a). The "serious injury" threshold is met if one of the following resulting injuries is proven by the plaintiff:

      i. death;

      ii. dismemberment;

      iii. significant disfigurement;

      iv. a fracture;

      v. loss of a fetus;

      vi. permanent loss of use of a body organ, member, function, or system;

      vii. permanent consequential limitation of use of a body organ or member;

      viii. significant limitation of use of a body function or system;

      medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment.

3. New York is a No-Fault State for medical expenses, wage loss and certain household expenses. (*State Farm Mut. Auto. Ins. Co. v La Forte*, 125 AD2d 563 (2d Dept 1986))

**Minor's Settlements:** Any settlement or judgment an infant becomes entitled to in New York must be formally approved by the Courts. Approval takes place in a formal hearing where the Court considers the settlement agreement. Generally, any settlement or judgment must be placed in a trust account for the future benefit of an infant.

**Property Damage:**

- Minimum limit $10,000 — mandatory (VTL §345(3).

- Credit must be given for salvage recovery.
- Loss of use is covered. Measure of damage is cost of rental of like vehicle.
- Loss of use for a totaled vehicle is limited to a reasonable time to replace.

**Personal Injury:**

1. PIP, otherwise known in New York as "Basic Economic Loss" (Insurance Law §5102(a)):

   "...up to fifty thousand dollars per person of the following combined items, subject to the limitations of section five thousand one hundred eight of this article;

   (1) All necessary expenses incurred for:

   (i) medical hospital, surgical, nursing, dental, ambulance, x-ray, prescription drug and prosthetic services;

   (ii) psychiatric, physical and occupational therapy and rehabilitation;

   (iii) any non-medical remedial care and treatment rendered in accordance with a religious method of healing recognized by the laws of this state; and

   (iv) any other professional health services; all without limitation as to time, provided that within one year after the date of the accident causing the injury it is ascertainable that further expenses may be incurred as a result of the injury.

   (2) Loss of earnings, from work which the person would have performed had he not been injured, and reasonable and necessary expenses incurred by such person in obtaining services in lieu of those that he would have performed for income, up to two thousand dollars per month for not more than three years from the date of the accident causing the injury.

   (3) All other reasonable and necessary expenses incurred, up to twenty-five dollars per day for not more than one year from the date of the accident causing injury.

2. No injury threshold to receive benefits under no-fault, but company is entitled to IME and examination under oath re: causal relationship of the injury and necessity of medical treatment and can deny continued payments for treatment based on doctor's opinion.

3. Benefits may be denied for failure to file timely or failure to cooperate. Failure to attend independent medical examination or appear for scheduled examinations under oath may serve as a basis for denial of payments for future treatment.

4. Coverage cannot be rejected: it is mandatory.

5. PIP subject to intercompany transfer if a vehicle that weighs in excess of 6500 pounds, unloaded or a livery vehicle is involved. (Ins. Law §5105)

6. See Worker's Compensation section re: Worker's Compensation claimant receiving PIP Benefits.

7. Basic Economic Loss benefits are not recoverable in a Bodily Injury claim in an action against an owner or driver of another vehicle (e.g. a "covered person"). Those benefits are recoverable against a non-covered person (i.e. a bar, municipality for a bad road, construction company, product manufacturer).

   Note: Claimant can recover for any unreimbursed medical or wage loss, that is medical expenses and wages that are not Basic Economic Loss.

8. Six-year Statute of Limitations but policies usually require notice to be given within 30 days.

9. No-fault benefits cannot be released by the eligible injured person.

**Medical Payments:**

- Insurance Law § 5104(a) provides that a covered person has no right to recover for Basic Economic Loss through litigation unless it is not Basic Economic Loss. For example, if the combined medical and wage payout under Basic Economic Loss reaches $50,000, then any amount in excess is no longer Basic Economic Loss and therefore recoverable.
- There is no threshold on medical payments.
- Inter-company transfer available if any of the vehicles weigh in excess of 6500 pounds, unloaded or a livery vehicle is involved
- Workers Compensation benefits are primary. If a claimant is eligible for both, he or she recovers Workers Compensation benefits which offset PIP benefits. No setoff, no lien to the extent of no-fault coverage.

**SUM/UIM Coverage:**

- All automobile insurance policies must contain mandatory UIM coverage of 25/50 for uninsured vehicles. Additional SUM coverage is optional. Applies to both uninsured and underinsured claims.
- Does not apply to property damage.
- Notice is required as soon as practicable. Statute of Limitations is 6 years. The six-year time frame arises from the time when the rights to the benefits actually accrue by offer of a tortfeasor's policy limits. Claim can be brought either by suit or arbitration.
- Underinsured Motorist is potentially subrogatable. Prior approval of settlement with the tortfeasor is a condition precedent to an underinsurance claim.
- Carrier is entitled to offset from the liability coverage limits for amounts received by the insured from the tortfeasor on the underlying claim.

**Negligence:** New York is a pure comparative negligence state, i.e. — any award is reduced by percentage of plaintiff's comparative fault.

**Statutes of Limitations:**

*Bodily Injury and Property Damage:* 3 years from the date of accident.

*Minor.*• Statute does not start to run until minor turns 18 years old.

Adjuster should not notify parties of applicable statute of limitations. To do so would be practicing law

illegally.

**Licensing Requirements:** Not directed to us.

**Punitive Damages:**

1. Punitive damages are not covered by insurance as per public policy of state.

2. Punitive damages can be contained in the prayer for relief and recovery can be made.

3. No cap on recovery of punitive damages, except case law requires that they not exceed what "reasonable compensation should be."

4. In order to recover for punitive damages, jury or court must find that acts of defendant causing the injury was wanton, reckless or malicious. Punitive damages are allowed to punish defendant for wanton, reckless or malicious conduct.

However, before a judge charges a jury on punitive damages, the court must decide that there is a reasonable basis in the evidence for the jury to find that the defendant's conduct was so gross or wanton as to justify an award of such damages.

**Joint and Several:** Joint and Several applies to all economic damages. CPLR §1601 limits defendant's liability for non-economic loss in personal injury action if defendant's share of liability is less than 50%, **but not in motor vehicle cases.**

In motor vehicle accidents, defendants are jointly and severally liable, i.e., each defendant is responsible for entire amounts of verdict or their own portion plus any portion that a co-defendant cannot pay. Of course, if each defendant has sufficient means or insurance coverage, they pay their proportionate share.

Under GOL §15-108, if a party has been released, it does not discharge any of the other tortfeasors from liability for the injury unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors by the greater of any amount stipulated by the release or the covenant or the percentage of liability of the releasing tortfeasor.

Worker's Compensation: In New York, a worker is not permitted to sue his/her employer for work related injuries. Their sole remedy is Worker's Compensation (WCL §11). However, if a worker can sue another responsible party, i.e. a product manufacturer, that party may implead the employer in limited circumstances.

Claims for contractual indemnification may be commenced against the employer regardless of the extent of the plaintiff's injury. Common law indemnification and/or contribution may only be sought when an employee has sustained a "grave injury" (WCL §11). A grave injury is defined as follows:

- death;
- permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers;
- loss of multiple toes;
- paraplegia or quadriplegia;
- total and permanent blindness;
- total and permanent deafness;

- loss of nose;
- loss of ear;
- permanent and severe facial disfigurement;
- loss of an index finger;
- an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

Worker's Compensation carrier has a lien on any recovery from a third party, subject to certain conditions. Worker's Compensation is primary to no-fault coverage (Ins. Law §5102(b)(2)). No-Fault carrier must pay difference between its actual coverage and Worker's Compensation benefits. Both laws allow for "loss transfer" between the No-Fault and Worker's Compensation carriers if a commercial vehicle or a vehicle weighing more than 6,000 pounds is involved in the accident giving rise to claim. Loss transfer procedures are outlined in Insurance Law §5105 which provides for inter-company arbitration between the two carriers. Recovery is based on fault (comparative negligence) (Ins. Law §5105; WCL §29(2-a)).

The Worker's Compensation lien is statutory. No notice of lien is required (WCL §29). The injured plaintiff cannot settle the third-party claim without the consent of the Worker's Compensation carrier. A Worker's Compensation claimant may make a SUM/UIM claim

**Minor's Settlements:**

1. All minor settlements must be court approved.

2. Negligence can be attributed to a minor as of age 4 but the minor is held to a standard of care "which a reasonably prudent child of his/ her years, experience, intelligence and degree of development would use under the circumstances," i.e., a 10 year old child is held to a standard of care and reasonable of a 10 year old.

**Bad Faith:** Test is whether carrier put its interests ahead of the interest of its insured in gross disregard of the interests of its insured. (*Pavia v. State Farm Ins. Co.*, 42 N.Y. 2d 445 (1993)

**Alcohol:**

1. **Aggravated Driving While Intoxicated (Aggravated DWI):** Driving while blood alcohol content [BAC] exceeds .18% (V&T 1992(2-a)).

2. **Driving While Intoxicated (DWI):** Driving while BAC exceeds .08%. or is otherwise demonstrated to be intoxicated (V&T 1192(2)&(3)).

3. **Driving While Intoxicated – Commercial Vehicles:** Operating a commercial vehicle while BAC exceeds .04% (V&T §1192(6).

4. **Driving While Ability is Impaired by Drugs**: (V&T 1192(4) & (4-a) -combination).

5. **Driving While Ability Impaired by Alcohol (DWAI):** (V&T 1992(1) & (4-a)-combination).

6. **Driving While Impaired – Commercial Vehicle:** Operating a commercial vehicle while BAC exceeds .02% (V&T §1192(6)).

7. **Zero Tolerance Drivers:** Under 21 .02 to .07% BAC (V&T §1192(10(iii)).

8. **Servers of Alcohol:** Restaurants or stores can be held liable under General Obligations Law §11-101 which prohibits the sale, serving, procuring or giving of alcoholic beverages to a "visibly intoxicated person." Alcoholic Beverage Control Law §65(1). In addition, Alcohol Beverage Control Law §65 prohibits the sale of alcoholic beverages to anyone under the age of 21 (ABCL §65(2)), or to any "habitual drunkard known to be such to the person authorized to dispense any alcoholic beverages " (ABCL §65(3).

9. **Legal drinking age:** 21 years of age.

**Intra Family and Spousal Immunity:** There is no intra family or spousal immunity. New York does not require coverage for intra spousal claims. Coverage for intra spousal claims must be offered and may be purchased as an optional rider to automobile insurance policies. If a spouse passenger sues a third-party and the third-party seeks contribution from the spousal driver, there is coverage for the driver.

(*State Farm Mut. Auto. Ins. Co. v Westlake,* 35 NY2d 587)

**Seat Belt Defense:** New York does have a seatbelt defense which applies primarily to front seat passengers. Only front seat passengers are all required to wear seatbelts (VTL §1229-c). Defendant must prove that there was an operational seatbelt in vehicle that plaintiff failed to use. This includes the situation where a plaintiff chooses to remain seated at a location in an automobile/bus with a defective seatbelt when he/she has knowledge of another available seat with an operating seatbelt. Defendant must also prove by way of expert testimony that plaintiff would not have suffered the injuries, or as serious injuries if plaintiff had used seatbelt. Seatbelt defense goes to mitigation of damages not comparative negligence of plaintiff.

**Labor Law:** New York maintains two very liberal laws which impose a strict burden upon owners, general contractors and their agents involved in construction projects. Sections 240(1) and 240(1)(6) of the Labor Law statutorily impose non-delegable duties upon owners and general contractors and their agents to ensure that work sites are safe and that all workers are supplied with safety equipment adequate for the job they perform.

(1) Labor Law 240(1) imposes a strict liability burden, and non-delegable duty upon an owner or general contractor and their agents to see that workers working at elevated heights are provided with proper safety equipment, i.e. safety belts, safety line, properly equipped ladders, and scaffolds with guards to prevent falls. If a worker on a construction project is injured in a fall from a height or if the injury occurs where an object falls from a height and a worker below is injured by it, there will be grounds for a motion for finding of absolute statutory liability against the owner and general contractor or their agents, regardless of any culpable conduct on the part of the worker. In many cases the plaintiff obtains summary judgment on the issue of the defendants' liability creating a "damages only" scenario from the plaintiff's perspective. This leaves contractors to argue liability issues amongst themselves. Defendants may raise the defense of a "recalcitrant worker" who refuses to make use of an available safety device (*See Stolt v. General Foods Corp*. 81 N.Y. 2d 918). Defendants may also have available the defense that the plaintiff's actions were the "sole proximate cause" of his injury (*See Weininger v. Hagedorn & Company*, 91 N.Y. 2d 958).

(2) Labor Law 241(6) imposes a general burden upon the owner and general contractor to ensure that any construction site is kept in a safe condition. A plaintiff must prove a violation of a regulation contained in the NYS Industrial Code (11 NYCRR Part 23) the sets forth a specific, not a general, safety standard. If proven, the statute imposes the same non-delegable duty upon the owner, general contractor or their agents, despite the fact that the negligent party may have

been a subcontractor hired by them. However, this statute differs from Labor Law §240(1) in that the plaintiff's culpable conduct can be considered by a jury.

(3) Though these statutes attach non-delegable duties on the owner/general contractor, those parties, by third-party impleader seeking common law indemnity or contribution, may shift their statutory liability to a responsible subcontractor who was in control of the work when the injury takes place, unless that subcontractor is the plaintiff's employer. In that case a common law contribution or indemnity claim may only be sustained if the plaintiff sustained a "grave injury" as outlined above. Claims for contractual indemnity may be brought against all potentially responsible parties, including the plaintiff's employer.

**Rental Coverage:** The standard automobile policy in New York provides liability coverage for a temporary substitute vehicle where an insured auto is out of service due to an accident. There the policy will provide for the rental of a substitute vehicle. Though this may be an item of damages in a subrogation suit against a negligent driver, there is no immediate requirement that such a vehicle be provided to a third party.

In the event of a total loss there is no requirement that a rental vehicle be provided to a third party by a negligent insured. However, the cost of use of the rental vehicle to a non-negligent plaintiff may eventually be recovered as an item of damage in either a subrogation suit or a plaintiff's affirmative action.

**Liability of Lessors of Vehicles:** The so called "Graves Amendment" (49 U.S.C. §30106) eliminates vicarious liability for owners of leased or rented vehicles, providing:

> (a) In general - An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any state or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if:
>
> 1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and
>
> 2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).

**Releases:** Insurance Companies need not be named on a release unless it is named as a party. It is advisable to have the carrier named on the release to cut off any claims for liens that are unknown and/or not disclosed prior to the resolution of the claim. Entitlement to no-fault benefits cannot be released.

**Permissive Use:** New York's statutory language makes clear that an owner of a vehicle can be held liable for the damages caused by a user of that vehicle if the user had the express or implied permission of the owner to use the vehicle:

> New York Vehicle and Traffic Law §388:
>
> Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to a person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.

New York Vehicle and Traffic Law §388 gives rise to the presumption that the vehicle is being operated with the owner's consent. The presumption that an owner of a vehicle has consented to its use is very strong and continues until there is substantial evidence to the contrary. (*Aetna Cas. & Sur. Co. v. Santos*, 175 A.D.2d 91 (2nd Dept. 1991). The presumption of consent to use a motor vehicle is rebuttable, however, the Court of Appeals has held that where substantial evidence establishes that permission was conditioned upon driving in a certain locality only or conditioned upon instructions not to allow any riders, the owner was exonerated from liability when an accident occurred subsequent to a breach of the restriction (*Murdza v. Zimmerman*, 99 N.Y.2d 375, 380 (2003)).

When both the owner and the driver disclaim consent, and the plaintiff produces no competent evidence from which consent could be inferred, then the owner should prevail on summary judgment. However, disavowals by both the owner and the driver, without more, will not automatically result in summary judgment for the owner. "Where the disavowals are arguably suspect, as where there is evidence suggesting implausibility, collusion or implied permission, the issue of consent should go to a jury" (*County Wide Ins Co. v. National R.R. Passenger Corp.*, 6 N.Y.3d 172).

# North Carolina

**Bodily Injury:** North Carolina has minimum bodily injury coverage of $30,000 for injury or death to one person, and $60,000 for injury or death to two or more people. This coverage is mandatory and cannot be waived. There is no minimum damages requirement before a bodily injury claim can be made. However, North Carolina has three divisions of courts, depending on the level of claim:

(a) Magistrates Courts for claims of up to $10,000;

(b) District Courts for claims exceeding $10,000 up to $25,000; and

(c) Superior Courts for claims seeking more than $25,000.

North Carolina has adopted the "collateral source doctrine" which means that any collateral sources used to pay a claimant's bodily injury claim cannot be introduced in evidence at trial and further cannot be used as an offset against any recovery against a defendant. Underinsured motorist coverage payments are subject to the collateral source rule and treated as collateral source payments. Hairston v. Harward, 371 N.C. 647, 821 S.E.2d 384 (2018). North Carolina is not a "No-Fault" Jurisdiction.

**Third Party Liens:** The attorney for the plaintiff, upon proper notification of a valid lienholder's interest, is generally responsible for protecting the interests of the lienholder when disbursing proceeds from a settlement. However, an insurer can be responsible for payment of medical liens upon proper notice, which is especially true when the plaintiff is pro se. See N.C. Gen. Stat. § 44-50; Charlotte-Mecklenburg Hospital Auth. v. First of Georgia Ins. Co., 340 N.C. 88, 455 S.E.2d 655 (1995); Nash Hospitals, Inc. v. State Farm Mutual Automobile Ins. Co., 254 N.C. App. 726, 803 S.E.2d 256 (2017) (permitting Unfair or Deceptive Trade Practices claim against insurer).

The lienholder is entitled to an accounting of the judgment and disbursement if the lienholder makes a written request and the amount disbursed is less than the amount of the lien. N.C. Gen. Stat. § 44-50.1. An insurer or third party administrator (TPA) should do nothing to prejudice the rights of a valid lienholder and its counsel must comply with the provisions of N.C. Gen. Stat. § 97-10.2 with respect to the payment of Worker's Compensation liens in third party claims.

**Property Damage:** North Carolina has established mandatory minimum property damage coverage of $25,000.

There are no statutory provisions in North Carolina establishing the salvage value of a vehicle. Any motor vehicle declared a "total loss" or salvaged must reflect that designation on its title as directed by N.C. Gen. Stat. § 20-71.3, and a total loss must also be so designated on a tamperproof permanent marker in the door-jamb of the vehicle. In certain instances, the vehicle may be re-titled without the designation. Typically, when a property damage claim is settled, the insurance carrier and the owner of the damaged vehicle can agree that the wrecked vehicle will be turned over to the carrier to be sold to a salvage yard and that proceeds from the car are given to the carrier to calculate the claim. The owner of the vehicle may keep the vehicle and the assessed salvage value of the vehicle is to be deducted from the settlement proceeds to arrive at the agreed upon settlement.

The loss of use of a vehicle is usually compensable to an injured party in a property damage claim. Usually, loss of use damages are calculated as the rental value of a similar vehicle for a reasonable period of time to allow the injured party to either purchase a new vehicle in the event of a total loss, or for such a reasonable period of time as is reasonably necessary to repair the damaged vehicle. Damages for loss of use can be obtained even when no replacement is actually rented or when a spare vehicle is available, but an injured party's actual use of an available spare vehicle can be considered by a jury in calculating loss of use damages.

See Mauney v. Carroll, 251 N.C. App. 177, 795 S.E.2d 239 (2016). Damages for loss of business profits are also recoverable when no substitute vehicle could be rented and there is actual proof of such loss.

It is not known whether there is any standardized practice regarding payment of the "collision waiver" for a car rental company. In the situation where the carrier for the defendant authorizes the claimant to rent a vehicle, the defendants third party administrator or representative will typically authorize a per-diem allowance for car rental and allow the claimant to bear any costs over the per diem allowance. In cases which are in litigation, the rental costs including the collision waiver are normally recoverable to a plaintiff.

**Personal Injury:** North Carolina is not a PIP state.

**Medical Payments:** NOT MANDATORY. North Carolina does not require an insured driver to carry medical payments coverage. Med Pay typically covers any necessary medical treatment or hospitalization that is directly attributable to the particular incident. Usually, there is no minimum damages threshold before the Med Pay carrier will reimburse the policy holder. Med Pay is paid on a dollar for dollar level up to the Med Pay limits. Because coverage is not mandatory, Med Pay coverage need not be rejected in writing.

A workers' compensation claimant can receive Med Pay benefits. The payment of Med Pay benefits would generally not offset a bodily injury claim. Typically, a claim for Med Pay must be made within one year from the date of the injury, depending upon the terms of the insurance contract. However, since Med Pay is a creature of contract, a Med Pay claim must be made within three years of the injury.

**UM/UIM Coverage:** NOT MANDATORY on policies applicable *solely* to commercial motor vehicles or *solely* to fleet vehicles. North Carolina otherwise requires that uninsured motorist coverage be included in each motor vehicle liability policy, and that underinsured motorist coverage be included in each such policy that is written at limits that exceed the statutory minimum liability limits of $30k/$60k/$25k. The limits of uninsured and underinsured motorist coverage are equal to the highest policy limits of any one vehicle in the policy. However, insureds can elect to purchase a different amount of uninsured and underinsured coverage, so long as those amounts are not less than the statutory minimum liability limits and no more than $1,000,000.00. Selection of different amounts of these coverages need not be made in writing. However, insurers must provide insureds with notice of their right to select different UM/UIM under N.C. Gen. Stat. § 20-279.21(m) when issuing or renewing coverage. The statute of limitations for uninsured/underinsured motorist coverage claims for either property damage or personal injury is three years.

An employee receiving payments on a workers' compensation claim is also able to file UM/UIM claim. By statute, the UM/UIM carrier shall insure that portion of the loss uncompensated by workers' compensation and the amount of the workers' compensation lien. N.C. Gen. Stat. § 20-279.21(e). However, where an insured receives workers' compensation benefits and also seeks payment under UM/UIM coverage, the UM/UIM insurer may reduce the insured's UM/UIM benefits by the amount of any workers' compensation benefits received by the insured but that *are not* subject to an employers' lien. Austin v. Midgett, 159 N.C. App. 416, 583 S.E.2d 405 (2003), *clarified on rhr'g* at 166 N.C. App. 740, 603 S.E.2d 855 (2004); Walker v. Penn Nat'l Sec. Ins. Co., 168 N.C. App. 555, 608 S.E.2d 107 (2005). This is true regardless of whether the UM/UIM coverage and workers' compensation coverage are provided by the same carrier. McMillian v. North Carolina Farm Bureau Mut. Ins. Co., 347 N.C. 560, 495 S.E.2d 352 (1998).

N.C. Gen. Stat. § 20-279.21 (b)(3) allows stacking of UM.UIM coverage provided to an individual by multiple policies (generally excluding commercial or fleet policies) but prohibits stacking of UM/UIM coverage provided by a single policy covering multiple vehicles.

**Negligence:** North Carolina is one of a few remaining contributory negligence jurisdictions. Under the contributory negligence doctrine, if the fact finder (the judge or a jury) were to find that the plaintiff was even one percent (1%) contributorily negligent, then the plaintiffs claim would be barred, even if the defendant were negligent. However, the plaintiff may still recover under the "last clear chance" doctrine if the

defendant, aware that the plaintiff was in a helpless situation, could have avoided the harm and did not.

In North Carolina, by operation of the "owner-occupant doctrine," the negligence of a driver can be imputed to the owner who is a passenger at the time of the accident.

**Statute of Limitations:** North Carolina has a 3 (three) year statute of limitations from the date of an accident with respect to negligence claims involving both bodily injury and property damage claims.

A minor child (under 18 years of age) would be considered to be under a disability for the purposes of the statute of limitations. During the time when the minor was under age, the statute of limitations would not run with respect to the minor claimant. Therefore, the minor could bring the claim after their 18th birthday even if the statute of limitations would have expired if they were an adult. There is no requirement that an adjuster notify claimant parties of the applicable statute of limitations. However, the adjuster must be extremely careful not to misinform the parties of the applicable statute of limitations since the injured party could claim detrimental reliance or fraud.

**Punitive Damages:** Punitive damages are typically not covered by insurance under most insurance policies. However, even if punitive damages are not covered by insurance, a claimant can, under certain circumstances, plead for and recover punitive damages from the tortfeasor if the tortfeasor has sufficient assets to cover the award after insurance has paid the limits on its coverage. Punitive damages, also known as exemplary damages, are damages designed "to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts."

Punitive damages are governed by Chapter 1D of the North Carolina General Statutes. Under Chapter lD, punitive damages are recoverable only when there is clear and convincing evidence of fraud, malice or willful or wanton conduct. Punitive damages cannot be awarded solely on the basis of vicarious liability. A corporation is liable for punitive damages only when the aggravated conduct giving rise to the award is participated in or condoned by an officer, director, or manager of the corporation.

Liability for punitive damages can be tried separately from the issues relating to compensatory damages. The trial court must review all punitive damage awards and must state in a written opinion its reasons for upholding or disturbing the award. The amount of punitive damages is limited to three times the amount of compensatory damages or $250,000.00, whichever is greater. This upper limit does not apply if a plaintiff's injuries arose out of a defendant's operation of a motor vehicle that also gives rise to the statutory criminal offense of driving while impaired.

**Joint and Several Exposure:** YES. North Carolina has joint and several liability with respect to tortfeasors. This would apply to both economic and non-economic damages.

**Workers' Compensation:** Worker's compensation is generally the exclusive remedy that an employee has against his employer for a work-related injury if the employer is subject to the act. The employer will not be granted the exclusive remedy immunity for intentional acts by the employer, or for gross misconduct by the employer where there is substantial certainty that the misconduct will cause an injury to the employee and in fact causes the injury. Woodson vs. Rowland, 329 N.C. 330, 407 S.E.2d. 222 (l991). For such intentional acts a three-year statute of limitations applies. The exclusive remedy immunity also may be inapplicable for cases where the employer has agreed in writing to indemnify a third party, against whom the employer's employee later has alleged negligence. N.C. Gen. Stat. § 97-10.2(e).

Medical and employment benefits paid by a workers' compensation carrier to a workers' compensation claimant is subject to subrogation in an action against a third-party tortfeasor subject to the provisions of N.C. Gen. Stat. § 97-10.2. North Carolina provides that in a third-party action where the employee-plaintiff sues the third-party tortfeasor (and where the employer has been found not to be negligent), the proceeds from the recovery will first pay the costs of the action and reasonable expenses incurred in the prosecution, second the attorney's fees, third the workers' compensation carrier for medical and other employment

benefits payments, and finally any residual benefits to the employee.

**Minor Settlements:** Any minor settlements between a defendant and a claimant under the age of 18 should have court approval, at the risk of the settlement being voided when the minor reaches adult age. Typically, after the filing of either a special proceeding or a summons and complaint by the guardian ad litem for the minor child, and after the parties agree to a settlement, the matter is set on before a Superior or District Court Judge and will require the attorney for the plaintiff to present evidence regarding the injury, medical treatment to the child, and any future needs for medical treatment. The Court usually will question the guardian, parent, or custodian, and may questions the minor child if the child is old enough to understand the proceedings. Under North Carolina law, there is a conclusive presumption that a child up to the age of 7 is incapable of contributory negligence, but a rebuttable presumption that a child between the ages of 7 and 14 is incapable of contributory negligence.

**Bad Faith Issues:** North Carolina does not recognize a cause of action for third-party claimants against an insurer of an adverse party. However, if a plaintiff achieves the status of an intended third-party beneficiary of the contract between the defendant-insured and that defendant's insurer, the plaintiff may then bring a claim against the insurer for bad faith. But, unless the plaintiff obtains a judgment against the insured the plaintiff is not a third-party beneficiary and plaintiff has no claim for bad faith. This rule would not apply in the context of uninsured and underinsured motorist claims since the plaintiff in those cases would be the insured.

**Alcohol Issue:** North Carolina has adopted a standard of .08 blood alcohol concentration as the legal level of intoxication. The presumptive level of legal intoxication is .04 for commercial drivers. A server of alcohol may be held liable under North Carolina's Dram Shop Statute.

**Legal Age:** The legal age for consumption of beer, wine and alcoholic beverages in North Carolina is 21 (twenty-one).

**Inter Family and Spousal Immunity:** North Carolina has abolished immunity between husband and wife (N.C. Gen. Stat. § 52-5) and has abolished parent-child immunity with respect to motor vehicle negligence cases (N.C. Gen. Stat. § 1-539.21). The common law parent-child immunity with respect to non-motor vehicle negligence cases remains.

**Seatbelt Defense:** NO. North Carolina does not have a seat belt defense to negligent actions, even though seat belt use is mandatory and subject to prosecution for non-compliance in North Carolina.

**Wrongful Death:** North Carolina has a wrongful death statute, N.C. Gen. Stat. § 28A-18-l, et seq., with a two-year statute of limitations. The decedent's estate can bring an action for the final medical expenses of the decedent, for reasonable funeral expenses and for pain and suffering prior to the decedent's death, for the present monetary value of the decedent to his survivors for the loss of net income, services, protection, care society, companionship, comfort and guidance, and for several other categories of damages.

**Releases:** It is not necessary for an insurance provider to be specifically named in a release, although the preferred practice is to name the insured and the carrier in the release.

**Permissive Use:** North Carolina General Statute § 20-279.21(b)(2) states that a policy of liability insurance "shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles ***with the express or implied permission of such named insured, or any other persons in lawful possession***…" Therefore, a person driving an automobile is deemed an "insured" under a policy, so long as they have obtained express or implied permission from the owner of the vehicle or someone in lawful possession of the vehicle, under a good faith belief that the permission to use the vehicle would not be in violation of any law or contractual obligation.

Even if the owner of a vehicle gave explicit instructions to the borrower not to allow anyone else to operate

the vehicle, a third party would still be an "insured" under a policy if the borrower gave the third-party permission to use the vehicle. While this contradicts the owner's instructions when providing the vehicle to the borrower, the issue rests on whether the third party had a good faith belief that the permission from borrower was valid. In determining any fact pattern, North Carolina follows the general principle that when a policy provision is susceptible to two interpretations, one that provides coverage and the other that provides an exclusion, the courts have consistently construed the provision as to favor coverage.

Under North Carolina law there is no set of criteria in which to determine whether a driver has permissive use of the owner other than examining the facts on a case by case basis. Generally, the court analyzes whether the owner gave express permission to a third party or if permission can be implied. Permissive use has even been found in cases where the owner gave permission under a mistaken belief as to the identity of the borrower so long as the mistaken belief of the owner was not induced by fraud, misrepresentation, or deceit by the borrower. Permissive use can also be granted implicitly by prior use or based on the relationship of the parties.

North Carolina courts also have ruled that even if the driver of a vehicle does not have a valid driver's license and could not legally drive a car, those facts do not affect the permission being granted.

It should be noted that the issue of whether a person was an insured under the policy is only relevant in discussions regarding the ***liability*** limits under the policy. In North Carolina, when determining whether Collision Coverage is applicable, permissive use is not relevant. North Carolina has stated that collision insurance covers physical damage to a specific vehicle, regardless of who is driving.

# North Dakota

**The North Dakota Traffic Statues are at N.D. Cent. Code § 39-10-01 to 73; Insurance Requirements and Accident Reparations are at N.D.Cent. Code § 26.1-41-01 to 20.**

**Financial Responsibility:** The following applies to all motor vehicles. "Motor vehicle" includes "every self-propelled vehicle, including trailers and semitrailers designed for use with such vehicles."

**Bodily Injury:** The minimum limits required for bodily injury or death to another are $25,000/$50,000 (per person/per occurrence).

**Property Damage:** The minimum limit because of injury to or destruction of property of others in any one accident is $25,000.

No insurance is required, but following an accident, an owner or driver must prove his or her ability to pay the minimum statutory amounts provided above, by either proof of a "motor vehicle liability policy" or bond. A "motor vehicle liability policy" includes either an owner's policy or an operator's policy of liability insurance. In the absence of liability insurance or a bond, the owner or driver must either furnish proof of financial ability to pay damages by depositing an adequate security or surety bond with the state, or file proof that all claims have been settled or that there has been an adjudication of non-liability. The failure to offer any proof of financial responsibility results in either suspension of license (for in-state drivers) or loss of driving privileges in the state (for out-of-state drivers).

N.D. Cent. Code §§ 39-16, 39-16.1.

**No Fault/Personal Injury Protection:** Basic no-fault coverage is required. Basic no-fault benefits are benefits for economic loss from accidental bodily injury. The maximum amount of such benefits payable for all economic loss incurred and resulting from accidental bodily injury to any one person as the result of any one accident may not exceed $30,000, regardless of the number of persons entitled to benefits or the number of basic no-fault insurers obligated to pay benefits.

"Economic loss" means medical expenses, rehabilitation expenses, work loss, replacement services loss, survivors' income loss, survivors' replacement services loss, and funeral, cremation, and burial expenses.

A basic no-fault insurer that has paid or may become obligated to pay basic no-fault benefits is subrogated to the extent of its obligations to all of the rights of the injured person against any person other than the owner, operator, or occupant of a motor vehicle covered by no-fault insurance. The subrogee/basic no-fault insurer has a lien to the extent of its obligations, and no release of rights is effective against the rights without the subrogee's consent. In addition to the statutory subrogation rights for basic no-fault benefits mentioned above, an insurer may have contractual subrogation rights to the injured person's right of recovery against any responsible third party for optional excess no-fault benefits.

No-fault insurers must make available optional excess no-fault benefits for economic loss exceeding basic no-fault benefits, up to a total of $80,000 for accidental bodily injury to any one person in any one accident. The optional excess no-fault benefits of a basic no-fault insurer may provide for subrogation to the injured person's right of recovery against any responsible third party.

Persons entitled to no-fault benefits are those suffering economic loss resulting from:

1. Accidental bodily injury sustained by the owner of the motor vehicle or any relative of the owner:

    a. While occupying any motor vehicle; or

b. While a pedestrian as the result of being struck by a motor vehicle or motorcycle.

2. Accidental bodily injury sustained by any other person while occupying the motor vehicle.

3. Accidental bodily injury sustained by any pedestrian as a result of being struck by the motor vehicle.

No-fault benefits are not payable to persons who are injured while

1. Occupying any motor vehicle without the express or implied consent of the owner or while not in lawful possession of the vehicle.

2. Occupying a motor vehicle owned by a person not insured for no-fault benefits.

3. Participating in a race or a speed contest.

4. Intentionally causing or attempting to cause injury to oneself or another person.

Basic no-fault benefits on any motor vehicle may not be stacked upon basic no-fault benefits available from any other source.

N.D. Cent. Code § 26.1-41-01.

**Uninsured/Underinsured Motorist Coverage:** Uninsured coverage is required with the same limits as bodily injury liability. The coverage pays compensatory damages to which the insured is legally entitled for bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of an uninsured motor vehicle.

The insurer must make higher limits of uninsured coverage available but need not provide limits in excess of $100,000 per person and $300,000 per accident.

Underinsured coverage is required at limits equal to the limits of uninsured coverage.

In claims for uninsured/underinsured coverage, the insured and insurer each bear responsibility for their own attorneys' fees, unless the policy provides otherwise, or the insurer is found to have acted in bad faith. It is neither a conflict of interest nor bad faith for an insurer to contest and assert all defenses that the uninsured or underinsured motorist could assert.

Damages payable to an insured are reduced by the amount paid under any workers' compensation or other similar law, and the amounts payable under any collectible medical payments, personal injury protection insurance, or other motor vehicle coverages.

An insurer making uninsured/underinsured payments is subrogated to the rights of the insured against any legally responsible persons or organizations.

N.D. Cent. Code §§ 26.1-40-15.2 to -15.6.

**Seat Belt Defense Available:** Although the use of a seat belt is not relevant to the issue of liability, an injured person's failure to wear a seat belt may be treated as a mitigating factor to reduce damages. *Duma v. Keena*, 680 N.W.2d 627, 630 (N.D. 2004).

**Negligence Action:** To succeed in a negligence claim, the plaintiff must prove the defendant owed a duty to the plaintiff, the defendant failed to discharge that duty, and the plaintiff has suffered an injury that was proximately caused by the defendant's negligence. The driver of an automobile has a duty to keep a proper lookout, and failure to discharge that duty is negligence. *Perez v. Nichols*, 708 N.W.2d 884, 887 (N.D. 2006).

**Allocation of Liability:** Contributory fault does not bar recovery in an action by any person to recover damages for death or injury to person or property unless the fault was as great as the combined fault of all other persons who contribute to the injury, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering.

When two or more parties are found to have contributed to the injury, the liability of each party is several only, not joint. And each party is liable only for the amount of damages attributable to the percentage of fault of that party.

For automobile accidents, however, in an action to recover damages for *injury to property*, the damages may not be diminished in proportion to the amount of contributing fault attributable to the person recovering if:

1. The person seeking damages is seeking property damages resulting from a motor vehicle accident in which two persons are at fault;

2. The person seeking damages is seeking to recover direct physical property damages of not more than $5,000, and indirect physical property damages not to exceed $1,000; and

3. The percentage of fault of the person against whom recovery is sought is over 50%.

N.D. Cent. Code §§ 32-03.2-02, -02.1.

**Statutes of Limitation:**

No-fault benefits

If no benefits have been paid, two years after the injured person suffered the loss or should have known that the loss was caused by an accident, or not later than four years after the accident, whichever is earlier.

If no benefits have been paid to a decedent or dependent survivors, not later than two years after the death, or six years after the accident, whichever is earlier. If some payments have been made, not later than six years after the last payment for a claim for additional benefits. N.D. Cent. Code § 26.1-41-19.

UM/UIM Claims: six years. N.D. Cent. Code § 28-01-16.

Bodily Injury/Property Damage Claims: six years. N.D. Cent. Code § 28-01-16.

Claims by minors: when the claim for relief accrues, the time limit is tolled until the disability ends, but the limit cannot be extended more than one year. N.D. Cent. Code § 28-01-25.

**Punitive Damages:** For tort claims, a court or jury may award exemplary damages if there is clear and convincing evidence of the defendant's oppression, fraud, or actual malice.

For motor vehicle accidents resulting in bodily injury, exemplary damages may be awarded if clear and convincing evidence indicates that the accident was caused by a driver who, within the five years preceding the accident, has been convicted of driving while intoxicated and who was operating or in control of a motor vehicle:

a. With an blood alcohol concentration of .1%;

b. Under the influence of a controlled substance, unless prescribed by a doctor;

c. Under the influence of alcohol and refused to take a test to determine intoxication;

d. Under the influence of a volatile chemical, as listed in § 19-03.1-22.1.

Exemplary damages may not exceed two times the amount of the compensatory damages or $250,000, whichever is greater.

N.D. Cent. Code § 32-03.2-11.

**Alcohol:** It is illegal under North Dakota law to drive under the influence of alcohol. The legal standard for driving under the influence is a blood alcohol concentration of .08%. A second offense within five years mandates a suspension or revocation of the offender's driving privileges. N.D. Cent. Code § 39-08. The legal drinking age is twenty-one. N.D. Cent. Code § 5-01-08.

**Dram Shop Laws:** A person injured by an obviously intoxicated person has a claim for relief against any person who knowingly disposed, sold, bartered, or gave away alcoholic beverages to a person under twenty-one, an incompetent, or an obviously intoxicated person.

If death ensues, the survivors are entitled to damages.

N.D. Cent. Code § 5-01-06.1.

**Wrongful Death:** There are two types of actions concerning wrongful death: (1) a wrongful death action, and (2) a survival action.

A wrongful death action may be brought when the death of a person is caused by a wrongful act, neglect, or default, and the act would have entitled the injured party, had death not ensued, to maintain an action and recover damages. N.D. Cent. Code § 32-21-01. Such actions are intended to compensate the survivors of the deceased for the losses they have sustained as a result of the wrongful killing. Losses recoverable may include prospective loss of earnings; prospective expenses; loss of services; loss of companionship, comfort, and consortium; and mental anguish and grief. *Sheets v. Graco, Inc.*, 292 N.W.2d 63, 66 (N.D. 1980). For purposes of recovery for a wrongful death, the jury shall award damages as it finds proportionate to the injury resulting from the death to the persons entitled to the recovery. N.D. Cent. Code § 32-21-02.

A survival action is remedial in nature and is intended to permit recovery by the representatives of the deceased for damages the deceased could have recovered had he or she lived. Losses recoverable may include pain and suffering, medical expenses, funeral and burial expenses, and loss of earnings. *See Sheets*, 292 N.W.2d at 66-67. Unlike some states that do not permit survival of personal injury claims or that severely restrict them, North Dakota permits survival of personal injury claims. *See* N.D. Cent. Code § 28-01-26.1. With the exception of a claim for breach of promise, alienation of affection, libel, and slander, death of a party does not abate any action or claim. N.D. Cent. Code § 28-01-26.1.

**Releases:** A *Pierringer* release is available, whereby the plaintiff releases settling defendants' liability, but the plaintiff may then proceed against nonsettling defendants for their percentage of causal negligence. *Lochthowe v. C.F. Peterson Estate*, 692 N.W.2d 120, 125 (N.D. 2005). Before executing a *Pierringer* release with a tortfeasor that is not a "secured person," a plaintiff must obtain permission from a basic no-fault insurer which has paid or may become obligated to pay basic no-fault benefits. *See* N.D. Cent. Code 26.1-41-16. A "secured person" means the owner, operator, or occupant of a motor vehicle covered by no-fault insurance, and any person legally responsible for the acts or omissions of the owner, operator, or occupant. N.D. Cent. Code § 26.1-4-01(20)

A no-fault insurer's contractual subrogation rights to optional excess benefits are not affected by its insured's settlement and release of claims with the tortfeasor and its liability insurer. *Imperial Cas. & Indem. Co. v. Gen. Cas. Co. of Wis.*, 458 N.W.2d 335, 338 (N.D. 1990).

**Bad Faith:** North Dakota recognizes a cause of action in tort, including punitive damages, for an insurer's bad-faith refusal to defend or indemnify its insured. *Smith v. Am. Family Mut. Ins. Co.*, 294 N.W.2d 751 (N.D. 1980). The insurer's duty to act in good faith emanates from an obligation imposed by law, under which the

insurer must act fairly and in good faith in discharging its contractual responsibilities. The test is whether the insurer has acted unreasonably in handling an insured's claim by failing to compensate the insured, without proper cause, for a loss covered by the policy. An unreasonable interpretation of the policy can result in an insurer's bad-faith liability. *Seifert v. Farmers Union Mut. Ins. Co.*, 497 N.W.2d 694 (N.D. 1993).

For a breach of the insurer's duty to act in good faith, the insured is entitled to damages proximately caused thereby. Whether an insurer has acted in bad faith is a question for the fact-finder. *Corwin Chrysler-Plymouth v. Westchester Fire Ins. Co.*, 279 N.W.2d 638 (N.D. 1979).

**Intra-Family and Spousal Immunity:** There is no intra-family or spousal immunity in North Dakota. *See Johnson v. Hassett*, 217 N.W.2d 771, 778 (N.D. 1974).

**Workers' Compensation:** Workers' compensation is generally the exclusive remedy that an employee has for a work-related injury if the employer is subject to the act. An exception exists if the employee is injured because of the employer's intentional acts.

If an injury or death is compensable under the act, the injured party may still proceed with a cause of action against a liable third party, other than the Workforce Safety and Insurance Organization, which administers the act. Under such circumstances, the Organization is subrogated to the rights of the injured employee to the extent of 50% of the damages recovered, up to a maximum of the total amount it has paid or would pay to the employee in the future. The Organization also has a lien to the extent of 50% of the damages recovered, up to a maximum of the total amount it has paid or would pay to the employee in the future. The Organization's subrogation interest or lien cannot be reduced by settlement, compromise, or judgment.

An uninsured employer is not protected by immunity from civil liability granted to employers under the act. An employee of an uninsured employer may sue the employer for damages suffered by injuries in the course of employment. The employee may also file an application with the Organization for an award under the act, but the Organization is then subrogated to recovery made in an action against the uninsured employer.

N.D. Cent. Code § 65-09.

**Labor Law:** Employers cannot deny or abridge a person's right to work on account of their membership or non-membership in a labor union or organization.

All suits or actions for recovery of overtime, damages, fees, and penalties accruing under laws concerning the payment of wages and/or the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, must be brought within two years after the accrual of such claim for relief.

An employer cannot discharge, discipline, threaten to discriminate against, or penalize an employee regarding the employee's compensation, work conditions, location, or privileges of employment based on (1) the employee's good-faith whistleblowing, (2) the employee's compliance with a request to cooperate in an investigation, hearing, or inquiry, or (3) the employee's good-faith refusal to perform an action that the employee believes violates law.

The public policy of North Dakota dictates that a worker is free to decline to associate with fellow workers but is also free to associate and organize with fellow employees and designate representatives on the employees' behalf. Contracts entered into between an employer and collective employees are binding.

N.D. Cent. Code § 34-01.

**Rental Coverage:** All auto liability policies covering noncommercial private passenger motor vehicles must provide coverage for damage to and loss of use of a rented private passenger vehicle under the property damage liability portion of the policy. The obligation of the policy cannot be contingent on the fault or negligence of the insured.

The policy must inform the insured that the insurance applies to rental vehicles and that the insured may not need to purchase additional coverage from a rental company.

Rental car companies cannot require that a renter make a deposit of prior payment of damage or loss of use of a vehicle as a condition to the rental contract.

N.D. Cent. Code § 26.1-40-17.1.

**Liens:** Hospitals are entitled to a lien for the reasonable value of services rendered to a person injured in an accident. The lien attaches to claims for relief, demands, and judgments recovered on account of the injuries against the liable parties, as well as the proceeds to any settlement of such claims. The lien also attaches to insurance of the tortfeasor payable by reason of its liability, and to any insurance or indemnity payable to the injured person by any insurer.

An action to enforce a hospital lien must generally be commenced within one year after the lien is filed.

N.D. Cent. Code § 35-18.

**Permissive Use:** Under the North Dakota Financial Responsibility Laws, a motor vehicle liability policy must provide coverage for any person using a motor vehicle with the express or implied permission of the named insured. N.D. Cent. Code § 39-16.1-11(2)(b). Unlike some jurisdictions that have adopted one of three rules—the initial permission rule, the conversion rule, or the minor deviation rule—to determine whether someone is a permissive user of a vehicle under insurance omnibus clauses, North Dakota has not adopted a specific test.

Despite the lack of adoption of a specific rule, the North Dakota Supreme Court has provided guidance in determining whether a person is a permissive user. Permission may be express or implied. *Nat'l Farmers Union Prop. & Cas. Co. v. Ronholm*, 153 N.W.2d 322, 324 (N.D. 1967). Whether a person has express or implied permission depends on the circumstances of the user's operation of a vehicle. *See id.* at 324-26. Implied permission may be found where "there was such a relationship or course of conduct as to signify consent by the insured." *Id.* at 327. That is, implied permission may exist where a course of conduct or practice known to the owner and acquiesced in by the owner would lead to an implication of permission for a particular venture. *See id.* Permissive use also exists where "the user of the automobile has the permission of the named insured to use and if such user is using the automobile for a permitted purpose at the time a legal liability is incurred, then the user and any other person legally responsible for the use are insured persons." *Persellin v. State Auto. Ins. Ass'n*, 32 N.W.2d 644, 647 (N.D. 1948).

Several factors do not, by themselves, constitute permission. Mere lack of objection is insufficient. *Nat'l Farmers*, 153 N.W.2d at 326, 328. Engaging "in a joint venture of fun and relaxation," without anything more, does not constitute permission to use a vehicle. *Id.* at 325. Further, there is no permissive use where a vehicle owner gives permission to a first permittee to use a vehicle, but the first permittee is asleep at the time the vehicle is used by a third party, and the first permittee has no knowledge of such use. *See Manock v. Donley*, 139 N.W.2d 391, 391-92 (N.D. 1966); *Kadrmas v. Mudna*, 107 N.W.2d 346, 348-49 (N.D. 1961).

Several factors do not, by themselves, constitute permission. Mere lack of objection is insufficient. *Nat'l Farmers*, 153 N.W.2d at 326, 328. Engaging "in a joint venture of fun and relaxation," without anything more, does not constitute permission to use a vehicle. *Id.* at 325. Further, there is no permissive use where a vehicle owner gives permission to a first permittee to use a vehicle, but the first permittee is asleep at the time the vehicle is used by a third party, and the first permittee has no knowledge of such use. *See Manock v. Donley*, 139 N.W.2d 391, 391-92 (N.D. 1966); *Kadrmas v. Mudna*, 107 N.W.2d 346, 348-49 (N.D. 1961).

# Ohio

## COVERAGE

**Bodily Injury:**

- R.C. 4509.01 et seq., contains the Ohio Financial responsibility Act. Under that Act, bodily injury coverage is mandatory on all vehicles licensed in Ohio.

- Effective December 22, 2013, under R.C. 4509.20, the minimum amount of coverage will be increased to $25,000 for injury or death of one person in any one accident, or $50,000 for injury or death of 2 or more persons in any one accident.

**Property Damages:**

- As in the case with bodily injury coverage, property damage coverage is mandatory under the Ohio Financial Responsibility Act.

- Effective December 22, 2013, the minimum amount of coverage will be $25,000 for any one accident.

**Pip Coverage:**

- Ohio is not a PIP state.

**Medical Payments:**

- Not mandatory. Not required to be rejected in writing.

**Uninsured and Underinsured Motorist Coverage:**

- Not Mandatory: Senate Bill 97 (10/31/01) eliminated the statutory requirement that automobile liability policies of insurance must offer uninsured or underinsured motorists coverage. Under current Ohio law, insurance carriers may, but are not required to, offer uninsured and underinsured motorists coverage with motor vehicle liability policies. If an insurance carrier issues a new policy which does not offer such coverage after the effective date of the statute, it does not arise by operation of law.

- Scope of UIM/UM Coverage: In November 2003, the Ohio Supreme Court issued its decision in *Westfield Ins. Co. v. Galatis,* 100 Ohio St.3d 216, 2003-Ohio-5849. *Galatis* limited the Court's prior holding in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.,* 85 Ohio St.3d 660 (1999). Under *Galatis,* absent specific language to the contrary, an insurance policy that names a corporation as an insured for uninsured or underinsured motorists coverage covers a loss sustained by an employee of the corporation only if the loss occurs within the course and scope of employment.

- *Galatis* also overruled *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.,* 86 Ohio St.3d 557 (1999). Under *Galatis,* where an insurance policy designates a corporation as a named insured, the designation of "family members" of the named insured as other insureds does not extend insurance coverage to a family member of an employee of the corporation, unless that employee is also a named insured.

- **An automobile insurance policy may define "insured" to exclude individuals covered under another UM policy:** In *W. Am. Ins. Co. v. State Farm Mut. Auto. Ins. Co.,* 1st Dist. No. C-100012, 2010-Ohio-6311, an uninsured driver collided with another vehicle occupied by its driver and a passenger. The passenger asserted

a UIM claim against her own insurer West American, as well as the driver's insurer, State Farm. State Farm denied the claim, asserting that the passenger was not an "insured" under the driver's policy. West American settled its UM claim with the passenger and obtained summary judgment against State Farm in its subrogation claim for reimbursement. The appellate court reversed, noting that Ohio law unequivocally allows an insurer to define the class of persons who qualify as insurers under an automobile policy. In addition to the driver, the UM portion of the driver's police defined an "insured" as "any other person who is not insured for uninsured motorist coverage under another vehicle policy while occupying your car." The Court held this definition to be permissible and unambiguous. As the passenger was not covered under State Farm's policy, there was no need to compare policies to determine if one was excess coverage.

- Immunity: Where tortfeasor is immune from liability due to co-employee tort immunity, UM/UIM coverage is also unavailable to the injured parties because they are not "legally entitled to recover" from the tortfeasor: In *Kobak v. Sobhani,* 8th Dist. No. 94764, 2011-Ohio-13, the Kobaks had uninsured motorist coverage under a policy issued by Nationwide Mutual Insurance Company. Ms. Kobak was injured by Sobhani's negligent operation of his motor vehicle. Sobhani was uninsured. Both Kobak and Sobhani were employees of Parma Hospital when the accident occurred in the parking lot provided for hospital employees' exclusive use. The Kobaks sued Sobhani for negligence and Nationwide for uninsured motorist coverage. Sobhani defended on the grounds of co-employee tort immunity, and Nationwide moved for summary judgment arguing that the Kobaks were not "legally entitled to recovery" from Sobhani because of his immunity and, therefore, not entitled to uninsured motorist coverage. The trial court and court of appeals agreed, holding that Nationwide afforded no uninsured motorist coverage for the Kobaks because "it is well settled that where the plaintiff cannot maintain a claim against the driver due the application of co- employee rule, R.C. 4123.741, the plaintiff is not 'legally entitled to recover' under the uninsured motorist provision."

- Stacking of Coverages: Ohio law permits or recognizes "anti-stacking" policy language. Under R.C. 3937.18(F), insurance policies that include UM and UIM coverage may "without regard to any premiums involved, include terms and conditions that preclude and any and all stacking of such coverages . . . ." *See* also, R.C. 3937.18(G). It is important to note, however, nothing in Ohio law precludes stacking unless an insurance policy expressly prohibits stacking. *See Hower v. Motorists Mut. Ins. Co.*, 65 Ohio St.3d 442, 447, 1992-Ohio-74, 605 N.E.2d 15 (overruled on other grounds).

- "Phantom Vehicle": Ohio has rejected the "physical contact rule" as a prerequisite to an uninsured motorist claim. *Girgis v. State Farm Mut. Auto. Ins. Co.*, 75 Ohio St.3d 302, 1996 Ohio 111, 662 N.E.2d 280 (1996). In *Girgis* the Supreme Court of Ohio set forth the corroborative-evidence test holding that a UM "claim [may] go forward if there is independent third-party testimony that the negligence of an unidentified vehicle was a proximate cause of the accident." *Id.* at 303. Ohio UM/UIM statute, R.C. 3937.18(B)(3), was subsequently amended to provide:

(B) For purposes of any uninsured motorist coverage included in a policy of insurance, an 'uninsured motorist' is the owner or operator of a motor vehicle if any of the following conditions applies:

***

(3) The identity of the owner or operator cannot be determined, but independent corroborative evidence exists to prove that the bodily injury, sickness, disease, or death of the insured was proximately caused by the negligence or intentional actions of the unidentified operator of the motor vehicle. For purposes of division (B)(3) of this section, the testimony of any insured seeking recovery from the insurer shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.

**STATUTORY SUBROGATION RIGHTS**

**Immunity of Political Subdivisions to Subrogation Rights**

- Per R.C. § 2744.05, Political subdivisions are immune to any subrogation claim brought by an insurer.

- Per R.C. § 3937.18(E), in the event of payment to an insured for an uninsured/underinsured motorist claim, the insurer making such payment is entitled to the proceeds of any settlement or judgment resulting from the exercise of the insured's rights against a legally liable party. This right is limited by relevant insolvency problems.

**Subrogation**

- Per R.C. § 3937.21, if an insurance company pays to, or on behalf of, its insured any amount later determined to be due from another insurer, it shall be subrogated to all rights of the insured against such insurer.

**Worker's Compensation Subrogation Rights**

- R.C. § 4123.93 restores subrogation rights of the Ohio Bureau of Worker's Compensation and self-insured employers.

- Employees must notify the lienholder if there is a third-party who is responsible for their injuries so that there is a reasonable opportunity to assert their subrogation rights. Responsible parties include UM/UIM insurers.

- The BWC enjoys a statutory right of subrogation against all tortfeasors jointly. A defendant that settles with an injured WC claimant is not released from the BWC lien despite a "full" release between injured worker and the defendant. A release from the BWC is necessary.

**LIABILITY AND DAMAGES**

**Comparative/Contributory Fault:** MODIFIED 51% (READ CAREFULLY)

- Contributory fault may be established as an affirmative defense to a tort claim pursuant to R.C. 2315.32, 2315.34. The contributory fault of the plaintiff does not bar the plaintiff from recovery as long as the contributory fault of the plaintiff was not greater than the combined tortious **conduct of all other persons from whom the plaintiff seeks recovery and all other person from whom the** plaintiff does not seek recovery. R. C. 2315.33, 2315.34.

- The court must diminish the total amount of the compensatory damages that would have been recoverable by an amount equal to the percentage of tortious conduct attributable to the plaintiff. R.C. 2315.35. Thus, the 51 percent rule is still in effect; however, the main difference between the old and new Ohio comparative fault statutes is that the new statute attributes percentages of the combined tortious conduct to include all attributable parties, whether or not **the plaintiff seeks recovery from such persons.**

- If contributory fault is asserted and established, the trier of act shall specify, pursuant to R.C. 2315.34:

    A. The total amount of the compensatory damages that would have been recoverable but for the tortious conduct of the plaintiff;

    B. The portion of compensatory damages that represents economic loss;

    C. The portion of the compensatory damages that represents non-economic loss;

    D. The percentage of tortious conduct attributable to all persons, whether or not the

person is a party to the lawsuit.

- The trier of act is also to determine:

    A. The percentage of tortious conduct attributable to the plaintiff and to each party from whom the plaintiff seeks recovery:

    B. The percentage of tortious conduct attributable to each person from whom the plaintiff does not seek recovery.

Accordingly, defendants do not have to add a non-party tortfeasor in order to obtain an apportionment of fault for that tortfeasor.

**Joint & Several Liability:**

- **Economic Loss - The More Than 50 Percent Liable Defendant:** In a tort action where two or more persons are found liable for the same injury, loss to person or property, or wrongful death, and more than 50% of the tortious conduct is attributable to one defendant, that defendant is jointly and severally liable for **all** compensatory damages that represent economic damages. R.C. 2307.22(A)(1).

- In situations where a determination is made that more than 50% of the tortious conduct is attributable to one defendant, each defendant to whom 50% or less of the tortious conduct is attributable is liable to the plaintiff for its proportionate share of the compensatory damages that represent economic loss. R.C. 2307.22(A)(2).

- **Non-Economic Loss:** In a tort action in which the trier of act determine that two or more persons proximately caused the same injury or loss to person or property or the same wrongful death, **each defendant who is determined by the trier of fact to be legally responsible** for the same injury or loss to person or property or for the same wrongful death shall be liable to the plaintiff only for that defendant's proportionate share of the compensatory damages that represent non-economic loss. R.C. 2307.22(C). (See R.C. 2307.23, *supra,* to calculate proportionate share.)

**Compensatory Damages**

- As a general rule, a plaintiff asserting a tort cause of action will be permitted to recover several categories of damages if successful in proving a claim. As an initial matter, a plaintiff will be entitled to recover compensatory damages related to an injury or loss to a person or property. Compensatory damages in such actions include compensation for economic and non-economic losses.

- **Economic loss** is pecuniary harm suffered by a plaintiff that can include wages or salaries, costs for medical care or treatment, or any expenditure incurred as a result of the injury. R.C. 2315.18(A)(2). A plaintiff may also be entitled to recover indirect economic damages upon proof that the indirect economic damages arose from tangible, physical injury to a person or persons or from tangible property damage. In awarding compensatory damages, there is **no limit** on the amount awarded for the damages representing the plaintiffs economic losses. R.C. 2315.18(B)(1).

- **Non-Economic Loss** can include pain and suffering, loss of enjoyment of life, disfigurement, and loss of society. R.C. 2315.18(A)(4). Loss of enjoyment of life includes the loss of one's ability to perform usual activities. This contrasts with the mental suffering occasioned by the plaintiffs injury, such as nervousness, grief, shock, anxiety and so forth. Loss of society includes loss of companionship, consortium, and guidance suffered by the surviving spouse, dependent children, parents, or next of kin of the decedent. The jury must be instructed not to award additional damages for the same loss when considering any element of damages, such as physical or mental pain and suffering.

- **Non-Economic Damages Caps:** Damages for non-economic losses cannot exceed the greater of $250,000, or an amount that is equal to three times the economic loss a jury awards. R.C. §2315.18(B)(2). The latter determination is set to a maximum of $350,000 for each plaintiff in the tort action , or $500,000 for each occurrence that is the basis of that tort action. R.C. §2315.18(B)(2). If the action is tried to a jury, the court cannot instruct, nor can counsel inform, the jury of these limitations.

- The jury is not told about any caps limiting plaintiff's recovery. Instead, the judge modifies their verdict by applying the caps if the juries' interrogatory answers so dictate.

- The limits on non-economic losses **do not apply** if the injury is: (1) permanent and substantial, as in a loss of limb or bodily organ system; (2) if the injury permanently prevents the injured person from being able to independently care for himself; or (3) if the tort action is based upon a wrongful-death claim. R.C. §2315.18(B)(3).

- *Weldon v. Presley,* No. 1:10CV1077, 2011 WL 3749469 (N.D. Dist., Aug. 9, 2011). Plaintiffs argued permanent damage and substantial injury to head, neck, shoulders and back, which included scarring. Defendants filed motion to enforce non-catastrophic damage caps, arguing that there was a lack of evidence showing that plaintiff suffered the types of injury required for an exception to the non-economic damages cap. The court agreed that injuries did not constitute "permanent and substantial physical deformity, or loss of use of limb or organ system," thus damage caps applied. However, there is authority holding nearly any significant scaring creates a jury question as to the application of the caps.

- **Wrongful Death and Survivorship Damages:** In a case involving the plaintiffs death, two separate causes of action and two recovery measures may be available. If the decedent survived for a period of time before expiring, a cause of action for conscious pain and suffering may result in damages. In that case, compensatory damages may be awarded from the time of the injury until the time of death. Additionally, a cause of action for wrongful death may be maintained by the decedent's estate, with beneficiaries entitled to damages for losses directly related to the decedent's demise. Such damages may include any financial benefits that would have naturally flowed from the decedent to the beneficiaries, as well as claims for loss of consortium. Ohio R.C. 2125.01 governs survivorship actions; R.C. 2125.02 governs wrongful death actions.

- **Calculating compensatory damages:** The jury may consider lost earnings and lost earning capacity. Proving lost earning capacity usually will require expert testimony. Mathematical exactness, however, is not required . Any future damages, medical expenses, or future lost wage, must be reduced to present value.

- **Collateral Source:** In all Ohio tort actions, a defendant is permitted to introduce evidence of certain collateral-source benefits (benefits provided by a third party) that have been paid to the plaintiff. Such evidence, however, is not permitted if the source of the collateral benefit has certain subrogation rights. The Ohio Supreme Court in *Jacques v. Manton,* 125 Ohio St.3d 342, 2010-Ohio-1838, reaffirmed its earlier ruling in *Robinson v. Bates,* 112 Ohio St.3d 17, 2006- Ohio-6362; to wit, where a plaintiff alleges damages related to personal injuries, evidence of both the **amount billed** by a medical provider, as well as the amount actually paid, are admissible. As such, a plaintiff may present evidence of the amount of her medical bills, but defendant, in turn, may demonstrate to the jury the portion of the medical bills that the medical-care provider wrote off. From a practical standpoint, plaintiff attorneys almost never ask a jury to award amount charged when the jury will also know what was actually paid.

**Settlement of Minor's Claims:**

- Per R.C. § 2111.18, all settlements of personal injury claims of minors must be approved by the probate court of the county where the minor resides.

- Amended by 2009 Ohio SB 106 to change the amount of net settlement from $10,000 or less to $25,000 or less after payment of fees and expenses. Additional language added includes: "In the settlement, if the ward is a minor, the parent or parents of the minor may waive all claim for damages on account of loss of service of the minor, and that claim may be included in the settlement."

## STATUTES OF LIMITATIONS

**Bodily Injury:**

- Under R.C. 2305.10, the statute of limitations for negligence is two (2) years. Loss of spousal consortium and for medical expenses of a spouse is four (4) years.

- Under R.C. 2305.11, the statute of limitations for certain intentional torts, including false imprisonment, is one year. Under R.C. 2305.111, actions for assault or battery must be brought within one year after the cause of action accrues.

- Under R.C. 2305.09, the statute of limitations for the intentional infliction of emotional distress is four (4) years.

- The statute of limitations for a wrongful death claim is two years, pursuant to R.C. 2125.02(D).

- In cases involving minors, the statute of limitations will generally not begin to run until that individual turns 18. For example, in a negligence case involving a minor, the minor would have two years from the date he or she turns 18 to bring suit. The applicable section is R.C. 2305.16. (There may be exceptions for actions against political subdivisions or physicians/hospitals.) Similarly, the statute of limitations does not begin to run against a person who was of unsound mind at the time his or her claim arose until such time as the disability is removed.

- Ohio's Fair Claims Practices Act, Ohio Administrative Code 3901-1-54(G)(5), requires that notice shall be given to claimants at least sixty (60) days before the expiration of any statute of limitation or contractual limit, where the insurer has not been advised that the claimant is represented by legal counsel.

- Ohio law recognizes claims for loss of consortium in cases involving injury to a spouse. Likewise, a parent may make a claim for loss of a child's services, and, due to the ruling of the Ohio Supreme Court in *Gallimore v. Children's Hosp. Med,* 67 Ohio St.3d 244, 617 N.E.2d 1052 (1993), a child may pursue a claim for loss of parental consortium.

**Property Damage:**

- The statute of limitations to bring a claim for loss or damage of personal property is two years, under R.C. 2305.10. Claims for loss or damage to real property must be brought within four years, under R.C. 2305.09.

**Licensing:**

- Ohio has no licensing requirement for insurance adjusters.

**Punitive Damages:**

- Under Ohio law, the issue of whether a plaintiff is entitled to punitive damages can be presented to the jury only once it has determined that plaintiff should recover compensatory damages. R.C. 2315.21(B)(1). Punitive damages are available in tort actions only if: (1) the jury has returned a verdict awarding compensatory damages to the plaintiff; and the defendant's actions or omissions demonstrate malice or egregious or

aggravated fraud. *Hartman v. Smith,* 9th Dist. No. 04CA0079, 2005 WL 1523862 (June 29, 2005).

- A finding of actual malice may be shown by demonstrating that the "defendant possessed either: (1) that state of mind characterized as evincing hatred, ill will, or spirit of revenge; or (2) conscious disregard for the rights and safety of other persons that result in a great possibility of causing substantial harm." *Preston v. Murty,* 2005 WL 1523862 (1987), *accord Daniels v. Fraternal Order of Eagles Aerie of Tecumseh #979,* 162 Ohio App.3d 446 (2005). A punitive damages claim against a defendant premised on a "conscious disregard" theory of malice is not warranted absent proof of the defendant's subjective knowledge of the danger posed to another. *Malone v. Courtyard by Marriott, LP.,* 74 Ohio St.3d 440 (1996).

- **Punitive Damages Cap:** R.C. 2315.21 provides a limitation on exemplary or punitive damages, so that such damages shall not exceed in excess of two times the amount of the compensatory damages awarded to the plaintiff from the defendant. R.C. 2315.21(D)(2)(a). Moreover, for tort actions brought against "small employers," meaning that the employer has less than 100 employees, punitive damages are further limited. For actions against small employers, the court shall not enter judgment in favor of punitive or exemplary damages in excess of the lesser of two times the amount of compensatory damages awarded to the plaintiff from the defendant, or 10% of the employer's net worth when the tort was committed up to a maximum of$350,000. R.C. 2315.21(D)(2)(6).

- **Bifurcation of Punitive Damages:** The Ohio Supreme Court has upheld the constitutionality of a 2005 tort reform provision which mandates that state trial courts "bifurcate," or divide trials into two separate stages where the plaintiff has alleged claims for both compensatory and punitive damages. *Havel v. Villa St. Joseph,* 131 Ohio St.3d 235, 965 N.E.2d 1270 (2012). The tort reform provision, R.C. 2315.21(B), provides that upon motion by any party, the trial of the tort action shall be bifurcated into two stages. The first stage, the jury determines the defendant's liability and awards compensatory damages. The second stage, the jury decides any punitive damages. A trial court's decision denying a motion to bifurcate constitutes a final appealable order. *Flynn v. Fairview Village Retirement Community, Ltd,* 132 Ohio St.3d 199,970 N.E.2d 927 (2012).

- **Workers' Compensation:** The General Assembly has passed a subrogation statute at RC. 4123.931, effective April 23, 2003, to replace the former statute declared unconstitutional by the Ohio Supreme Court in *Holeton v. Crouse Cartage Co.,* 92 Ohio St.3d 115 (2001). This statute does not apply retroactively, however, and like its predecessor, it creates subrogation rights only in favor of a "statutory subrogee," which the statute defines as the BWC administrator, a self-insuring employer, or an employer that contracts for the direct payment of medical services pursuant to R.C. 4121.44(L). R.C. 4123.93(B).

## OTHER LITIGATION ISSUES

### Independent Negligence Claims Against Motor Carriers

- Following the minority view, Ohio courts allow a plaintiff to maintain independent claims of negligence (i.e., negligent hiring, entrustment, supervision) against a motor carrier *even* when a motor carrier concedes the negligence of its driver and application of respondeat superior and does not otherwise raise contributory negligence as an affirmative defense. *Clark v. Stewart*, 126 Ohio St. 263, 185 N.E. 71 (1933); *see* also *Nichols v. Coast Distrib. Sys*., 86 Ohio App.3d 612, 621 N.E.2d 738 (9th Dist.1993).

### Assured-Clear Distance

- Ohio's "assured-clear-distance-ahead" statute, R.C. 4511.21 (A), provides, in relevant part, that "No person shall operate a motor vehicle ... upon any street or highway at a greater speed than will permit the person to bring it to a stop within the assured cleared distance ahead." Four elements must be established in order to prove a violation of the assured-cleared-distance ahead statute: the driver collides with an object which (1) is ahead of him in his path of travel, (2) is stationary or moving in the same direction as the driver, (3) does not

suddenly appear in the driver's path, and (4) is reasonably discernible. *Mitchell v. Kuchar,* 8th Dist. No. 85363, 2005-Ohio-3717 (July 21, 2005).

**Pedestrian in Crosswalk has Right-of-Way**

- Ohio R.C. 4511.46 provides, in pertinent part, as follows:

    A. When traffic control signals are not in place, not in operation, or are not clearly assigning the right-of-way, the driver of a vehicle ... shall yield the right of way, slowing down or stopping if need be to so yield ... to a pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling, or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger.

    B. No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle...which is so close as to constitute an immediate hazard.

**Bad Faith:**

- The duty to act in good faith extends only to the insured, and not to third parties, thus, only an insured has standing to bring a bad faith claim.

**Alcohol Issues:**

- The legal standard for intoxication under Ohio law is a blood alcohol content of 0.08 percent. (R.C. 4511.19). There are varying degrees of intoxication under Ohio law. The mandatory sentencing under Ohio law varies based on whether a person's blood alcohol content is more than 0.08 percent but less than 0.17 percent, and if a person's blood alcohol content is more than 0.17 percent. For operators of motor vehicles who are less than twenty-one years of age, this standard is reduced to 0.02 percent to 0.08 percent.

- In the case of *Great Central Ins. Co. v. Tobias,* 37 Ohio St.3d 127, 524 N.E.2d 168 (1988), the Supreme Court held a permit holder was not liable where one patron purchased alcoholic beverages and proceeded to give those beverages to another person who was subsequently involved in a fatal automobile accident.

**Legal Age:**

- R.C. 3109.01 states that all persons age 18 or older who are under no legal disability are of full legal age. The only exception to this statute is the liquor control statute outlined in the previous section, under which one must be 21 years of age or older to purchase and/or consume alcoholic beverages.

**Inter-Family and Spousal Immunity:**

- *Fratilla v. Owners Insurance Co.,* 6th Dist. No. L-10-1237, 2011-Ohio-970. A woman injured in an auto accident sued her husband's insurer for UM coverage. The insurer denied coverage based on the policy's intra family exclusion. The trial court granted summary judgment to the insurer. On appeal, the woman argued that the exclusion is against public policy because "it is the clear legislative intent of [the Ohio Financial Responsibility Act] that a motor vehicle should not be operated on Ohio highways unless proof of financial responsibility is maintained in the type and amount mandated. Because a household exclusion ... negates a facet of that coverage. .. it is contrary to public policy." The court of appeals affirmed, holding that the insured was at liberty to purchase whatever policy he desired, and such clauses are not against public policy.

**Seatbelt Defense:**

- Under Ohio's mandatory seatbelt statute, R.C. 4513.263, the failure of a person to have worn a seat belt, in violation of the statute, may **not** be considered or used as evidence of negligence or contributory negligence. The statute permits, however, admitting evidence of a plaintiff's non-use of a seatbelt for purposes of reducing a recovery of non-economic damages. R.C. 4513.263(F)(1).

**Negligent Entrustment:**

- A motor-vehicle owner may be held liable for an injury to a third person on grounds of negligence if the owner knowingly, either through actual knowledge or through knowledge implied from known facts and circumstances, entrusts its operation to an inexperienced or incompetent driver whose negligent operation results in the injury. *Gulla Strauss,* 154 Ohio St. 193 (1950). Under negligent entrustment, the liability of the owner is not based upon ownership or agency, but upon the combined negligence of the owner and driver -- the owner in entrusting the vehicle to an incompetent driver, and the negligence of the driver in its operation. *Keeley v. Hough,* 11th Dist. No. 2004- T-0038, 2005-Ohio-3771.

**Expert Witness:**

- Contingency fees are disallowed for expert witnesses.

# Oklahoma

**Bodily Injury:** Bodily injury coverage is mandatory in Oklahoma. Section 7-204 of Title 47 "sets the minimum limits of liability coverage required to be carried by all owners of vehicles registered in the State of Oklahoma." *May v. Natl. Union Fire Ins. Co. of Pittsburgh*, 84 F.3d 1342, 1347 (10th Cir. 1996). The minimum liability coverage in Oklahoma for policies issued prior to April 1, 2005 is $10,000 per person and $20,000 per accident. Okla.Stat.tit. 47, § 7-103. For polices issued after April 1, 2005, the minimum liability is $25,000 per person and $50,000 per accident. *Id.*. There is no minimum tort threshold that has to be reached before a bodily injury claim can be made. Some types of common carriers may have different statutory requirements with higher liability limits. Whether or not a collateral source can be used to offset a bodily injury claim will depend upon whether the previous payment actually came from a "collateral source." Oklahoma courts have held that if the defendant tortfeasor created the funds, or insurance policy, from which payment to the plaintiff has already been made, any additional payments which must be made by the tortfeasor can be offset by these original payments. Alternatively, if the plaintiff, or someone on their behalf, created the fund which provided the original coverage, the tortfeasor cannot offset these payments.

**Property Damage:** Property damage coverage is mandatory in Oklahoma. For policies issued after April 1, 2005, there is a minimum requirement of $25,000 per accident. Okla.Stat.tit. 47, §§ 7-204(A)(2); 7-103. Handling of salvage value is usually determined by policy provisions. There are generally two ways that an insurance company handles salvage claims. The most common is that the insurance company will take title and give salvage value. In some cases, the insurance company allows the insured to maintain title and they pay less than salvage value on the vehicle. Loss of use of personal property is compensable in Oklahoma. A person whose vehicle is "totaled" can receive compensation for loss of use from the time the vehicle is destroyed until the time it is replaced. However, this is probably not the case where the person has access to another suitable vehicle which would not result in any additional cost or expense.

A person can also recover for the interruption of his business caused by the property damage, provided the lost profits can be proven with reasonable certainty by competent evidence. The property damage payment for a totaled vehicle should include tax, title and license fees subject to policy provisions. Salvaged vehicles may not be "abandoned" in Oklahoma. The insurance company must obtain the certificate of title from the owner and remove the license plate. Both must be returned to the Oklahoma Tax Commission within 30 days.

**Personal Injury ("PIP"):** PIP is not applicable in Oklahoma.

**Medical Payments:** Medical payments coverage is not mandatory in Oklahoma, nor is there a minimum limit required. If purchased, this coverage applies only to medical expenses. It does not cover lost wages or pain and suffering. There is not a threshold that has to be met in order to have expenses paid under this coverage. The extent of the coverage is determined by the contract. Medical payments coverage does not have to be rejected in writing.

Oklahoma statutes provide that no automobile liability policy may contain a provision which grants the insurer the right of subrogation for payment of benefits under the expenses for the medical services coverage portion of the policy to a named insured or relative of the named insured who is a member of the named insured's household. Medical payments insurance cannot be set-off against UM coverage limits. *Aetna v. St. Bd. for Property and Casualty Rates*, 637 P.2d 1251, 1257 (Okla. 1981). In *Aetna*, the Supreme Court of Oklahoma held that "medical payment provisions allowing subrogation and set-off as to the named insured or resident relative in any automobile liability policy, including uninsured motorist coverage, is in violation of [Oklahoma law]." *Id.* (citing Okla.Stat.tit. 36, § 6092).

However, such a policy may provide for an insurer's right of subrogation and setoff to any person who is not a named insured or a member of the named insured's household. Also, a workers' compensation claimant is entitled to recover medical payments benefits.

The right to medical payments is based on the insurance contract. Consequently, the statute of limitations for medical payments coverage is based on the statute of limitations for written contracts, which is five (5) years in Oklahoma.

**Uninsured/Underinsured Motorist (UMBI/UMPD):** Unless waived, uninsured motorist (UM) coverage is mandatory in Oklahoma. Okla.Stat.tit. 36, § 3636(A). *See also Shepard v. Farmers Ins. Co., Inc.*, 678 P.2d 250, 252-53 (Okla. 1983) ("[S]ince uninsured motorist coverage is mandatory unless waived, the presumption exists that one who owns an automobile has recourse to some uninsured motorist benefits"); *Keel v. MFA Ins. Co.*, 553 P.2d 153, 155 (Okla. 1976) (finding that no automobile policy shall issue in this state unless it offers coverage for payment within specified limits of what an uninsured motorist would be liable for to an insured for damages for bodily injuries). Only the insured has the right to waive UM coverage and such waiver must be in writing. *See Moon v. Guarantee Ins. Co.*, 764 P.2d 1331, 1337 (Okla. 1988). If an automobile insurance carrier fails to offer uninsured motorist coverage or fails to secure a written waiver from the insured, UM coverage is imputed into the insured's automobile policy by operation of law. *Id.* at 1334-35. An insurer is under no statutory or common law duty to provide an explanation of uninsured motorist coverage as a precondition to a statutorily effective rejection of such benefits. *See Silver v. Slusher*, 770 P.2d 878 (Okla. 1988).

Whether or not UM coverage can be stacked in Oklahoma depends on whether the insured is a "stranger" to the insurance policy in question (insured only due to their status as a passenger in an insured vehicle). That person (considered a "Class II" insured) is normally limited to the amount of per person coverage that applies to the particular vehicle that this class of insured is occupying when the injuries occur. Stacking by this type of insured of the vehicle owner's other coverage is generally prohibited.

A so-called "Class I" insured, (named insured or family member) may "stack" TIM coverage and recover on every vehicle for which a separate UM premium is paid, even if there is only one policy paid. The only requirement is that the claimant qualify as an "insured" under the terms of the applicable policy. "It is well settled in Oklahoma that insureds may stack their UM coverage for the additional vehicles under a policy if they have paid separate UM premiums for each vehicle, or if they have separate policies and pay UM premiums for each policy." *See Winthrow v. Pickard*, 905 P.2d 800, 803 (Okla. 1995). These stacking rules may depend upon the policy language. It is critical that such language be reviewed when issues of stacking arise. Insurance policies can prevent stacking when the insured has "paid only one premium, and . . . the policy plainly state[s] that the UM coverage was not based on the number of vehicles." *See Kinder v. Okla. Farmers Union Mutual Ins. Co.*, 943 P.2d 617, 620 (Okla. 1997). In fact, insurance companies have no obligation to offer stackable UM coverage. *See Winthrow*, 905 P.2d at 803. However, if the insurance company overcharged on the single premium, stacking may be available to the insured. *See Kramer v. Allstate Ins. Co.*, 619 P.2d 128, 129-30 (Okla. Civ. App. 1994).

By statute, in Oklahoma, UM may be subrogated. However, in order to preserve subrogation rights, there are some instances in which the UM carrier must substitute the amount of the tortfeasor's limits of liability coverage. To preserve a right to stack the policies, the insured must provide notice to the company of the claim. The insured may not act in a manner that will prejudice the company's rights of subrogation.

It is well-settled that an insured's injuries, to be redressible under UM coverage, must have (1) been caused by an accident and (2) arisen out of the use of an automobile. *See Mayer v. State Farm*, 944 P.2d 288, 290 (Okla. 1997). The uninsured vehicle must be in use as a motor vehicle at the time of the injury. *Id.*

In order to recover UM benefits, an insured must be "legally entitled to recover" from the alleged tortfeasor.

The Oklahoma Court of Civil Appeals recently held that phrase means "the insured must be able to establish fault on the part of the uninsured motorist which gives rise to damages and prove the extent of those damages." *See Lamfu v. GuideOne Ins. Co.*, 131 P.3d 712, 715 (Okla. Ct. App. 2005). In *Lamfu*, the plaintiff asserted that he was only required to make a "claim" in excess of the amount liability coverage to trigger the insurer's duty to pay UM benefits. The Court disagreed, stating that:

In order to trigger the obligation to pay UM benefits under § 3636, we therefore hold the "claim" must be supported by evidence establishing a prima facie right to recover under the UM provisions of the policy, and that the bare allegation of the existence of unliquidated damages for pain and suffering is simply insufficient. Id. at 715.

The statute of limitations for a UM claim in Oklahoma is five years and begins to run when the breach of the insurance contract occurs. *See Wille v. GEICO*, 2 P.3d 888 (Okla. 2000). In Wille, the Oklahoma Supreme Court rejected the argument that a UM claim should begin to accrue on the date of the accident. *Id.* The Court noted that, at the time of the accident, the insured may not be aware that he has a claim against his insurance carrier and may not be aware of the extent of the injuries suffered, the amount of the tortfeasor's available coverage or whether the cost of medical treatment will exceed the value of the tortfeasor's insurance policy and available assets. *Id.*

An insured is not required to sue the tortfeasor in order to receive UM benefits. An insured is merely required to establish the preconditions to UM benefits as set forth in Oklahoma's UM statute. The UM carrier may not reduce a UM policy limit by virtue of a potential set-off of benefits from the tortfeasor's liability policy. *See Burch v. Allstate Ins. Co.*, 977 P.2d 1057, 1064-65 (Okla. 1998). In *Burch*, the Supreme Court of Oklahoma held that "an uninsured motorist carrier is liable for the entire amount of its insured's loss from the first dollar up to the UM policy limits without regard to the presence of any other insurance." *Id.* at 1058. Thus, UM coverage is primary in Oklahoma and there is no set off against what the liability insurers would have had to pay if suit had been brought directly against the tortfeasor. *Id.*

In Oklahoma, there is an implied covenant of good faith in every contract, including UM policies. Pursuant to this duty of good faith, UM carriers may deny coverage only when they have a reasonable basis for doing so. Absent such a reasonable basis, the insured can recover actual damages for the carrier's breach, and in the proper case, punitive damages as well.

**Negligence:** Oklahoma is a comparative negligence jurisdiction; thus, a plaintiff may not recover if he/she is 51% or more negligent. If the plaintiff is 50% or less at fault, they recover damages reduced by the percentage of their negligence. Okla. Stat. tit. 23 §§ 12, 13, 14.

Negligence of a claimant driver can be imputed to claimant passengers if a joint venture can be established. Common elements of a joint venture are as follows: (1) A community of interest in the objects or purposes of the undertaking; and (2) An equal right to direct and govern movement and conduct of each other with respect thereto. *See, e.g., Hasty v. Pittsburg County*, 240 P. 1056, 1058 (Okla. 1925).

The statute of limitations for bodily injury and property damage claims generally is 2 (two) years. For minors, it is two years from the date of the tort or one year after the minor turns 18, whichever is later. An adjuster would generally not be required to notify parties of the statute of limitations. This general rule may change if the adjuster has in some way intentionally or unintentionally misled the parties as to the relevant dates. There are specific statutes which deal with an adjuster's duties to claimants, even if they are third-party claimants.

**Punitive Damages:** Punitive damages are generally not covered by insurance in Oklahoma. *See Aetna Cas. and Surety v. Craig*, 1989 OK 43, 771 P.2d 212. Coverage may be provided, however, when punitive damages are imposed upon an insured vicariously. *See Dayton Hudson v. American Mut.*, 621 P.2d 1155, 1158-59 (Okla.

1980).

Punitive damages are generally available in tort actions only, where the defendant has acted in a wanton, reckless or oppressive manner, or where fraud or malice is proved. The procedure for an obtaining an award of punitive damages is governed by section 9.1 of Title 23. Oklahoma's current punitive damages statute provides **three** standards by which a defendant's conduct may be judged for purposes of awarding punitive damages. First, a jury may award punitive damages pursuant to 23 O.S. §9.1(B)(1), if the plaintiff establishes, by clear and convincing evidence, that the defendant is guilty of conduct which shows a "reckless disregard for the rights of others." Under the first tier, punitive damages cannot exceed the greater of $100,000.00 or the amount of actual damages awarded.

The second standard for obtaining punitive damages, pursuant to 23 O.S. §9.1(C)(1), requires the plaintiff to show, by clear and convincing evidence, that the defendant has acted "intentionally and with malice." Oklahoma case law defines malice, in the context of punitive damages, as actual evil intent, ill will or hatred, fraud or oppression. Under this second tier, punitive damages cannot exceed the greater of $500,000.00 or twice the amount of actual damages awarded.

The third standard for obtaining punitive damages, pursuant to 23 O.S. §9.1(D)(1), requires the plaintiff to show by clear and convincing evidence that the defendant has acted intentionally and with malice toward others. In addition, the court must find that there is evidence beyond a reasonable doubt that the defendant acted intentionally and with malice and engaged in conduct "life-threatening to humans." Under this third tier, the jury may award punitive damages as it "deems appropriate" without regarding to the caps mentioned above.

In actions for the recovery of money damages, a plaintiff's petition shall indicate whether the amount sought exceeds the amount required for diversity jurisdiction pursuant to 28 U.S.C. §1332. The petition shall not demand a specific amount of money, but only allege that "the amount sought as damages is in excess of the amount required for diversity jurisdiction pursuant to Section 1332 of Title 28 of the United States Code." 12 O.S. §2008(A)(2). This provision does not apply to contract actions. *Id.* However, if the amount demanded is "an amount that is required for diversity jurisdiction" or "less," the plaintiff's pleading shall "specify the amount of such damages to be recovered." *Id.* The plaintiff is allowed to demand alternative or several different types of relief. *Id.*

The Oklahoma legislature has repeatedly attempted to enact various tort reform measures, including limitations on certain non-economic damages. Those efforts have, for the most part, been stricken as unconstitutional by the Oklahoma Supreme Court. *E.g., Beason v. I. E. Miller Servs., Inc.*, 2019 OK 28, 441 P.3d 1107 (finding statute limiting a plaintiff's recovery of noneconomic damages to $350,000 was a special law forbidden by the state constitution); *Montgomery v. Potter*, 2014 OK 118, 341 P.3d 660 (finding statute barring uninsured motorists from recovering certain non-economic damages was an unconstitutional special law).

**Joint and Several Exposure:** In civil actions based on fault not arising in contract, liability for damage caused by two or more persons shall be several only, and a joint tortfeasor shall be liable only for the amount of damages allocated to that tortfeasor. Okla. Stat. tit. 23 § 15(A).

The statutory rights of a joint tortfeasor to contribution and any rights of indemnity are specifically set out in Title 12 O.S. § 832. There is a right of contribution among joint tortfeasors. This extends to both economic and non-economic damages. In addition, the statute contains a right of set-off related to payments made by any settling defendants or settling tortfeasors. 12 O.S. § 832(H). However, in light of Oklahoma's adoption of several liability, there is a substantial question regarding whether the right of set-off remains in actions based on fault. *E.g., Loos v. Saint-Gobain Abrasives, Inc.,* No. CIV-15-411-R, 2016 WL 5017335, at *6 (W.D. Okla. Sept. 19, 2016) ("Because the right to contribution requires that a tortfeasor has had to pay for more than its share of liability, contribution cannot be appropriate for Saint-Gobain: Oklahoma's several

liability statute now apportions liability by degree of fault rather than imposing joint liability.").

**Workers' Compensation:** Worker's compensation is generally subrogable in Oklahoma. O.S. §43. Many cases have held that no right of subrogation exists as to death benefits, but one federal court sitting in Oklahoma has recently found that the statutory language contained in 85A O.S. 43 permits such subrogation. *E.g., Akins v. C&J Energy Services, Inc.*, 2019 WL 3728284 (W.D. Okla. 2019).

Furthermore, a workers' compensation carrier cannot generally subrogate against uninsured motorist coverage unless the employer purchased the uninsured motorist coverage. *E.g.*, 85A O.S. §43(B)(4). In order to prove up the right to subrogate workers' compensation payments, the carrier must have given notice to the third party, the injured claimant, and any other insurance carriers involved. Recent statutory modifications outline the procedure applicable to all such subrogation rights, including provisions related to how any recovery should be distributed. 85A O.S. §43.

**Minor Settlements:** Any settlement with a minor under the age of 18 must have court approval to be binding. The same is true for incapacitated persons. *See Lambert v. Hill*, 73 P.2d 124 (Okla. 1937); *Gomes v. Hameed*, 2008 OK 3, 184 P.3d 479.

**Alcohol Issue:** The legal limit for intoxication in Oklahoma is set out by statute. Briefly stated, evidence of an alcohol concentration of eight-hundredths (0.08) or more shall be admitted as prima facie evidence that the person was under the influence of alcohol. *See, e.g.*, 47 O.S. § 754(A).

The Supreme Court of Oklahoma has held that a commercial server of alcoholic beverages may be held liable for: (1) serving a person who is known to be intoxicated; or (2) for serving a person who the server should know was intoxicated. *See Brigance v. Velvet Dove Restaurant, Inc*, 725 P.2d 300 (Okla. 1986). The cause of action does not extend to an adult who voluntarily consumes an excessive amount of alcohol and injures himself, see *Ohio Casualty v. Todd*, 813 P.2d 508 (Okla. 1991), nor does it apply to a social host, see *McGee v. Alexander*, 37 P.3d 800 (Okla. 2001).

**Legal Age:** The legal age to consume alcohol in Oklahoma is 21.

**Interfamily and Spousal Immunity:** In Oklahoma, a child may bring a negligence action against a parent up to the amount of the parent's insurance coverage. Under Oklahoma law, one spouse may maintain a tort action against another spouse.

**Seat Belt Defense:** There is no seat belt defense in Oklahoma.

The Oklahoma Mandatory Seat Belt Use Act provides that "the use or nonuse of seat belts shall not be submitted into evidence in any civil suit in Oklahoma." *See* 47 O.S. § 12-420.2 The Oklahoma Supreme Court has explained that the statute protects plaintiffs from being penalized in a civil proceeding from those "connotations of fault" which are associated with not wearing a seatbelt. *See Bishop v. Takata Corp.*, 12 P.3d 459, 464 (Okla. 2000). It is well-settled that Section 12-420 precludes the introduction of evidence of the use or non-use of a seatbelt in a negligence claim. *See Bishop*, 12 P.3d at 463 (discussing *Comer v. Preferred Risk Mut. Ins. Co.*, 991 P.2d 1006 (Okla. 1991)). Seat belt evidence, however, may be admissible in some product liability actions. *See, e.g., Clark v. Mazda Motor Corp.*, 68 P.3d 207, 209 (Okla. 2003); *Bishop*, 12 P.3d at 466.

**Wrongful Death:** Wrongful death actions are controlled by statute in Oklahoma. Title 12 O.S. § 1053 provides that the estate can collect for:

1. The loss of financial support of contributions of money;

2. The grief of the surviving husband/wife;

3. The loss of the society, services, companionship, and marriage relationship of the husband/wife;

4. The grief of the child[ren] [and] parents;

5. The loss of companionship and parental care, training, guidance, or education that would have been forthcoming from decedent to the child[ren], and the loss of companionship of decedent by the child[ren];

6. The loss of the companionship of decedent by his/her parent[s];

7. The pain and suffering of decedent;

8. The medical and burial expenses.

**Permissive Use:** Oklahoma's Compulsory Insurance Law requires omnibus coverage for all 'motor vehicle liability policies'[1] up to the 'minimum liability insurance limits"[2] provided by statute. *See*, ~~76~~ 47 O.S. § 7-600(1)(b). An omnibus clause in a motor vehicle insurance policy extends liability coverage to the named insured and other persons using the insured vehicle with permission. *Hartline v. Hartline*, 2001 OK 15, ¶ 15 n. 22, 39 P.3d 765, 771 n. 22. The omnibus clause, in effect, protects third parties wrongfully injured by the use of the insured vehicle by persons other than the owner.

Section 7-600(1)(b) of Title 47 of the Oklahoma Statutes requires that an "owner's policy" of motor vehicle liability insurance "shall insure the person named therein and insure any other person . . . using an insured vehicle with the express or implied permission of the named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance, operation or use of the vehicle." (emphasis added).

Thus, an owner's automobile insurance policy in Oklahoma must provide liability coverage to persons using the insured vehicle with the permission of the named insured and up to the minimum liability insurance limits. Insurance liability policies that purport to qualify "permissive use" by limiting such use to the scope of consent granted by the named insured have been declared void as against public policy,[3] but only up to the minimum liability insurance limits. *O'Neill v. Long*, 2002 OK 63, ¶ 18, 54 P.3d 109, 114.

The compulsory insurance law "evinces an unmistakable intent to maximize insurance coverage for the greater protection of the public." *O'Neill*, 2002 OK 63 at ¶ 18, 54 P.3d at 113. Because the public policy of the law is "clearly articulated," it "plainly overrides contrary private agreements that restrict coverage whenever the contractual strictures do not square with the purpose of the Act." *Harkrider*, 2000 OK 94 at ¶ 15, 24 P.3d at 829.

In *O'Neill*, the Oklahoma Supreme Court struck down a policy limitation that purported to limit the insurer's liability to only 'permitted users' acting 'within the scope of the permitted use', finding the omnibus clause limitation inconsistent with the public policy of the of the compulsory insurance law:

We hold that where the named insured gives permission to another to use the insured vehicle, Oklahoma's Compulsory Insurance Law requires liability insurance must continue to cover the insured vehicle even though the permittee exceeds the scope of the named insured's consent. Once express or implied permission to use an insured vehicle is granted, the omnibus coverage is fixed barring criminal theft. Our ruling in this regard is limited to a claim for an amount up to our law's statutory mandate of [the statutorily prescribed 'minimum liability insurance limits found in 47 O.S. § 7-103(2)].

[1]A 'motor vehicle liability policy" is defined as an owner's policy or operator's policy of liability, issued by a

duly- authorized insurance carrier to or for the benefit of the named insured, but this definition applies only to that part of the coverage which is required by minimum liability insurance limits. 47 O.S. § 7-103(3).

[2] The 'minimum liability insurance limits' are set by statute. *See* 47 O.S. § 7-103(2) (for policies issued before April 1, 2005, the mandatory limits are $10,000 for each person, $20,000 for each accident, and $10,000 for property damage, and for policies issued after April 1, 2005, the limits are $25,000 for each person, $50,000 for each accident, and $25,000 for property damage).

[3] The principal purpose of compulsory liability insurance is to protect the public from the financial hardship that may result from the use of automobiles by people who are financially unable to respond in damages for any injury done. *Harkrider v. Posey*, 2000 OK 94, ¶ 15, 24 P.3d 821, 829. In enacting legislation compelling the purchase of liability insurance, the legislature intended that every vehicle operated in this state be secured against liability to innocent victims of the negligent operation of insured vehicles. *Ball v. Wilshire Ins. Co.*, 2009 OK 38, ¶ 12, 221 P.3d 717, 721 (citation omitted).

*Id.* at ¶ 18, 54 P.3d at 114; *see also*, *Spears v. Preble*, 1983 OK 8, 661 P.2d 1337, 1341 (citations omitted) (adopting the rule that "once general permission is given to a person to use a car, the accident is covered by the policy even though the particular use was not contemplated by the owner.").

Omnibus liability coverage in excess of the statutory minimum compulsory insurance amounts is not subject to Oklahoma's compulsory insurance law and is controlled by freedom of contract principles. *See*, 47 O.S. § 7-600.1(B); *O'Neill*, 2002 OK 63 at ¶ 27, 54 P.3d at 116. Disputes over such coverage for negligent operation of motor vehicles are resolved under the 'minor-deviation rule'. *Id.* at ¶ 21, 54 P.3d at 115 (citing *Lloyds America v. Tinkelpaugh*, 1939 OK 135, 88 P.2d 356, 357)).

Under the minor-deviation standard, coverage is defeated where there is proof that the deviation from the scope of permission was material in nature, and coverage is extended where there is proof that the deviation from the scope of permission was minor in nature. *Id.* at ¶ 22, 54 P.3d at 115. The issue of deviation is typically a question of fact dependent upon the particular facts and circumstances presented. *Id.* at ¶ 23, 54 P.3d at 115. However, the Oklahoma Supreme Court has held that "some deviations might be so slight as to not raise a fact issue as to whether the permission was revoked while other deviation might be so gross as to destroy the permission as a matter of law." *Id.*

Thus, if the evidence shows a material deviation from the scope of consent given by the named insured to the 'permitted user', the permittee is not considered to be an 'insured person' under the non-compulsory omnibus liability provision, and the coverage is defeated. The rule gives effect to the public policy underlying the compulsory insurance laws while refraining from unduly interfering with parties' freedom of contract. *Ball*, 2009 OK 38 at ¶¶ 17-18, 221 P.3d at 723-24.

# Oregon

**COVERAGE**

**Bodily Injury:**

Minimum limit required: $25,000/$50,000 ORS 806.070 (2) (a-b).

Coverage Mandatory: Yes

Any tort threshold to be reached before a BI claim can be made: None, other than whatever deductible is provided in the individual policy.

Can Collateral sources be used as an offset? Yes, except the following collateral sources do not diminish the damage award:

(1) Benefits that the injured person or their estate must repay;

(2) Life insurance or death benefits;

(3) Insurance benefits for which the injured or deceased, or members of that person's family paid premiums; and

(4) Retirement, disability, and pension plan benefits, and federal social security benefits. ORS 31.580

Other data in this category to be listed as the last item(s). Oregon does not have "no fault".

Other: For person convicted of driving under the influence of intoxicants, minimum limits are $50,000/$100,000 BI and $10,000 property damage. ORS 806.075 (1) (a-c).

The 1987 tort reform act limits recovery of non-economic damages to $500,000. ORS 31.710. In 1999, the Oregon Supreme Court ruled the limitation was unconstitutional in common law negligence claims. *Lakin v. Senco Products*, 329 Or 62, 81 987 P2d 463 (1999). However, in recent decisions, whether the non-economic damages cap will apply in a specific action is uncertain and will depend upon an analysis under the Remedy Clause of the Oregon Constitution. Namely, (1) did the plaintiff obtain a benefit or a "quid pro quo" in exchange for the damages limitation and (2) what percentage of plaintiff's recovery at trial was reduced by the $500,000 cap? If the percentage is substantial, the likelihood that the cap will be applied is diminished. See, *Horton v. OHSU*, 359 Or 168 (2016); *Rains v. Stayton Builders Mart, Inc.*, 359 OR 610 (2016) and *Vasquez v. Doublepress Mfg., Inc.*, 364 Or 609 (2019)( the Court did not address to constitutionality of the damages cap because it held that plaintiff's claim against a third party in a case arising from an on the job injury was exempted from ORS 31.170 because the claim arose under ORS 656- Worker Compensation laws).

**Property Damage:**

Minimum limit required? $10,000 ORS 806.070 (2)(c.)

Is PD Mandatory? Yes

Salvage-how must it be handled? There are few statutory requirements. Usual practice is dependent on company guidelines and policy language. Usually, if the claimant wants to keep the vehicle, salvage is deducted

from the actual cash value. If the vehicle is totaled, claimant is paid the actual cash value minus the deductible and the company takes title and sells the vehicle for scrap. (ORS 819.016 - when salvage title is required).

If the automobile policy provides for adjustment and settlement of collision or comprehensive coverage for total losses on the basis of actual cash value or replacement with like kind and quality, the following administrative rules apply:

(a) The insurer may elect to offer a specific, comparable and available replacement car with all incident taxes and fees paid, at no cost to the insured other than the deductible. Such an offer and rejection should be documented in the insurers claim file.

(b) The insurer may elect to make a cash settlement based upon the actual cost to purchase a comparable car including all attendant fees and taxes, less the deductible as provided in the policy. Such costs shall be determined either by a valuation obtained from a computerized database source that produces statistically valid and fair market values for automobiles, or by the actual cost to purchase the automobile identified by the insurer as a replacement automobile that is at least comparable to the insured automobile.(c) The insurer may elect another method allowable under the policy but deviating from rules (a) and (b) above, if the deviation is supported by documentation in the claim file giving the particulars of the condition of the automobiles involved. All deductions from the cost of a comparable vehicle, including deduction for salvage must be measurable, discernible, itemized and specified as to dollar amount. The basis for the settlement shall be fully explained to the claimant, in writing. (ORS 742.462-insurer's right to settle claims if settlement made in good faith).

Loss of use-how handled?

Oregon has no statutory requirement that insurance include coverage for payment of loss of use damages. This is usually controlled by the terms of the particular insurance policy. (ORS 742.510(3) (b)-coverage for property damage to vehicle caused by uninsured does not include coverage for loss of use of the covered vehicle).

Generally, plaintiff can recover loss of use from the defendant for the period during which the vehicle is being repaired. The measure of damages is the reasonable rental value of a similar vehicle for a reasonable repair period.

Can there be loss of use on a totaled vehicle?

Generally, the plaintiff cannot recover from the defendant for loss of use if the vehicle is totally destroyed. There are no Oregon cases on this issue, but as an extension on the rule for loss of use of damaged but not destroyed vehicles, it is logical that a claimant could recover loss of use damages for the period of time reasonably necessary to replace the destroyed vehicle.

Tax, title and license fees?

Generally, vehicle registration period for an ordinary passenger vehicle is two (2) years. ORS 803.400. However, as of January 1, 2020, new vehicles for which new plates are issued, the period is four (4) years. ORS 803.415. Fees are now based upon the MPG rating for the vehicle and additional fees can now be imposed by the county, ORS 801.041, or district, ORS 801.042 where the vehicle is registered. The current 2-year state registration fee for a vehicle with 0-19 MPG is $122 and $244 for 4 years. *See generally* ORS 803.420.

Oregon currently has no sales tax or other tax applying to the purchase of a vehicle.

Drivers license fee - $60.00 ($40.00 renewal fee). For other licensing fees, *see* ORS 807.370.

**Personal Injury Protection (PIP)**

ORS 742.520 *et seq.*

Minimum limit required, mandatory?

$15,000 per person minimum, mandatory. ORS 742.524(1)(a)

What does PIP cover in this state?

Reasonable and necessary expenses of medical, hospital, dental, surgical, ambulance and prosthetic services incurred within two years after the date of injury; loss of income (if disability continues for at least 14 days, 70% up to maximum of $3,000 per month for maximum of 52 weeks); funeral expenses (maximum $5,000); child care if parent is hospitalized ($25 per day, $750 max); ORS 742.524(1)(b)-(e).

Is there a threshold to be met? No.

Does coverage have to be rejected in writing:

Yes, written notice to the insured, with a copy to the provider, within 60 days of receiving claim from the provider, along with reason for denial and method for contesting denial. ORS 742.528(1). Expenses are presumed to be reasonable and necessary unless the provider is given notice of denial of the charges not more than 60 calendar days after the insurer receives from the provider notice of the claim for the services. At any time during the first 50 calendar days after the insurer receives notice of claim, the provider shall, within 10 business days, answer in writing questions from the insurer regarding the claim. Counting of the 60-day period shall be suspended if the provider does not supply written answers. ORS 742.524(1)(a).

Is PIP subrogable?: Yes, ORS 742.538.

Can WC Claimant receive PIP Benefits?

PIP benefits may be reduced or eliminated, if the policy so provides, if the claimant is entitled to receive workers' compensation benefits or any similar medical or disability benefits. ORS 742.526(2).

Can the insurer recover PIP payments made?

PIP insurer has three options for reimbursement: (1) Interinsurer reimbursement, if available (ORS 742.534) or if the injured person files an action against another, options include (2) lien ORS 742.536 or (3)subrogation. ORS 742.538.

Effective January 1, 2020, an insurer may not receive a reimbursement or subrogation for PIP benefits arising from a vehicle accident from any recovery the injured person receives for damages unless:

(A) The injured person first receives full compensation for the injuries; and

(B) The reimbursement or subrogation is paid only form the total amount of the recovery in excess of the amount that fully compensates for the injured person's injuries. ORS 742.544(1)(b) as amended by Or Laws 2019, ch 460, §4.

**"Total amount of the recovery"** is the amount recovered from (1) applicable UIM benefits as described in ORS 742.502(2), (2) liability insurance coverage received from other parties to the accident, (3) PIP or health benefits, and (4) any other payment by or on behalf the party that caused the accident.

Note: The history appears to be silent about the reason for amending the UM statute from "the insurer will pay all sums that the insured * * * is legally entitled to recover *as general and special* damages from the owner or operator of an uninsured vehicle" to "the insurer will pay all sums that the insured * * * is legally entitled to recover *as damages* from the owner or operator of an uninsured vehicle." The absence of legislative comment does not necessarily mean that the amendment was not intended to be a substantive change to the law. Consequently, as of April 2020, whether the insurer will be obligated to pay any punitive damages awarded against its insured has not been addressed by the appellate courts.

For claims between 2015-2019, PIP reimbursement was only recoverable if the injured party's recovery exceeded the damages suffered by that person, including both the sum of the economic and noneconomic damages.

Under ORS 742.542, PIP benefits are an offset against damages but not against policy limits in both UM and UIM claims.

Can PIP be stacked? Yes , *Anderson v. Farms Ins. Co. of Oregon*, 188 Or App 179, 71 P3d 144 (2003).

Is there a statute of limitations involved? No, but it is likely that a six year statute would apply as either an action on a contract (ORS 12.080(1) or as an action statutorily created (ORS 12.080(2)).

**Other:** All disputes between PIP insurers and other insurers shall be decided by arbitration. All disputes between PIP insurer and beneficiaries shall be decided by arbitration only if mutually agreed to at the time of dispute. ORS 742.520(6), 742.522, 742.534(3).

**Medical Payments**

Med pay is not required in Oregon and is therefore a creature of contract and answers to the questions below will depend on the terms of that contract/policy. ORS 742.530.

In general, when an insured qualifies for medical payments, there will usually be PIP coverage as well, and the PIP is primary in most instances.

Minimum limit required, mandatory? None. Coverage is not mandatory.

What does med pay cover in this state? Medical and funeral expenses, but not loss of wages or loss of essential services.

Is there a threshold to be met? No

Does coverage have to be rejected in writing? No

Is med pay subrogable? Yes, by contract.

Can WC claimant receive med pay benefits? By contract.

Can med pay benefits offset a BI claim? Yes.

Statute of limitation involved? Governed by contract.

**Uninsured/Underinsured Motorist- UMBI/UMPD** ORS 742.500 et seq.

Minimum limit required? Same as for BI and PD ($25,000/$50,000 BI and $10,000 PD) Coverage for amounts above this minimum and even above the ordinary liability limits may be offered and shall include underinsurance coverage. ORS 742.502(2-3), ORS 742.510.

Mandatory coverage? Yes for BI, ORS 742.502(1), and must be offered for PD, ORS 742.510(1).

Can it be rejected and if so, does it have to be rejected in writing? Cannot reject bodily injury liability coverage unless (1) the available limits are at least equal to the amounts prescribed in ORS 806.070 and ORS 742.502(2)(a) or (2) the insured ed signs a statement within 60 days of the time the lower election is made. ORS 742.502(3)(a). The offer also must be in writing. ORS 742.502(2)(a)

Statute of limitation for UMBI?: Within 2 years from the date of the accident the claimant seeking UM coverage must:

(1) file suit against the uninsured motorist,

(2) settle the claim with the insurer, or

(3) formally institute arbitration proceedings.

ORS 742.504(12).

The policy may provide a longer period. If the policy is silent, the normal 6 year contract statute of limitations applies.

For UMPD? Same as for BI

Is UM Subrogable? Yes

Can UM be stacked? Yes, ORS 742.502(3)

**Other:** Disputes between insured and insurer may be decided by arbitration if upon mutual agreement. PD- $300 deductible for hit-and-run or phantom vehicle, $200 deductible in all other instances, loss of use not covered. ORS 742.510 (2-3).

**Other Issues**

**Negligence:**

Oregon follow modified comparative negligence:

Briefly explain the doctrine involved: Contributory negligence is not a bar to recovery if the fault attributable to the person seeking recovery is not greater than the combined fault of the persons against whom recovery is sought. The damages are diminished in proportion to the percentage of fault attributable to the person seeking recovery. ORS 31.600(1)

Can negligence of claimant driver be imputed to claimant passenger(s)? No. However, in some circumstances the passenger may be found contributorily negligent by placing him - or herself in a position of peril, for example, if the passenger knows the driver is so drunk that he is unfit to drive safely, yet the passenger agrees to ride with him.

Can a joint venture be established? Yes

Statute of Limitation:

BI: Two Years

PD Six Years

Minor: Statute is tolled against a minor (18 years or under) but cannot extend period for more than 5 years in all or more than one year after the disability ceases. ORS 12.160.

Must the adjuster notify parties of the statute? Yes, under the following circumstances:

(1) When negotiating with an unrepresented claimant, written notice must be given that the limitation period may be expiring and may affect the claimant's rights. The notice shall be given to first party claimants not less than 30 days, and to third party claimants not less than 60 days before the date on which the insurer believes the time limit may expire.

(2) If advance payments are made, written notice of the limitation period must be given. If written notice is not given within 30 days of the first advance payment, the period until notice is given is added onto the statutory period. (Exact words of statute; period "not part of period limited for commencement of the action by the statute of limitations.") ORS 12.155.

**Other:**

Doctrines of last clear chance and implied assumption of the risk have been abolished by statute. ORS 31.620.

Governmental Immunity: The Oregon Tort Claims Act (OTCA) (ORS 30.260-30.300) largely abrogated the traditional immunity granted to public bodies from actions of officers, employees, and agents of that public body. The general rule in Oregon is that a public body is liable for the actions of officer, employee, or agent unless immunity is statutorily provided. ORS 30.265(1). "Public bodies" include school districts. ORS 30.260(4)(b).

A public body is liable for the actions of an agent where the agent is acting within the course and scope of official duties. Agency is determined by (1) whether the public body has meaningful direction and control of the alleged agent, *Cain v. Rijken*, 300 Or 706, 717 P2d 140 (1986), and (2) whether the alleged agent is performing a function on behalf of the public body, *Moxness v. City of Newport*, 89 Or App 265, 748 P2d 1014 (1988). The test for whether an agent is acting in the "course and scope of official duties" is (1) "whether the act in question is of a kind the employee was hired to perform," (2) "whether the act occurred substantially within the authorized limits of time and space," and (3) "whether the employee was motivated, at least in part, by a purpose to serve the employer." *Stanfield v. Laccoarce*, 284 Or 651, 655, 588 P2d 1271 (1978).

Oregon immunizes public bodies in some instances. A public body is "immune from liability for any claim for injury to or death of any person or injury to property resulting from an act or omission of an officer, employee or agent of a public body when such officer, employee or agent is immune from liability." ORS 30.265(2). Furthermore, a public body is immune from liability for any claim "limited or barred by the provisions of any other statute, including but not limited to any statute of ultimate repose." ORS 30.265(3)(d).

Public bodies also are immune from liability for claims "based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." ORS 30.265(3)(c). This "discretionary immunity" applies to actions that result from "a choice among alternative public policies by persons to whom responsibility for such policies have been delegated." *Ramirez v. Hawaii T & S Enters.*, 179

Or App 416, 419 (2002) (quoting *Miller v. Grants Pass Irrigation Dist.*, 297 Or 312, 316, 686 P2d 324 (1984). Thus, an action is protected by discretionary immunity if it satisfies three criteria:

(1) the action must be the result of an exercise of judgment, *McBride v. Magnuson*, 282 Or 433, 437, 578 P2d 1259 (1978), (2) the choice must be made for policy reasons, *Stevenson v. State of Oregon*, 290 Or 3, 14, 619 P2d 247 (1980), and (3) the choice must be made by "a body or person that has, either directly or by delegation, the responsibility or authority to make it," *Miller*, 297 Or at 316.

**Liability Limitation:** In 2007, the Oregon Supreme Court held that the statutory cap of $200,000, (ORS 30.270(1) public body) as applied to a medical malpractice claim, violated Article 1, Section 10 of the Oregon Constitution because the remedy was inadequate for the serious injuries and significant damages ($18,000,000) Plaintiff sustained. *Clarke v. Oregon Health Sci. University,* 343 Or 581,175 P3d 418 (2007). The court did not rule the statutory cap was unconstitutional as a whole, but invited the legislature to assess the adequacy of the caps.

The 2009 Oregon Legislature revamped the damage limitation for state and local public agencies for claims involving both personal injury including wrongful death and property damage. Starting with claims arising after December 28, 2007, the damage cap increases each year as of July 1st based upon Cost of Living Indexes. ORS 30.271. As of July 1, 2019, the damage limitation for one claimant in a single accident or occurrence is $2,247,000. The aggregate damage limit for all claimants in a single accident or occurrence is $4,494,000. *See,* courts.oregon.gov/Pages/tort. Claims against a local public agency or employee, utilize a similar scheme but the damage limits are lower. As of July 1, 2019, the single claimant limit is $749,000while the aggregate limit for all claimants is $1,490,0000. ORS 30.272

The damage limit for property damage claims against any state or local public agencyare identical. The limit for a single claimant is $122,900 and the aggregate is $614,300.

Punitive damages cannot be asserted against any state or local public agency. ORS 30.269

**Punitive Damages:**

Covered by insurance? Punitive damages may be insured against, but usually they are excluded. Insurance for punitive damages is not per se void as against public policy. Most policies exclude coverage for intentional acts, and therefore, coverage for punitive damages is often excluded.

Even if not covered, can these be plead and recovery made?: Yes However, in state court, plaintiff can initially only allege that punitive damages will be claimed; the amount is not stated. Rather, plaintiff must file a motion to amend for punitive damages before trial and obtain court approval to do so.

Limitations (not Statute of) on recovery of punitive damages?:

Punitive damages must comport with the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution which prohibits imposing grossly excessive or arbitrary punishments. The court will consider, on appeal, (1) the degree of responsibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *BMW of North America, Inc. v. Gore*, 517 US 559, 116 SCt 1589, 134 L.Ed 2d 809 (1996), *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 US 408, 123 SCt 1513, 155 LEd 2d 585 (2003). *See also*, *William v. Phillip Morris, Inc.*, 340 OR 35 (2006), affirmed on remand from the United States Supreme Court, OR (January 31, 2008)

No limit in dollar amount. Punitive damages against certain health care providers require a showing of malice. ORS 31.740.

Punitive damages: cannot be awarded against public bodies when its officers, employees, or agents are acting within the scope of their employment or duties. ORS 30.270 (2).

- are generally not recoverable in contract actions.

- are not recoverable from a decedent's estate.

- are not available in a defamation case or where the tort is based on speech or expressive conduct because such an action would violate the Oregon Constitution.

What constitutes punitive damages?: Punitive damages may be awarded to punish conduct that society finds undesirable and to deter the defendant and others from similar conduct in the future.

The standard used to evaluate a claim for punitive damages includes wanton misconduct, maliciousness, gross negligence, extraordinary disregard of or indifference to known of highly probably risks to others. Negligence alone is not sufficient to support an award of punitive damages.

Peculiar or special requirements to file & recover for punitive damages?: Punitive damages must be established by clear and convincing evidence, which has been described as more than a preponderance of the evidence but less than proof beyond a reasonable doubt. ORS 31.730.

Upon entry of a verdict for a punitive damage award, the Oregon Department of Justice becomes a judgment creditor. ORS 31.735 specifies how such award will be distributed First, the prevailing party receives 30% of the award and the attorney's fees are paid from this sum. In no event may the attorney's fees exceed 20% of the prevailing party portion. The 60% is paid to the Criminal Injuries Compensation Account, a state entity and the remaining 10% is paid to the Attorney General in the State Court Facilities and Security Account.

**Joint and Several Exposure:**

Yes/No: Several liability only, unless a portion of damages is uncollectible. Under certain circumstances, the remaining defendants will be responsible for the uncollectible amount based upon each party's respective percentage of fault. ORS 31.610.

But be sure to explain fully your yes/no. Give Examples(s).

"In any action described in subsection (1) of this section, the court shall determine the award of damages to each claimant in accordance with the percentages of fault determined by the trier of fact under ORS 31.605 and shall enter judgment against each party determined to be liable. The court shall enter a judgment in favor of the plaintiff against any third party defendant who is found to be liable in any degree, even if the plaintiff did not make a direct claim against the third party defendant. The several liability of each defendant and third party defendant shall be set out separately in the judgment, based on the percentages of fault determined by the trier of fact under ORS 31.605. The court shall calculate and state in the judgment of monetary amount reflecting the share of the obligation of each person specified in ORS 31.600(2). Each person's share of the obligation shall be equal to the total amount of damages found by the trier of fact, with no reduction for amounts paid in settlement of the claim or by way of contribution, multiplied by the percentage of fault determined for the person by the trier of fact under ORS 31.605." *See*, ORS 31.610(2)

The trier of fact shall not compare the fault of any person who is immune from liability to the claimant, who is not subject to the court's jurisdiction or who is not subject to the action because the claim is barred by a statute

of limitations or statute of ultimate repose. ORS 31.600(2). The Appellate Courts have not resolved whether the fault of a person who is not named in the lawsuit and who does not qualify under ORS 31.600(2) can be placed on the verdict form and fault assessed against such person.

By statute, the trier of fact can consider and allocate on the jury verdict form the fault of the parties and those who have settled with the plaintiff/claimant.

**Worker's Compensation:**

Is WC subrogable in this state?: Yes

Any limitations?: The injured worker may elect to prosecute a third party claim or to assign the right to a paying agent. The paying agency (a self-insured employer or an insurer) may require an election by serving a written demand on the worker. If no election is made within 60 days, and if the worker elects to sue but no action is filed within 90 days, the worker is deemed to have assigned the cause of action to the paying agency, ORS 656.583, who may then sue in the worker's name.

Any settlement or compromise of the worker's claim is void unless the paying agency has given its written approval. ORS 656.587.

WC subrogation rights do not extend to actions based on uninsured motorist policies.

How must WC lien be proved up and protected by the subrogating WC carrier?:

The paying agency usually gives notice to any third party if the worker has elected to sue. But in any event, the provision for preference of the WC lien and the necessity of written approval of any settlement protect the WC lien. ORS 656.587.

Does WC carrier have right of first recovery? Almost. The WC lien is preferred to all claims except the cost of recovering the damages, i.e., attorney fees and costs. (ORS 656.580(2).

Can WC claimant collect No Fault (PIP/Med Pay) benefits?: Not PIP, and med pay only if by contract.

**Minor Settlements:**

What must have court approval? It depends upon the amount of the settlement.

A guardian ad litem must be appointed to prosecute a minor's claim. However, ORS 126.725 authorizes the person having legal custody of a minor to enter into a settlement without court intervention provided a conservator has not been appointed and the total amount of the claim is $25,000 or less, not including reimbursement of medical expenses, liens, reasonable attorney's fees and costs of suit. The settlement amount must be paid directly into a federally insured savings account "in the sole name of the minor." The custodial adult on behalf of the minor must sign an affidavit or a verified statement attesting that, after reasonable inquiry, the minor will be fully compensated by the settlement and that "there is no practical way to obtain additional amounts from the party entering into the settlement agreement with the minor."

If a settlement does not meet the requirements of ORS 126,725, a conservatorship must generally be established to settle cases, and then court approval is strongly advised. Court approval is not required if the settlement is less than $10,000. ORS 126.700.

At what age can negligence be attributed to a minor?: No limit; however, a minor is held to the standard of care of a reasonable minor of like age, intelligence and experience under the circumstances. Parents are

statutorily liable for the intentional or reckless torts of their minor unemancipated children. Damages are limited to $7,500 payable to the same claimant for one or more acts. ORS 30.765. Recovery is for actual damages only to person or property.

**Alcohol Issues:**

Legal limit of intoxication: .08 blood alcohol percent by volume.

Are there varying degrees? No.

Can the server of alcohol i.e., restaurant or individual be held liable to third persons injured by that individual (dram shop)? Yes. Not only is a restaurant or bar liable if, by clear and convincing evidence it is proven that they served a visibly intoxicated person, or someone under 21, but a social host has the same liability, whether serving drinks in his home or paying for them at a restaurant or bar. ORS 471.565. *See also*, *Wilda v. Roe*, 290 Or App 599 (2018).

**Legal Age:**

18 for voting; 21 to drink and purchase alcoholic beverages; 18 for emancipation; 18 to enter into a valid contract.

**Inter-Family and Spousal Immunity:**

Describe: Oregon has abolished spousal immunity. However, the fact of marriage may relax the standard of care. *Heino v. Harper*, 306 Or 347, 376 (1988). The common law rule of spousal immunity for non-intentional torts remains the law of Oregon. Infliction of intentional harm resulting in physical or emotional damage can give rise to an action against a spouse, but it must be outrageous in the extreme. Recklessness and willful misconduct are not enough.

Oregon does not uphold a parental immunity per se. The court makes inquiry into the tortious or privileged nature of the parent's act causing injury to the child, and not any special parental immunity from a child's action for personal torts as distinct from other kinds of claims.

There is no family immunity doctrine barring an action between siblings. However, the sibling relationship may relax the standard of care or availability of privileges.

**Seatbelt Defense:**

Yes/No: Yes, but limited. Evidence of nonuse of safety belt can be admitted only to mitigate damages, and only up to 5%. This rule does not apply to products liability cases or motor vehicle accidents in which the nonuse of the safety belt was a substantial contributing cause of the accident itself. ORS 31.760.

**Wrongful Death:** ORS 30.020 et seq.

What can the estate collect and what types of action can the estate bring? The personal representative can maintain an action and recover the following damages:

(1) medical services, burial and memorial services

(2) disability, pain and suffering, loss of income from the injury to the decedent's death

(3) pecuniary loss to the decedent's estate

(4) pecuniary loss and loss of society, companionship and services of the decedent for the spouse, children and parents

(5) punitive damages

Injury actions do not abate upon the death of the injured party, and the personal representatives of the decedent may maintain an action against the wrongdoer, if the decedent might have maintained an action, had the decedent lived, against the wrongdoer for an injury done by the same act or omission. The court may award to the prevailing party, at trial and on appeal, a reasonable amount to be court y the court as attorneys' fees. ORS 30.075.

Statute of Limitations? Three years or the longest of any other period for commencing an action under a statute of ultimate repose that applies to the act causing the injury. ORS 30.020(1).

**Additional Issues of Interest:**

Attorney fees may be recovered by the insured in actions on the policy where settlement was not made within six months after proof of loss and recovery exceeds amount of tender. ORS 742.061

No direct action statute exists.

Attorney fees are recoverable in actions for personal or property injury where the amount pleaded is $10,000 or less and the plaintiff prevails, if written demand for the payment of the claim was made not less than 30 days before filing of the formal complaint. Such attorney fees can be avoided if the defendant tendered to the plaintiff, prior to commencement of the action, an amount not less than the damages awarded to the plaintiff. ORS 20.080.

All actions in which the prayer is $50,000 or less are automatically moved to a mandatory, but non-binding, court arbitration system. Either party may appeal an arbitration award and the case returns to the court's jury trial docket. ORS 36.400-425 and UTCR 13.010 et seq.

**Claims Practices:**

The insurers claim files can consist of microfilm, computer information systems or other types of files, and must contain information in sufficient detail that pertinent events and their dates can be reconstructed.

**Misrepresentation and Other Prohibited Claims Practices:**

The insurer is prohibited from engaging in various practices, including but not limited to failing to disclose to the insured all pertinent benefits, coverages and provisions of the policy, failing to acknowledge and act promptly with communications, refusing to pay claims without reasonable investigations and compelling claimants to initiate litigation to recover amounts due by offering substantially less than amounts ultimately recovered in actions brought by such claimants. The insurer is also not allowed to ask for a release that is beyond the subject matter giving rise to the claim payment. Similarly, checks issued in partial settlement of a loss cannot contain language releasing the insurer from total liability. (ORS 746.230-unfair claim settlement practices, OAR 836-080-0220).

**Required Claim Communication Practices:** OAR 836-080-0225

The insurer must acknowledge or pay a claim within 30 days after it receives notification of the claim. In addition, with a first-party claimant, the insured must provide the necessary claims forms, instructions and assistance within 30 days of the notice.

The insurer must also make an appropriate reply, within 30 days, to all pertinent communications about a claim from a claimant that reasonably indicate a response is expected.

When an insurer receives an inquiry from the Insurance Commissioner about a claim, the insurer must provide an adequate response not later than the 21st day after receipt of the inquiry.

**Standard For A Prompt Claim Investigation:** OAR 836-080-0230

The insurer shall complete its claim investigation within 45 days (not "working days") after receipt of notification of the claim, unless the investigation cannot reasonably be completed within that time.

**Standards for Prompt and Fair Settlements- Generally:** OAR 836-080-0235, provides in part:

The claimant must be advised of the acceptance or denial of a claim within 30 days after its receipt. If a claim is denied, the denial must be in writing and include reference to the specific policy provision, condition or exclusion.

If the insurer needs more time to investigate the claim before deciding whether to accept it, the insurer shall notify the claimant within 30 days after receipt of the proof of loss, giving the reason more time is needed. Forty-five days from that initial notification and every 45 days thereafter, until the completion of the investigation, the insurer shall notify the claimant in writing of the reason additional time is needed. Again, this 45 days is not "working days".

The insurer cannot refuse to settle claims of first-party claimants on the grounds that responsibility for payment should be assumed by others, except as provided in the specific insurance policy.

An insurer shall not tell a third-party claimant that his/her rights may be impaired if a form or release is not signed by a certain date, unless the statement is given for the purpose of notifying the third-party claimant of a relevant status of limitations.

**Standards for Prompt and Fair Settlements- Automobile Insurance:** OAR 836-080-240 provides in part:

When liability is reasonably clear, the insurer shall not recommend that a third-party claimant make claim under the claimants own insurance policy solely for the insurer to avoid paying a claim.

The insurer shall not require unreasonable travel by the claimant to inspect a replacement automobile, obtain a repair estimate or have the auto repaired.

Upon a first-party claimant's request, an insurer shall include the claimant's deductible in any subrogation case. No deduction for expenses may be made from the subrogation recovery unless an outside attorney is retained to collect it.

The insurer shall not require that repairs be made by an particular person as a condition of recovery.

**Permissive Use:**

The Oregon Motor Vehicle Financial Responsibility Law (FLR) provides that a vehicle owner's liability insurance policy shall insure the owner and any person using the vehicle with the consent of the named insured under the policy. Specifically, the Act provides:

(1) A motor vehicle liability insurance policy used to comply with the financial responsibility requirements under ORS 806.060, must meet all of the following requirements:

(a) It must be a policy or part of a policy designating, by explicit description or by appropriate reference, all motor vehicles for which coverage is provided by the policy.

(b) It must insure the named insured and all other persons insured under the terms of the policy against loss from the liabilities imposed by law for damages arising out of the ownership, operation, use or maintenance of those motor vehicles by persons insured under the policy. *The policy must include in its coverage all persons who, with the consent of the named insured, use the motor vehicles insured under the policy, except for any person specifically excluded from coverage under ORS 742.450* (Emphasis added).

ORS 806.080 (1)(a) and (b).

The named insured is the person or persons who have authority to amend the policy by adding vehicles to it or to cancel the policy. Typically, the declarations page will identify the policyholder or named insured. A person who is simply listed as an additional driver under the policy is not a named insured and cannot not give "consent' to others to use the vehicle. *Laird v. Allstate Insurance Company*, 232 Or App 162, 221 P3d 780 (2009). Furthermore the Oregon FRL did not adopt the Initial Permission Rule which permits any person initially given permission by the named insured to use an insured vehicle, to in turn permit another person to use the vehicle. *Id.* 221 P3d at 786. As the court noted:

> The specific provision in the FRL requiring coverage for permissive users is found in ORS 806.080(1)(b)…. The text of ORS 806.080(1)(b) provides that a liability insurance policy used to comply with statutory financial responsibility requirements 'must include in its coverage all persons who, with the consent of the named insured, use the motor vehicles insured under the policy, except for any persons specifically excluded from coverage under ORS 742.450.'…..
> Even if the overriding goal of the FRL were to provide universal coverage, the text of ORS 806.080(1)(b) simply cannot be reconciled with that aim. The statue mandates coverage for all persons using an insured vehicle "with the consent of the named insured." When an initial borrow allows a third person to use a vehicle despite having been told by the named insured not to do so, the third person cannot be said to be using the vehicle with the consent of the named insured. …
> *Id.,* 221 P3d at 786.

# Pennsylvania

COVERAGE

**I. Financial Responsibility:** The following coverages are mandatory, unless the otherwise insured party files a Certificate of Self-Insurance with the Commonwealth.

**A.** **Liability Coverage**: Every operator of a motor vehicle registered in Pennsylvania is required to be financially responsible. "Financial responsibility" is defined as the ability to respond in damages for liability on account of accidents arising out of the maintenance or use of a motor vehicle in the amount of $15,000 because of injury to one person in any one accident, in the amount of $30,000 because of injury to two or more persons in any one accident, and in the amount of $5,000 because of damage to property of others in any one accident.

**B.** **First Party Benefits**: Every policy of insurance covering a motor vehicle registered in Pennsylvania, including a bus and tractor-trailer, but excluding a trolley/streetcar, must provide coverage for medical benefits in the amount of $5,000. 75 Pa.C.S.A. § 1711(a). Under Pennsylvania's Motor Vehicle Financial Responsibility Law ("MVFRL"), first party, or PIP benefits, must be made available for purchase, but coverage is not mandatory. First party benefits include:

**(1) Medical Benefits** - coverage for all reasonable and necessary medical treatment and rehabilitative service, with limits up to at least $100,000;

**(2) Extraordinary Medical Benefits** - reasonable and necessary medical treatment and rehabilitative services which exceed $100,000, the coverage limits of which must be from at least $100,000 to $1,100,000;

**(3) Income Loss Benefits** - includes 80% of actual loss of gross income. $2,500 per month to a maximum benefit of at least $50,000 must be made available;

**(4) Accidental Death** - the available death benefit paid to the insured's personal representative, up to at least $25,000;

**(5) Funeral Benefits** - $2,500.

Under Pennsylvania's modified no-fault system, any person who suffers injury arising out of the "maintenance or use" of a motor vehicle is entitled to recover first party benefits from the applicable insurance coverage in the following order of priority:

(1) for a named insured, the policy on which he is the named insured;

(2) for an insured, the policy covering the insured;

(3) for the occupants of an insured motor vehicle, the policy on that motor vehicle;

(4) for persons not occupying a motor vehicle, i.e., pedestrians, the policy on any motor vehicle involved in the accident.

Note: A parked and unoccupied vehicle is not a motor vehicle involved in an accident unless it was parked so as to cause unreasonable risk of injury.

75 Pa.C.S.A. § 1713(a).

*Statute in Context*

> If a passenger in the insured's vehicle owns a motor vehicle and is the named insured on a policy covering that vehicle, or is an insured under any other policy, he must look to one of those policies, and not the insured's policy, for first party benefits. If the passenger is the owner of a currently registered motor vehicle, but does not have financial responsibility, he cannot recover first party benefits from any source. 75 Pa.C.S.A. § 1714. If, however, the passenger does not own a motor vehicle and is not covered by any other insurance policy, then he may recover first party benefits under the insured's policy because that is the first applicable policy on the priority list under §1713(a).

If the motor vehicle with which an insured vehicle is involved in an accident is covered by an insurance policy, both the driver and the passenger(s) of the motor vehicle must look to the policy on that motor vehicle for First Party Benefits. If the motor vehicle is not presently insured, the owner of the vehicle, if in the vehicle at the time, is barred from recovery of first party benefits from the vehicle in which they are a passenger, but those who are not the owners are not.

**Stacking of Benefits -** The MVFRL does not permit the stacking of limits of coverage for first party benefits. 75 Pa.C.S.A. § 1717.

**Exclusion from Benefits** – Benefits are excluded from any insured when: the insured intentionally injures himself or another or attempting to injure himself or another; while committing a felony; and while seeking to elude lawful apprehension or arrest by a law enforcement official. A person who knowingly converts a motor vehicle is ineligible to receive first party benefits from any source other than a policy of insurance under which he is insured for injuries arising from maintenance or use of a converted vehicle, and insurers may exclude persons from benefits through named driver exclusions. 75 Pa.C.S.A. § 1718.

**Audit/Review of Medical Bills -** All healthcare providers' bills must be forwarded directly to the insurer, not to the insured, for collection. Two separate evaluations should be made of all bills received by the carrier. First, an injured person or the healthcare provider providing medical treatment to that person (to whom plaintiff's right to benefits is generally assigned**)** may not receive first party benefits in excess of 110% of the prevailing charge at the 75 percentile of that rate pertaining to the service involved applicable under the Medicare program for comparable services. If applicable, the measure against which recoverable benefits are made may be 110% of the applicable fee schedule, the recommended fee or the inflation index charge; or 110% of the diagnostic-related groups (D.R.G.) payment. 75 Pa.C.S.A. § 1797(a). Therefore, all bills should be independently audited with respect to the amount charged.

Second, all insurers covered by the MVFRL are required to contract with a peer review organization (PRO) for the purpose of evaluating treatment and healthcare services provided to a claimant. 75 Pa.C.S.A. § 1797(b). PRO evaluations are for the purpose of confirming services as reasonable and medically necessary. If an insurer intends to challenge the reasonableness and medical necessity of treatment reflected in a claimant's bill, it must submit its challenge to its PRO within 90 days of receipt of the provider's bill. If an insurer challenges a bill within 30 days of receipt, it need not pay the healthcare provider until a determination has been made by the PRO. Otherwise, it is required to pay the bill, pending the outcome of the peer review. If the PRO determines a bill is reasonable and medically necessary, the insurer must pay the bill plus 12% interest per annum on any balance it withheld after the 30 days. If the PRO determines certain treatment was not reasonable or medically necessary, and the carrier has paid the bill, the provider must reimburse the carrier for any benefits paid plus 12% interest per annum thereon. If an insurer fails to submit a bill to a PRO and refuses payment for that and future bills, the healthcare provider and/or insured may challenge the insurer's refusal in Court. If the Court determines medical treatment was necessary and reasonable, the insurer will be required to pay the outstanding

amount plus 12% interest, as well as the costs of the challenge and all attorneys' fees. Conduct considered to be wanton shall be subject to a payment of treble damages.

**NOTE:** Because of the extent of potential exposure (attorney fees, interest, treble damages), it is advisable to submit a claim to a PRO in almost all situations. Also, firms that simply audit bills for compliance with § 1797(a) (i.e., the amount of the bill) most often do not evaluate the reasonableness and necessity of treatment, and therefore submission to such agencies will not satisfy the requirement of submission of bills to a PRO.

**Bad Faith -** The failure of an insurer to submit bills to a bona fide PRO (as opposed to a mere auditing firm) is frequently the basis of a plaintiff's claim of bad faith. Pennsylvania courts have held, however, that the Pennsylvania statute creating a cause of action against an insurer for bad faith conduct is not applicable to actions for denial of first party benefits under the MVFRL. Although the court may, under 42 Pa.C.S.A. § 8371, award interest, court costs, attorney fees and punitive damages against an insurer found to have acted in bad faith toward its insured, only the remedies under § 1797(b) apply with regard to bad faith conduct for failure to pay first party benefits under the MVFRL. Thus, the punitive damages remedy available under § 8371 is not available in a claim for first-party benefits under § 1797.

**Subrogation -** No right to subrogation exists with respect to BI benefits paid or payable between First Party Benefit providers. 75 Pa.C.S.A. § 1720.

**Exceptions** - There is a right of subrogation for an insurance company who pays workers' compensation benefits to a person injured in a motor vehicle accident. Also, an ERISA plan that pays medical benefits is entitled to subrogation. Medicare, Medicaid and payments made by the Pennsylvania Department of Public Assistance are all subject to subrogation. To the extent that subrogation is allowed, only the amount actually paid is recoverable, not the face amount of the bill. For example, if there is a hospital bill for $10,000 and Medicare pays $6,000 to satisfy that obligation, the amount of the subrogation lien and the amount that could be presented to a jury for consideration in a verdict is $6,000.

There is no right of subrogation or reimbursement from a plaintiff's tort recovery with respect to first party benefits paid or payable under any applicable policy covering plaintiff. 75 Pa.C.S.A. § 1720.

**Statute of Limitations** - If first party benefits have not been paid, an action to recover such benefits shall be commenced within four years from the date of the accident giving rise to the claim. If first party benefits have been paid, an action for further benefits shall be commenced within four years from the date of the last payment. For minors entitled to § 1711 and § 1712 benefits, an action for first party benefits shall be commenced within 4 years after the minor turns 18 years old.

**C.** **Property Damage**: Coverage for property damage must be acquired in the amount of $5,000 for any one accident to be financially responsible under the MVFRL.

**D.** **Uninsured Motorist and Underinsured Motorist (UM/UIM) Coverage**: UM/UIM coverage must be made available, but coverage is not required under the MVFRL.

**Important**: Unless coverage is waived by the first named insured on the policy by signing and dating an approved form, the insured is deemed to have elected UM/UIM coverage in amounts equal to the BI coverage. 75 Pa.C.S.A. § 1731(c.1).

Each waiver form must be on a separate sheet. The separate sheet requirement means only that UM and UIM forms must be separate from each other.

**Stacking of UM/UIM Coverage:** Absent a waiver of stacking on the policy in return for a reduced premium, "insureds" may stack UM/UIM claims based on the sum of the limits of coverage on vehicles on applicable policies.

**Priority of UM/UIM Coverage 75 Pa.C.S.A. § 1733** - Where multiple policies are applicable, the priority of recovery outlined by the statute is:

(1) The policy covering the motor vehicle occupied by the claimant;

(2) The policy under which the claimant is an insured.

The priority of UM/UIM for all passengers, including the employee driver, is the vehicle which they occupy.

## II. Third Party Claims

**A.** **Tort Threshold Options**: The MVFRL permits an insured to choose one of two options regarding his ability to sue for non-economic damages (pain and suffering, inconvenience).

**(1) "Limited Tort" Option**: An insured may sue for economic losses, but not for noneconomic losses unless the injuries sustained fall within the definition of "serious injury" or "serious impairment of a bodily function" as set forth in the applicable policy. An owner of a currently registered private passenger motor vehicle who lacks financial responsibility, i.e., has no insurance, is deemed to have chosen the limited tort option if he brings suit as a result of an accident.

**NOTE**: An individual otherwise bound by the limited tort option retains full tort rights, including the right to sue for non-economic damages, if injured while an occupant of a motor vehicle other than a private passenger motor vehicle. Therefore, as an example, a bus passenger may recover economic as well as non-economic damages.

**(2) "Full Tort" Option**: An insured may seek recovery for all economic as well as noneconomic damages. An individual who is neither the owner of a currently registered private passenger motor vehicle nor a named insured nor an insured under any private passenger motor vehicle policy is treated as though she had elected the full tort option.

**B.** **Negligence Theories**:

**Comparative Negligence Act**: Pennsylvania is a modified comparative negligence state. Under 42 Pa.C.S.A. § 7102, a plaintiff must be at least 51% at fault in order to be barred from recovery. If plaintiff is found 50% or less negligent, he is entitled to recover the damages awarded less the percentage of fault attributable to him.

The negligence of a driver cannot be imputed to his claimant passenger and the passenger is presumed to have exercised due care, unless it can be shown the guest concurred in the driver's negligence, i.e., smoking marijuana with the driver, allowing the driver to drive even though the passenger is aware the driver is intoxicated. A child under seven years of age cannot be found contributorily negligent. Children between seven and fourteen years of age are presumed non-negligent, but the presumption is rebuttable.

**C.** **Joint and Several Liability**: On June 28, 2011, Pennsylvania enacted the Fair Share Act. In doing so, Pennsylvania largely eliminated joint and several liability and the "Deep Pockets" rule. Prior to the Fair Share Act, in civil cases involving multiple tortfeasors, a defendant found even 1% liable could be required to pay 100% of the damages awarded to the plaintiff. Under the Fair Share Act, where recovery is allowed against more than one defendant each defendant is only responsible for paying damages equal to the percentage of liability found against him. For example, if a defendant is found to be 25% liable, then he would only be responsible for paying 25% of the total damages. Thus, each defendant pays their "fair share." 42 Pa.C.S.A. § 7102(a.1)

There are several exceptions in the Act. Most notably, joint and several liability still applies to defendants found 60% or more liable. 42 Pa.C.S.A. § 7102(a.1)(3)(iii). Therefore, a defendant could still be required to pay 100% of the damages awarded to the plaintiff if he is found 60% or more liable. Additionally, under the Act joint and several liability applies, and a tortfeasor will still be responsible for 100% of the plaintiff's damages regardless of his percentage of liability, in actions for 1) intentional misrepresentation, 2) intentional tort, 3) a release or threatened release of a hazardous substance under the Hazardous Sites Cleanup Act, and 4) serving alcohol to a visibly intoxicated person under Section 497 of the Liquor Code.

Finally, under the Act any party may request that the liability of a defendant or other non-party who entered into a release with the plaintiff be taken into consideration when apportioning liability. Therefore, a party may request to add a defendant or other non-party's name to the verdict form. To do so, a party must make an appropriate request and proofs. 42 Pa.C.S.A. § 7102(a.2).

**D.** **Statute of Limitations:** The statute of limitations for third party bodily injury and property damage claims is two years. However, the statute of limitations on the claims of a minor does not begin to run until the minor reaches 18 years of age, which is the age of majority in Pennsylvania.

**E.** **Punitive Damages:** Punitive damages are not generally covered by insurance policies issued in the Commonwealth of Pennsylvania. However, vicariously assessed punitive damages are insurable. A plaintiff may plead and recover punitive damages for outrageous conduct or acts committed with reckless disregard for human life. Punitive damages must be specifically pled in plaintiff's complaint. The willful and malicious, and even criminal, acts of an employee may not be imputed to his employer unless they were committed within the course and scope of employment and are of the kind and nature the employee was hired to perform, i.e., a bouncer at a bar throwing a drunk patron into the street.

**F.** **Wrongful Death/ Survival:** The wrongful death action is brought by the survivors of a decedent to recover funeral, medical, administrative expenses and value of loss of services. A survival action is brought by the estate of a decedent to recover on any cause of action the decedent would otherwise still possess, such as future loss of wages and pain and suffering. The statute of limitations is two years for both causes of action.

**G.** **Permissive Use** - The MVFRL provides in relevant part:

> Any owner of a motor vehicle for which the existence of financial responsibility is a requirement for its legal operation shall not operate the motor vehicle or permit it to be operated upon a highway of this Commonwealth without the financial responsibility required by this chapter.

75 Pa.C.S.A. § 1786(f). The MVFRL does not provide that all permissive users of a vehicle must be insured under the owner's policy.

"Under an omnibus clause of an automobile insurance policy which designates as insured any person using the insured vehicle with the permission of the owner, the permission necessary to elevate the user to the status of an additional insured may be express or implied. . . . Implied permission may arise from the relationship of the parties or by virtue of a course of conduct in which the parties have mutually acquiesced." *Federal Kemper Ins. Co. v. Neary*, 366 Pa. Super. 135, 530 A.2d 929 (1987). When the driver's deviation from the insured's permission to use the automobile is "slight and inconsequential," coverage to an omnibus insured will be extended. However, when the deviation is substantial, coverage will not be extended. *General Acc. Ins. Co. of America v. Margerum*, 375 Pa. Super. 361, 544 A.2d 512 (1988) (interpreting a business automobile policy).

With respect to whether a third party's actions are covered under another's insurance policy, the Pennsylvania Supreme Court has stated that "the operator must be shown to have obtained possession of the car lawfully and with permission, express or implied, of the named [insured]; if there is a complete lack of permission to use the car for any purpose, the operator is clearly not within the coverage of the policy." To trigger implied consent coverage for third-party accidents, the necessary permission can be implied from the parties' relationship or through the course of conduct to which they have mutually acquiesced. *Adamski v. Miller*, 545 Pa. 316, 681 A.2d 171 (1996). To illustrate, in *Adamski*, the driver was found to have implied consent to drive his girlfriend's mother's car at the time of accident. The court based this determination on evidence that the driver and his girlfriend lived together, were expecting a child together, and the mother knew that he did not have a car.

Named driver exclusions are permitted in Pennsylvania pursuant to Section 1718(c) of the MVFRL, and are designed to lower insurance premiums and allow insurance companies to lower their risks. *Donegal Mutual Ins. Co. v. Fackler*, 835 A.2d 712 (Pa. Super. 2003). In *Donegal,* the automobile liability policy stated that the "named driver exclusion" applied "to the use of any other motor vehicle to which the terms of the policy would ordinarily be extended," and "whether or not such operation was with the express or implied permission of a person insured under [the] policy." The court held that the exclusion clearly and unambiguously precluded coverage regardless of whether the driver's use of the insured's vehicle was permissive.

"Nonpermissive use" exclusions for uninsured motorist ("UM") benefits in an automobile insurance policy have been upheld by Pennsylvania courts and found not against public policy. *Nationwide Mut. Ins. Co. v. Cummings*, 438 Pa. Super. 586, 652 A.2d 1338 (1994).

**H. <u>Seat Belt Defense</u>:** Pennsylvania has abolished the seat belt defense. Although all drivers and passengers are required by statute to wear seat belts, evidence of a plaintiff's failure to wear a seat belt is inadmissible in a civil proceeding.

**I. <u>Intoxication</u>:** Pennsylvania reduced the legal limit for intoxication from .10% to .08% effective February 1, 2006. The legal limit for intoxication is a blood alcohol level of 0.08, but medical testimony can be used to establish a driver was impaired at a lesser blood alcohol level. 75 Pa.C.S.A. § 3802(a). The server of alcohol can be held liable to a third party if it serves alcohol to a visibly intoxicated person and the third person's injuries are proximately caused by the intoxicated person's intoxicated state. 47 Pa.C.S.A. § 4-497. The legal drinking age in Pennsylvania is 21 years old.

However, it is possible to present evidence that a person was impaired due to consumption of alcohol or drugs even if the blood alcohol is less than .08%. Medical evidence and, in particular, physical evidence, such as observations of the individual by witnesses, would be necessary to establish that a person was impaired even though the blood alcohol level was less than .08%. Additionally, expert testimony from a toxicologist would be important evidence.

A server of alcohol can be held liable to a third person to whom alcohol is served if that individual was visibly intoxicated when served. Visible intoxication can be proven by circumstantial evidence. However, to be liable under Pennsylvania's Dram Shop Act, the person serving the alcohol must be a "licensee," i.e. it has a license issued by a state to serve alcoholic beverages. Pennsylvania does not recognize social host liability. Therefore, there is no liability to a person or entity who is not a licensee for serving alcohol to someone who is visibly intoxicated if that individual is later involved in a motor vehicle accident. However, there is liability of a social host if the individual served alcohol is a minor, that being someone under the age of 21 years.

**J.** **Family Immunity**: All such immunity has been abolished.

**K.** **Workers' Compensation**: A workers' compensation carrier has a right to subrogation from a plaintiff's tort recovery. 75 Pa.C.S.A. § 1720. This provision became effective on August 31, 1993, and has been held to apply where the subject accident occurred after the effective date. It does not apply where the accident occurred before the effective date, but the right to subrogation accrued subsequently.

When a claimant receives money in a lawsuit concerning a work injury, the workers' compensation carrier is limited to recovery only to the extent that future disability benefits are payable to the claimant. Therefore, a carrier is not entitled to a credit for future medical expenses against the balance of the recovery. *Whitmoyer v. WCAB*, 186 A.3d 947 (Pa. 2018).

# Rhode Island

**Bodily Injury:** A motor vehicle insurance policy must provide coverage of at least $25,000 for bodily injury to or death of any one person and coverage of at least $50,000 for bodily injury to or death of two (2) or more persons in any one accident. R.I. GEN. LAWS § 31-31-7.

**Property Damage:** A motor vehicle insurance policy must provide coverage of at least $25,000 for injury to or destruction of property of others in any one accident. R.I. GEN. LAWS § 31-31-7.

**Uninsured Motorist Coverage:** All automobile liability insurance policies must include uninsured motorist (UM) coverage unless the insured specifically rejects such coverage. R.I. GEN. LAWS § 27-7-2.1(a).

In Rhode Island the owner of an automobile must obtain UM liability insurance if he purchases more than the statutorily required minimum insurance coverage, which is $25,000 per person, $50,000 per accident for bodily injury or death. The insurer must offer UM coverage in an amount equal to the insured's bodily injury liability limits. R.I. GEN. LAWS § 27-7-2.1(a). However, the insured may select a UM limit less than the bodily injury liability coverage. *Id.* In no event shall the amount of UM insurance be less than the minimum amount described above, unless the insured is purchasing only the minimum amount of compulsory insurance, in which case the UM limit may be reduced to zero. Note: the insured must first sign an advisory notice approved by the Director of the Rhode Island Department of Business Regulation concerning the hazards of uninsured and underinsured motorists. *Id.*

An insured may also reject, in writing, uninsured motorist property damage coverage. R.I. GEN. LAWS § 27-7- 2.1(b).

For a discussion of the rejection of uninsured motorist coverage, see *Ferreira v. Integon Nat'l Ins. Co.*, 809 A.2d 1098 (R.I. 2002).

**Negligence:** Rhode Island adheres to the pure form of comparative negligence. A claimant's negligence does not bar recovery, but the fact finder must reduce the amount of damages awarded in proportion to the amount of negligence attributable to the claimant. R.I. GEN. LAWS § 9-20-4. For example, a plaintiff may recover 1% of his damages even if he is 99% negligent.

**§ 31-33-7. Prima facie evidence of consent of owner.**

In all civil proceedings, evidence that at the time of the accident or collision the motor vehicle was registered in the name of the defendant, shall be prima facie evidence that it was being operated with the consent of the defendant, and the absence of consent shall be an affirmative defense to be set up in the answer and proved by the defendant.

**§ 31-33-6. Owner's liability for acts of others.**

Whenever any motor vehicle shall be used, operated, or caused to be operated upon any public highway of this state with the consent of the owner, lessee, or bailee, expressed or implied, the driver of it, if other than the owner, lessee, or bailee, shall in the case of an accident be deemed to be the agent of the owner, lessee, or bailee, of the motor vehicle unless the driver shall have furnished proof of financial responsibility in the amount set forth in chapter 32 of this title, prior to the accident. For the purposes of this section, the term "owner" includes any person, firm, co-partnership, association, or corporation having the lawful possession or control of a motor vehicle under a written sale agreement.

**Permissive Use:** Under Rhode Island statutory law, where it is shown that a motor vehicle was registered to the defendant at the time of the injury complained of, this is prima facie evidence that the vehicle "was being operated with the consent of the defendant, and the absence of consent shall be an affirmative defense to be set up in the answer and proved by the defendant." R.I. Gen. Laws §31-33-7 ("Prima facie evidence of consent of owner").

Rhode Island courts have noted that "rarely under this statute can it be ruled as a matter of law that an affirmative defense has been made out or that a prima facie case under the statute has been overcome." Kent v. Draper Soap Co., 75 R.I. 30, 37 (1949) (finding that "evidence that the vehicle was registered in the defendant's name was enough to take the question of consent to the jury"); see also Gemma v. Rotondo, 62 R.I. 293, 301, 5 A.2d 297, 301 (1939) (concluding that ordinarily a jury would determine whether a defendant's affirmative defense of lack of consent overcomes a plaintiff's statutory prima facie case).

For example, a genuine issue of material fact existed as to whether a defendant motorist was operating vehicle with the vehicle's lessee's consent, precluding summary judgment in negligence action for damages stemming from an automobile accident, because, although the lessee claimed that the motorist did not have her permission to operate the vehicle, the fact that the vehicle was registered in the lessee's name was prima facie evidence that it was being operated with consent. Andreoni v. Ainsworth, 898 A.2d 1240 (2006).

If the defendant owner produces evidence that he is actually not the owner of the vehicle, and this evidence is not refuted by the plaintiff, the alleged owner will escape liability. Battista v. Muscatelli, 106 R.I. 514, 261 A.2d 636 (1970) (finding that a defendant automobile owner was not liable, by reason of statutory implied consent, for a driver's negligence, as the owner affirmatively swore, in an affidavit supporting his summary judgment motion, that the automobile was, in fact, registered to the driver's employer at the time of the accident, and plaintiffs' attorney did not by affidavit contradict that sworn statement).

**Rear-End MV Accidents**

Under Rhode Island law, a claim resulting from a rear-end collision creates a rebuttable presumption that the driver of the second vehicle is at fault. Barnes v. Quality Beef Co., 425 A.2d 531 (R.I. 1981); Maglioli v. J.P. Noonan Transportation, Inc., 869 A.2d 71 (R.I. 2005). Ordinarily, a judge will prefer to allow questions of negligence to be given to a jury rather than being settled before trial if there is even slight evidence that would explain the rear-end collision. Russo v. Odell, 252 A.2d 135 (R.I., 1969); DeMaio v. Ciccone, 59 A.3d 125 (R.I. 2013).

Assumption of the risk is a complete bar to recovery in situations where the claimant had actual knowledge of the hazard. As discussed in Kennedy v. Providence Hockey Club, Inc., 119 R.I. 70, 75, 376 A.2d 329, 332 (1977), Rhode Island's comparative negligence statute "neither diminishes the validity of assumption of the risk as a defense to negligence actions nor makes it a mere mitigating factor in assessing liability."

**Statute of Limitations:** Except as otherwise specially provided, the limitation period for all civil actions is ten (10) years. R.I. GEN. LAWS § 9-1-13.

The statute of limitations for personal injury actions is three (3) years. R.I. GEN. LAWS § 9-1-14(b). This period applies to all actions in which the claim arises out of personal injury, regardless of whether the plaintiff is seeking relief under a theory of strict liability, implied warranty or negligence. Pirri v. Toledo Scale Corp., 619 A.2d 429 (R.I. 1993). See also Benner v. J.H. Lynch & Sons, Inc., 641 A.2d 332 (R.I. 1994) (claims arising from auto accidents must be brought within 3 years of the accident).

The limitation period for wrongful death actions is three (3) years from the time that the 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, 10-7-7. See also O'Sullivan v. Rhode Island Hosp., 874 A.2d 179 (R.I. 2005).

A compilation of the various statutes of limitation for civil actions appears at R.I. GEN. LAWS § 9-1-36.

**Liability of A Minor:** The age of majority in Rhode Island is 18. R.I. GEN. LAWS § 15-12-1.

A child must exercise the degree of care that children of the 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).

In addition to any other liability that may exist, the parents of an unemancipated minor may be jointly and severally liable with the minor in an amount up to $1,500 for damages to property or injury to a person caused by the minor's willful or malicious conduct. R.I. GEN. LAWS § 9-1-3. *But see* R.I. GEN. LAWS § 12-19-33, which grants a family court justice the authority to order the parents of an unemancipated minor to make financial restitution up to $2,000. A parent may also be personally liable for injuries caused to a third person by his unemancipated minor child as a result of the parent's own negligence. See Salisbury v. Crudale, 41 R.I. 33, 102 A. 731 (1918).

**Spousal Immunity and Intrafamily Immunity:** Rhode Island has explicitly and totally abrogated the common law doctrine of interspousal immunity. R.I. GEN. LAWS § 15-4-17. *See Digby v. Digby*, 120 R.I. 299, 388 A.2d 1 (1978). It has also abrogated the defense of parent-child immunity. *Silva v. Silva*, 446 A.2d 1013 (R.I. 1982)

**Punitive Damages:** The Supreme Court of Rhode Island has repeatedly emphasized that punitive damages are awarded not to compensate for injury or loss, but to punish the offender and to deter future misconduct. Abbey Medical/Abbey Rents, Inc. v. Mignacca, 471 A.2d 189, 195 (R.I. 1984); see also *Greater Providence Deposit Corp. v. Jenison*, 485 A.2d 1242, 1244 (R.I. 1984). Punitive damages may be awarded only when the party seeking them produces "evidence of such willfulness, recklessness or wickedness, on the part of the party at fault, as amount[s] to criminality, which for the good of society and warning to the individual, ought to be punished." Sherman v. McDermott, 114 R.I. 107, 109, 329 A.2d 195, 196 (1974) (quoting *Hagan v. Providence & Worcester R.R. Co.*, 3 R.I. 88, 91 (1854)). See also Morin v. Aetna Cas. & Sur. Co., 478 A.2d 964, 967 (R.I. 1984). Whether adequate facts exist to support an award of punitive damages is a question of law for the court to decide. Sherman, 114 R.I. 108, 329 A.2d 196. Even in actions in which punitive or exemplary damages are appropriate, such an award is discretionary with the finder of fact. Scully v. Matarese, 422 A.2d 740, 741 (1980).

Rhode Island has adopted the view that an automobile insurer is not required to indemnify injured parties for punitive damages assessed against its insured. According to the court in Allen v. Simmons, 533 A.2d 541, 543 (R.I. 1987), coverage would defeat the purpose of punitive damages, which is not to enrich or reward a plaintiff, but rather to serve as a lesson both to the wrongdoer and to others who might be tempted to follow in his path. In addition, allowing coverage would serve no useful purpose, since the award of compensatory damages supposedly makes the plaintiff whole. Further, the uninsured motorist statute, R.I. GEN. LAWS § 27-7-2.1, does not require an insurer to provide coverage for punitive damages, since the intention of the law is to protect an insured against his or her actual loss.

Rhode Island law provides that an insured under any insurance policy may bring an action against the insurer for the insurer's bad faith refusal to pay or settle a claim made pursuant to the provisions of the policy. In such an action the insured may seek compensatory damages, punitive damages and reasonable attorney fees. The trier of fact shall determine whether the insurer has acted in bad faith. R.I. GEN. LAWS § 9-1-33. See also Bibeault v. Hanover Ins. Co., 417 A.2d 313 (R.I. 1980). However, as stated in *Bartlett v. John Hancock Mut. Life Ins. Co.*, 538 A.2d 997, 1000 (R.I. 1988), "There cannot be a showing of bad faith

when the insurer is able to demonstrate a reasonable basis for denying benefits." To avoid bad faith liability, an insurer may enter into a nonwaiver agreement to defend an insured and later question coverage or bring a declaratory judgment action on the question of coverage. See Rumford Prop. & Liab. Co. v. Carbone, 590 A.2d 398, 401 (R.I. 1991).

Insurance companies must pay settled claims within 30 days of the date that the claimant sends the release. Payors failing to make timely payment shall be liable in a separate cause of action for punitive damages and interest at a rate of 12% per annum from the date the cause of action giving rise to the settlement occurred.

R.I. GEN. LAWS § 9-1-50.

**Direct Action Statute**: The general rule in Rhode Island is that an insured party has no right to a direct action against the insurer for a tortfeasor. However, section 22-7-2 of the General Laws of Rhode Island permits a direct action against an insurer in limited situations, such as when service of process against the insured is returned "*non est inventus*" or the named insured dies before judgment is entered. The Rhode Island Supreme Court has emphasized that section 27-7-2 "is designed only to provide a remedy to the injured party and not to enlarge the liability of the insurer beyond the limits stated in the policy." Barber v. Canela, 570 A.2d 670, 671 (R.I. 1990). Further, initiating a direct action against the insurer does not toll or otherwise extend the statute of limitations to bring an action. Rivers v. American Commerce Ins. Co., 836 A.2d 200, 205 (R.I. 2003). The direct action statute applies only to Rhode Island policies. Coderre v. Travelers Ins. Co., 48 R.I. 152, 136 A. 305 (1927).

A tort claimant may file a complaint directly against the liability insurer of an alleged tortfeasor whenever the tortfeasor files for bankruptcy. However, the injured party cannot recover in excess of the available coverage. R.I. GEN. LAWS § 27-7-2.4. In Giroux v. Purington Building Sys., Inc., 670 A.2d 1227, 1231 (R.I. 1996), the Rhode Island Supreme Court determined that federal bankruptcy law did not preempt section 27-7-2.4, explaining that "[s]ince substituting the insurer as defendant results in no harm to the other creditors of the debtor when there is but one claimant against the policy, we therefore hold that substitution of the insurer does not frustrate the goals of federal bankruptcy law." However, the court left open the question of the constitutionality of section 27-7-2.4 in cases where several creditors have claims against an insurance policy.

**Joint and Several Liability:** Rhode Island follows the common law doctrine of joint and several liability. As stated in *Roberts-Robertson v. Lombardi*, 598 A.2d 1380, 1381 (R.I. 1991), "It is a well-settled doctrine that a plaintiff may recover 100 percent of his or her damages from a joint tortfeasor who has contributed to the injury in any degree." *See also Sousa v. Casey*, 111 R.I. 623, 637-638, 306 A.2d 186, 194 (1973). The joint tortfeasor may then seek contribution pursuant to R.I. GEN. LAWS § 9-20-4 either by a separate action or by impleading the fellow joint tortfeasor under third-party practice. *Roberts-Robertson*, 598 A.2d at 1381. For a discussion of joint and several liability, *see* the Uniform Contribution Among Joint Tortfeasors Act, R.I. GEN. LAWS § 10-6-1 *et seq.*, and *Cooney v. Molis*, 640 A.2d 527 (R.I. 1994).

**Workers' Compensation:** The Workers' Compensation Act provides compensation for personal injuries arising out of and in the course of employment and for death resulting from injuries so sustained. R.I. GEN. LAWS §§ 28-29-1 to 28-38-25. With certain exceptions, the Act applies to all employees, as defined in section 28-29-2(4), who are injured or hired in the state of Rhode Island. *Id.* at

§ 28-29-1.3. Whenever a general contractor or a construction manager enters into a contract with a subcontractor for work to be performed in Rhode Island, the general contractor or construction manager shall require written documentation evidencing that the subcontractor carries workers' compensation insurance for its employees or is an independent contractor. If the general contractor or construction manager fails to obtain such written documentation, the general contractor or construction manager shall

be deemed to be the employer. R.I. GEN. LAWS § 28-29-6.1.

A worker who has received compensation benefits may not reap the benefits of a double recovery. Thus, he cannot receive both workers' compensation benefits and damages from the tortfeasor. He may sue a third party tortfeasor only if he first agrees to repay those who paid him compensation. R.I. GEN. LAWS § 28-35-

58. See Brimbau v. Ausdale Equip. Co., 119 R.I. 14, 19, 376 A.2d 1058, 1061 (1977); Benders v. Board of Governors for Higher Education, 636 A.2d 1313 (R.I. 1994). Even if an employee is working under concurrent contracts of employment when injured, he may not recover workers' compensation benefits from one employer if he has already been awarded maximum benefits from the other. Lupo v. Nursery Originals, Inc., 400 A.2d 950 (R.I. 1979).

Rhode Island has refused to apply the collateral source rule to workers' compensation. Because workers' compensation is a wage-replacement scheme, workers' compensation payments do not constitute damages from a negligent tortfeasor. Thus, 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).

**Minor Settlement:** For a release involving a sum greater than $10,000 to be valid and binding on an injured minor, a court-appointed guardian ad litem must execute the release on behalf of the minor, and the court must approve it. R.I. GEN. LAWS § 33-15.1-1(b). See Julian v. Zayre Corp., 116 R.I. 518, 388 A.2d 813 (1978).

**Wrongful Death:** Wrongful death actions in Rhode Island are statutory, R.I. GEN. LAWS § 10-7-1 *et seq.*, and can exist only if the decedent would have been able to maintain an action and recover damages if death had not ensued. See Hall v. Knudsen, 535 A.2d 772 (R.I. 1988). Damages recovered are not an asset of the decedent's estate, but rather are awardable to beneficiaries prescribed in R.I. GEN. LAWS §10-7-2. However, a beneficiary may not recover wrongful death or "survival-type" damages when the beneficiary of these damages is a tortfeasor responsible for the decedent's death. Aetna Cas. & Sur. Co. v. Curley, 585 A.2d 640 (R.I. 1991).

A wrongful death action must be brought by and in the name of the executor or administrator of the deceased person. R.I. GEN. LAWS § 10-7-2. In addition to the action for wrongful death, the executor or administrator of the deceased may bring an action for hospital, medical and other expenses incurred, including diminution of earning power until the time of death, as well as pain and suffering. R.I. GEN. LAWS §§ 10-7-5 – 10-7-8. Amounts recovered in actions brought under section 10-7-5 shall go to the decedent's estate and become part of the estate. R.I. GEN. LAWS § 10-7-6. Claims for loss of society, loss of companionship and loss of consortium shall be brought in the name of those alleging the loss. R.I. GEN. LAWS §§ 10-7-1.2, 10-7-2.

Rhode Island does not cap the amount recoverable for wrongful death. The minimum recovery for wrongful death is $250,000. R.I. GEN. LAWS § 10-7-2. The measure of damages is the prospective pecuniary loss to the estate of the deceased. Romano v. Duke, 111 R.I. 459, 304 A.2d 47 (1973); McCabe v. Narragansett Elec. Co., 26 R.I. 427, 59 A. 112 (1904). By statute, such pecuniary loss is the gross amount of the decedent's prospective income or earnings over the remainder of his or her life expectancy minus the estimated personal expenses that the decedent would probably have incurred for himself or herself, exclusive of any of his dependents, over the course of his or her life expectancy, reduced to its present value as of the date of the award. Pecuniary damages include the value of homemaker services. R.I. GEN. LAWS § 10-7.1.1.

The wrongful death of an unborn but viable fetus prior to birth is compensable under Rhode Island's

wrongful death act. *Presley v. Newport Hosp.,* 117 R.I. 177, 365 A.2d 748 (1976). But see Miccolis v. AMICA Mut. Ins. Co., 587 A.2d 67 (R.I. 1991), where the court ruled that a nonviable, five-week old fetus was not a "person" for purposes of recovery under the wrongful death statute.

The statute of limitations for a wrongful death claim is three (3) years from the date of death; if the wrongful act is not known at the time of death, the action shall be commenced within three (3) years from the time that the wrongful act is discovered, or, in the exercise of reasonable diligence, should have been discovered. R.I. GEN. LAWS § 10-7-2.

**Loss of Consortium:** Loss of consortium is a separate legal action in Rhode Island. R.I. GEN. LAWS § 9-1-41. An unemancipated minor may recover damages for loss of parental society and companionship; parents may recover for the loss of a minor child's society and companionship. R.I. GEN. LAWS § 10-7-1.2.

However, loss of consortium is a derivative claim and attached inextricably to the claim of the injured spouse or parent. Damages for both loss of consortium and bodily injury claims are thus subject to the single per person limit of liability afforded by the insurance policy. Allstate Ins. Co. v. Pogorilich, 605 A.2d 1318 (R.I. 1992). See *also* VanCleef v. Navilliat, 622 A.2d 442 (R.I. 1993). A loss of consortium claim must be joined with the underlying tort claim whenever it is practicably feasible to do so. Desjarlis v. USAA Ins. Co., 824 A.2d 1272 (R.I. 2003).

**Property Damage:** When the injury to property is temporary, the measure of damages is the amount necessary to restore the property as of the date of injury. Tortolano v. DiFilippo, 115 R.I. 496, 349 A.2d 48 (1975). When injury to property is permanent, the measure of damages is the diminution of its value, calculated by determining the difference between the property's fair market value just before the damage and its fair market value following the damage. The calculation shall consider the costs of repair, demonstrated by presenting the repair bills or through expert testimony. Greco v. Mancini, 476 A.2d 522 (R.I. 1984).

An insurance company taking possession of a vehicle that has been declared a total loss shall deliver the certificate of title to the Registry of Motor Vehicles within ten (10) days of taking possession of the vehicle.

R.I. GEN. LAWS § 31-46-1. If the insurance company then sells the salvaged vehicle it must obtain a salvage certificate title. The company must apply to the Registry of Motor Vehicles for the certificate of title for a fee of $25. R.I. GEN. LAWS § 31-46-2.

**Collateral Sources:** The common law collateral source rule is a well-established principle of Rhode Island law, preventing defendants in tort actions from reducing their liability by presenting evidence that the injured party received compensation for injuries from a source wholly independent of the tortfeasor. Although the rule may allow plaintiffs to recover damages in excess of their injuries, the rationale underlying the rule is that it is better for the windfall to go to the injured party rather than to the wrongdoer. Esposito v. O'Hair, 886 A.2d 1197, 1199 (R.I. 2005). See also Oddo v. Cardi, 100 R.I. 578, 584 218 A.2d 373, 376-377 (1966).

Medical malpractice actions are exceptions to the rule. Section 9-19-34 of the General Laws of Rhode Island effectively abrogated the collateral source rule by making collateral source benefits received by a plaintiff admissible in medical malpractice actions against physicians. See Esposito, 886 A.2d 1197, 1199-1201. See also Poulos v. Aetna Cas. & Sur. Co., 119 R.I. 409, 379 A.2d 362 (1977), where the question before the court was whether a clause reducing payments under an uninsured motorist policy by the amount paid to the insured as workmen's compensation benefits was contrary to public policy where the clause applied only to that amount of coverage which was in excess of the amount mandated by the automobile liability statute, but allowed deduction regardless of whether the insured had been fully

compensated for actual loss. The court opined that the public policies of protection for actual losses of the insured and prevention of double recovery required an interpretation of the clause to allow the deduction of workers' compensation benefits only to the extent that such benefits represented a double recovery. The court thus held that the deduction clause entitled the insurer to deduct workers' compensation benefits from the insured's total damages, rather than from the face value of the policy. 119 R.I. at 414, 379 A.2d at 365.

**Alcohol:** The blood alcohol content limit in Rhode Island is .08%. R.I. GEN. LAWS § 31-27-2. The legal age for alcohol consumption in Rhode Island is 21.

**Seatbelt Defense:** Rhode Island does not recognize a seatbelt defense. **§ 31-22-22.**

**Safety belt use:** In no event shall failure to wear a child restraint system or safety belt be considered as contributory or comparative negligence, nor the failure to wear the child restraint system, seat belt and/or shoulder harness be admissible as evidence in the trial of any civil action.

**Helmet use:** Failure to wear a helmet is not considered contributory or comparative negligence, nor is the failure to wear a helmet admissible as evidence at trial in any civil action. R.I. GEN. LAWS § 31-19-2.1 (2016).

**Insurer Liability for Excess Verdict Above the Policy Limits**

Rhode Island law provides that an insurer is liable for a judgment that exceeds the policy limits unless the insurer can demonstrate that it made a definite pretrial offer to settle the claim within the policy limits and that the claimant declined the offer. Thus, the risk of miscalculating the merits of a claim and proceeding to trial falls upon the insurer, the entity that controls the litigation and with whom the insured has contracted. Asermely v. Allstate Ins. Co., 728 A.2d 461 (R.I. 1999)

**Bad Faith and Fraud:** An insured may bring an action against an insurer when the insurer wrongfully and in bad faith refused to pay or settle a claim or refused timely performance of its obligations under an insurance policy. R.I. GEN. LAWS § 9-1-33. A plaintiff can claim compensatory and punitive damages, as well as reasonable attorney fees. *Id.*

An insurer has a fiduciary duty to act in the "best interests of its insured in order to protect the insured from excess liability . . . [and to] refrain from acts that demonstrate greater concern for the insurer's monetary interest than the financial risk attendant to the insured's situation." Medical Malpractice Joint Underwriting Association of Rhode Island v. Rhode Island Insurers' Insolvency Fund, 703 A.2d 1097, 1102 (R.I.1997). See also Asermely v. Allstate Ins. Co., 728 A.2d 461 (R.I. 1999). This duty includes an obligation to give serious consideration to a reasonable offer to settle within the policy limits. *Id.* at 464. The insurer assumes the risk of miscalculation even if it believes it has a legitimate defense in good faith. *Id.* To avoid a bad faith claim, an insurer must be able to show that (1) the claim was fairly debatable, and (2) the claim was evaluated in an appropriate and timely manner. Skaling v. Aetna Ins. Co., 799 A.2d 997 (R.I. 2002).

RI GL § 9-1-33provides that the question of whether or not an insurer has acted in bad faith in refusing to settle a claim shall be a question to be determined by the trier of fact.

The Unfair Claims Settlement Practices Act, R.I. GEN. LAWS § 27-9.1-1 *et seq.*, prohibits any resident, foreign or alien insurer doing business in Rhode Island from engaging in any act constituting an unfair claims practices, including:

a) misrepresenting relevant facts or policy provisions to claimants and insured;

b) failing to effectuate prompt, fair settlements in good faith;

c) refusing to pay claims without conducting a reasonable investigation;

d) unreasonably delaying payment of claims;

e) failing to provide forms necessary to present claims within 10 (ten) calendar days of a request;

f) misleading a claimant as the applicable statute of limitations; and

g) failing to respond to a claim within 30 (thirty)days, unless insured agrees to longer period.

The Motor Vehicle Theft and Motor Vehicle Insurance Fraud Reporting – Immunity Act, R.I. GEN. LAWS § 27-49-1 *et seq*., allows for the sharing of information about motor vehicle theft and/or motor vehicle insurance fraud between automobile insurers and governmental agencies. The Act allows governmental agencies to request and receive from insurers information relating to motor vehicle theft or fraud and also grants immunity to insurers providing that information.

An insurer of loss or damage to an insured vehicle may not pay a claim for fire coverage until the insured has filed a statement in conformity with the provisions of R.I. GEN. LAWS § 27-8.1-2.1, and the insurer has, within a reasonable time, reviewed the statement and determined that no fraud was involved. R.I. GEN. LAWS

§ 27-8-17.

Rhode Island's Unfair Trade Practice and Consumer Protection Act defines terms, prohibits various general practices as well as practices particular to specific industries, and describes the penalties and enforcement procedures for unfair trade practices. R.I. GEN. LAWS § 6-13.1-1 *et seq*. The Rhode Island Department of the Attorney General also has a consumer protection unit, which can be reached at (401) 274-4400 or at http://www.riag.state.ri.us/civilcriminal/consumerprotection.php.

In addition to the statutory provisions regarding bad faith, a party may also be liable for common law fraud. In order to establish a claim of common law fraud in Rhode Island, the plaintiff must prove each of the following four elements:

a) false representation;

b) defendant's knowledge of the statement's falsity;

c) intent to induce reliance by defendant; and

d) plaintiff's detrimental reliance.

See Women's Dev. Corp. v. City of Central Falls, 764 A.2d 151, 160-161 (R.I. 2001).

**Small Claims Court:** The Small Claims Court is a session of the District Court dedicated to cases in which the plaintiff is claiming a maximum of $2,500.00, exclusive of interest and costs, based on a contract, the collection of a tax, a negotiable instrument or a retail sale or service to a consumer. R.I. GEN. LAWS §§ 10-16- 1, 10-16-2. The Small Claims Court cannot hear personal injury or property damage cases.

When filing a small claims action, the plaintiff waives the right to appeal. R.I. GEN. LAWS § 10-16-4. The defendant may appeal to the Superior Court for a new trial unless the plaintiff is a consumer and the

defendant is a manufacturer or seller whose failure to file an answer results in default. In such instances the defendant forfeits the right to appeal. R.I. GEN. LAWS § 10-16-14; R.I. GEN. LAWS § 9-19-7.

Close and family corporations with assets less than $1 million may designate a representative to prosecute claims in the Small Claims Court. Otherwise, corporations require representation by an attorney. R.I. GEN. LAWS § 10-16-3.1.

**Mandatory Arbitration:** Every contract of motor vehicle liability insurance issued in Rhode Island by an insurance carrier authorized to do business in the state must include an arbitration provision stating that whenever the claim is for $25,000.00 or less, any person who suffers a loss resulting from the ownership or use of a motor vehicle by an insured may at his or her election submit the matter to arbitration. R.I. GEN. LAWS § 27-10.3-1(a). Both parties preserve their right to a jury trial and may exercise this right within 60 days of the arbitrator's award. R.I. GEN. LAWS § 27-10.3-1(a)(3)(i-ii). If the case proceeds to trial subsequent to arbitration, the decision of the arbitrator shall not be admissible. R.I. GEN. LAWS § 27-10.3-1(a)(3)(ii). All suits must be filed within the applicable statute of limitations, but the suit will be stayed until an arbitrator's award has been made or the case reached for trial. R.I. GEN. LAWS § 27-10.3-1(a)(4).

Additionally, the Rhode Island Courts also offer an arbitration program that is neither mandatory nor binding for claims under $100,000.00.

**Independent Medical Examinations:** When the medical condition of a person is material to evaluating a first or third party's automobile insurance claim, the individual shall submit to an independent, noninvasive medical examination conducted by impartial, competent physicians approved by the Medical Advisory Board of the Workers' Compensation Court. R.I. GEN. LAWS §§ 27-9.2-1, 27-9.2-2. Every automobile insurance policy issued in Rhode Island shall include reasonable provisions for an examination of persons claiming medical payment benefits. R.I. GEN. LAWS §§ 27-9.2-1. The automobile insurance company making the request for the examination shall pay for the examination. R.I. GEN. LAWS § 27-9.2-2.

# South Carolina

**Stacking of Insured's Policies**:

- Bodily Injury (BI) and Property Damages (PD) may be stacked. (See Misc. Section).
- Uninsured Motorist (UM) and Underinsured Motorist (UIM) may be stacked.
- Personal Injury Protection (PIP) is not allowed; Additional Personal Injury Protection (APIP) is allowed.

**Legal Age and Operation of Vehicle:** Age 17. Restricted license is issued under certain conditions at age 16 with the ability to obtain a Beginner's Permit at Age 15.

**Medical Payments**: NO.

**Owner Liable If Not In Vehicle**: Is liable under the Family Purpose Doctrine, otherwise, not liable regardless of agency or purpose. Not liable if not in course of employment or on owner's business.

**Elements of negligent entrustment in South Carolina:**

1. knowledge of or knowledge imputable to the owner that the driver was either addicted to intoxicants or had the habit of drinking;
2. the owner knew or had imputable knowledge that the driver was likely to drive while intoxicated; and
3. under these circumstances, the owner entrusted a vehicle to such a driver

*Jackson v. Price;* 288 S.C. 377, 342 S.E.2d 628 (Ct. App. 1986))

**Permissive Use**

1. The burden is on the party seeking coverage to establish that permission was given by the named insured.
2. Whether the permission is expressly granted or impliedly conferred, it must originate in the language or conduct of the named insured or of some one having authority to bind [the person] in that respect
3. Express consent must be of an affirmative character, directly and distinctly stated, clear and outspoken, and not merely implied or left to inference.
4. Implied consent, as the term suggests, rests upon proof of circumstances from which an inference of actual permission or consent reasonably arises. It involves an inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or lack of objection under circumstances signifying assent.
    a. Implied permission requires something more than mere sufferance or tolerance without taking steps to prevent the use of the automobile, and permission cannot be implied from possession and use of the automobile without the knowledge of the name insured.
    b. Insured's actual knowledge and acquiescence to third party's use constitutes implied permission.

5. Permission to use a covered vehicle for a particular purpose does not imply permission to use it for all purposes.

6. Consent should be considered limited to the purpose for which it was given.

7. Permission must be expressly or impliedly given for the particular use being made of the insured vehicle at the time of the accident.

*Catawba Ins. Co. v. Smith*, 336 S.C. 33, 518 S.E.2d 291 (Ct. App. 1999).

**Actions for Wrongful Death**:

- Brought by personal representative with 6 years if cause of action occurred prior to April 5, 1988, otherwise, 3 years. (S.C. Code Ann. § 15-3-530)

- Measure of damages - All (*Self v. Goodrich,* 300 S.C. 349, 387 S.E.2d 718 (1989)).

- Distribution of proceed - by intestate (S.C. Code Ann. § 15-51-40).

- Distribution of pain and suffering compensation goes to the estate for payment of debts *(Biales v. Southern-Railway Co.,* 227 S.C. 176, 87 S.E.2d 481 (1955); S.C. Code Ann. § 15-51-20).

**Legal Age of Majority:** Age 18.

**Uninsured Motorist Coverage:** If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, there is no right of action or recovery under the uninsured motorist provision, unless:

1. The insured or someone in his behalf has reported the accident to some appropriate police authority within a reasonable time, under all the circumstances, after its occurrence;

2. The injury or damage was caused by physical contact with the unknown vehicle, or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit;

3. The insured was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.

The following statement must be prominently displayed on the face of the affidavit provided in item (2) above: A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.

(S.C. Code Ann. § 38-77-170).

The uninsured motorist provision may not require arbitration of any claim arising under it nor may anything not otherwise herein provided for, or as may be provided in the form prescribed by the director or his designee, be required of the insured except the establishment of legal liability of the uninsured motorist, nor may the insured be restricted or prevented in any manner from employing legal counsel or instituting legal proceedings. S.C. Code Ann. § 38-77-200.

An insurer paying a claim under the uninsured motorist provision required by §38-77-150 is subrogated to the rights of the insured to whom the claim was paid against any and every person causing the injury, death, or damage to the extent that payment was made. However, the insurer shall pay its proportionate part of any reasonable costs and expenses incurred in connection with any recovery, including reasonable attorneys' fees. S.C. Code Ann. § 38-77-190.

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**Minimum Policy Limit:**

| | | |
|---|---|---|
| Bodily Injury: | $25,000.00 /$50,000.00 | |
| Property Damage: | $25,000.00 | |
| Uninsured Motorist: | $25,000.00 /$50,000.00 | $25,000.0000 |
| Underinsured Motorist: | $25,000.00 /$50,000.00 | $25,000.00 |

**BI / PD / UM limits are mandatory.** *See* S.C. Code Ann. §§ 38-77-140, -150, -160. Additional UM limits must be offered up to liability limits. **UIM not mandatory,** but must be rejected in writing on a form approved by the State Insurance Department. **Collateral sources cannot be used as an offset.** (See below)

- No automobile insurance policy may be issued or delivered in this State to the owner of a motor vehicle or may be issued or delivered by an insurer licensed in this State upon any motor vehicle then principally garaged or principally used in this State, unless it contains a provision insuring the persons defined as insured against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of these motor vehicles within the United States or Canada, subject to limits exclusive of interest and costs, with respect to each motor vehicle, as follows: *twenty- five thousand dollars because of bodily injury to one person in any one accident and, subject to the limit for one person; fifty thousand because of bodily injury to two or more persons in any one accident; and twenty-five thousand dollars because of injury to or destruction of property of others in any one accident.* Nothing in this article prevents an insurer from issuing, selling, or delivering a policy providing liability coverage in excess of these requirements. (S.C. Code Ann. § 38-77-140) (emphasis added)

- No automobile insurance policy or contract may be issued or delivered unless it contains a provision by endorsement or otherwise, herein referred to as the uninsured motorist provision, undertaking to pay the insured all sums which he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which may be no less than the requirements of § 38-77-140. *The uninsured motorist provision must also provide for no less than ten thousand dollars coverage for injury to or destruction of the property of the insured in any one accident but may provide an exclusion of the first two hundred dollars of the loss or damage.* The director or his designee may prescribe the form to be used in providing uninsured motorist coverage and when prescribed and promulgated no other form may be used. (S.C. Code Ann. § 38-77-150(A)) (emphasis added)

- Automobile insurance carriers *shall offer,* at the option of the insured, *uninsured motorist coverage up to the limits of the insured's liability coverage in addition to the mandatory coverage prescribed by §38-77-150. Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute.* If, however, an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. If none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or

underinsured coverage. Benefits paid pursuant to this section are not subject to subrogation and assignment. (S.C. Code Ann. § 38-77-160) (emphasis added)

**Plaintiff Attorney Allowed To Get Policy Limits Thru Discovery:** Yes. *See* Rule 33(b), SCRCP or Fed.R.Civ.P. 33(b).

**Offer of Judgment:** PERMISSIBLE. *See* Rule 68, SCRCP or Fed.R.Civ.P. 68. *See also* S.C. Code § 15-35-400.

**Punitive Damages:** Punitive damages are insurable. They are insurable if vicarious. Duty to defend applies. Burden of proof lies with the Plaintiff and is clear and convincing standard. S.C. Code Ann. § 15-33-135

**Subrogation:**

- Collision and Comprehensive — YES;
- UM – YES. S.C. Code Ann. § 38-77-160;
- Additional UM and UIM – NO. S.C. Code Ann. § 38-77-160.

Benefits paid pursuant to [UM Code Section] are subject to subrogation and assignment if an uninsured motorist has selected the option to be uninsured by paying the fee pursuant to § 56-10-510. S.C. Code Ann. § 38-77-150(C).

**API:** Yes. *Burns v. State Farm Mut. Auto. Ins. Co.,* 297 S.C. 520, 377 S.E.2d 569 (1989).

Insurer is subrogated to the rights of insured and may recover against tortfeasor who, having knowledge of the insurer's interest, settles with the insured and obtains from him a release of all claims. *Calvert Fire v. James,* 236 S.C. 431, 114 S.E.2d 832 (1960).

The *Calvert* case was affirmed by *Seaside Resorts, Inc. v. Club Car, Inc.,* 416 S.E.2d 655, 665 (1992). Insurer is entitled to full reimbursement from insured if insured recovers from tortfeasors. *Ex Parte Rankin* av. *SuperiorAuto Ins. Co.,* 237 S.C. 380, 117 S.E.2d 525 (1960). The *Rankin* case has been affirmed by *Blake v. Cannon* 439 S.E.2d 302, 304 (1993).

**Dram Shop Law:** No first-party liability. *Lydia v. Horton,* 355 S.C. 36, 583 S.E.2d 750 (2003).

Third-party liability for selling alcohol to someone the seller knows, or reasonably should know, to be intoxicated when that person then goes out and injures a third party. *Tobias v. Sports Club, Inc.,* 332 S.C. 90, 504 S.E.2d 318 (1998).

Also, under the common law, an adult social host who knowingly and intentionally serves, or causes to be served, an alcoholic beverage to a person he knows or reasonably should know is between the ages of 18 and 20 is liable to the person served and to any other person for damages proximately resulting from the host's service of alcohol. *Marcum v. Bowden,* 372 S.C. 452, 643 S.E.2d 85 (S.C. 2007).

**Mental Fright**: Intentional infliction of emotional distress / outrage recognized. *Ford* v. *Hutson,* 276 S.C. 157, 276 S.E.2d 776 (1981); *Glover v. Lockheed Corp.,* 772 F. Supp. 898, 906 (1991), (the rationale of *Ford* affirmed by District Court of South Carolina).

**Joint and Several Liability:** YES. Joint wrongdoers could not have contribution one from the other as to judgment recovered against either, but both were liable to pay the recovery in equal part. *Knight v. Autumn*

*Co., Inc.,* 271 S.C. 112, 245 S.E.2d 602 (1978).

One who is injured by wrongful act of two or more joint tortfeasors has option of bringing an action against either one or all of them as parties defendants, since they are all severally liable, but to allow a defendant against the will of a plaintiff to bring in other joint tortfeasors as defendants would deny plaintiff the right to name whom he should sue. *Doctor v. Robert Lee, Inc.,* 215 S.C. 332, 55 S.E.2d 68 (1949); s*ee also* South Carolina Contribution Agency Joint Tortfeasors Act, S.C. Code Ann. § 15-38-15, *et seq.*

Release of one joint tortfeasor is not a release for all. *Bartholomew v. McCartha,* 255 S.C. 489, 179 S.E.2d 912 (1971).

**Interspousal Immunity**: South Carolina has abolished the doctrine of interspousal immunity from tort liability for personal injury. *Pardue v. Pardue*, 167 S.C. 129, 166 S.E. 101 (1932); *see also* S.C. Code Ann. §15-5-170 (1976) ("[a] married woman may sue and be sued as if she were unmarried. When the action is between herself and her husband she may likewise sue or be sued alone.").

South Carolina courts will no longer apply *lex loci delicti* doctrine when law of foreign state recognizes doctrine of interspousal immunity. *Boone v. Boone,* 345 S.C. 8, 546 S.E.2d 191 (2001), *overruling Oshiek v. Oshiek,* 244 S.C. 249, 136 S.E. 2d 303 (1964).

**Parental Immunity**: Children can sue parents. *Elam v. Elam,* 275 S.C. 132, 268 S.E.2d 109 (1980)).

In absence of statute, an emancipated child cannot maintain personal injury action against parent for negligence in operation of automobile. *Gunn v. Rollings,* 250 S.C. 302, 157 S.E.2d 590 (1967).

**Loss of Consortium**: Action allowed for damages for loss of consortium of spouse. S.C. Code Ann. § 15-75-20. Husband is entitled to consequential damages resulting from wife's injuries. *Hughey v. Ausborn,* 249 S.C. 470, 154 S.E2d 839 (1967).

**Children's Negligence**: Parents are liable for the intentional acts of their minor children if they knew or should have known of their child's dangerous propensities and failed to take reasonable steps to avoid harm caused by the child. *Howell v. Hairston,* 261 S.C. 292, 199 S.E.2d 766, (1973).

Child between ages of 7 and 14 is *prima facie* incapable of contributory negligence. *Hollman v. Atlantic Cost* LR., 201 S.C. 308, 22 S.E.2d 892 (1942).

**Prenatal Injuries Or Death:** Permits recovery for injury or death of a viable infant born alive; however, there is no recovery for the death of a non-viable fetus. *Phillips* v. *U.S.,* 508 F.Supp. 537 (D.S.C. 1980). Permits recovery for death of a viable infant prior to birth or stillborn. *Id.*

**Releases**: Release of one joint tortfeasor does not release others who wrongfully contributed to the plaintiff's injuries unless this was the intention of the parties, or unless the plaintiff has received full compensation amounting to a satisfaction. *Vaughn v. City of Anderson*, 300 S.C. 55, 386 S.E.2d 297 (1989).

**Adjuster Licensing:** Required (S.C. Code Ann. § 38-47-10 *et seq.).* Every individual, commonly called an adjuster, adjusting losses for an insurer licensed to do business in this state must be licensed by the director or his designee. These individuals shall apply for a license on a form prescribed by the director or his designee. The director or his designee shall satisfy himself that each applicant for an adjuster's license in an individual of good moral character, has sufficient knowledge of the insurance business and his duties as an adjuster, has not violated the insurance laws of this state, and is a fit and proper individual for the position. No license may be issued to a non-resident adjuster who resides in a state refusing to license South Carolina adjusters. Agents licensed under Chapter 43 are not required to comply with this section.

**Total Loss**: Book value used to determine ACV. Must pay sales tax. License fees or transfer fees not required.

**Miscellaneous:**

State Reporting Requirement: The operator or owner of a motor vehicle involved in an *accident resulting in injury to or death of any person or total property damage to an apparent extent of one thousand dollars or more which was not investigated by a law enforcement officer, within fifteen days after the accident, shall forward a written report and verification of liability insurance coverage of the accident to the department, the proof and report to be in a manner prescribed by the department.* The completed and verified form must be returned by the operator or owner to the department within fifteen days from the accident date. Failure to forward the accident report verified in the proper manner in respect to liability insurance coverage for the operation of the vehicle involved in the accident is prima facie evidence that the vehicle was uninsured. (S.C. Code Ann. § 56-5-1270) (emphasis added)

**Suits:**

Service on Director of Department of Public Safety as attorney of nonresident motorists: The acceptance by a nonresident of the rights and privileges conferred by the laws in force in this State permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the public highways, the streets of any incorporated municipality or the public roads of this State or anywhere within this State, or the operation by such nonresident of a motor vehicle on any such public highways, streets or public roads or anywhere within the State other than as so permitted or regulated shall be deemed equivalent to the appointment by such nonresident of the ***Director of the Department of Public Safety or of his successor in office*** to be his true and lawful attorney upon whom may be served all summons or other lawful process in any action or proceeding against him growing out of any accident or collision in which such nonresident may be involved by reason of the operation by him, for him or under his control or direction, express or implied, of a motor vehicle on such public highways, streets or public roads or anywhere within this State. Such acceptance or operation shall be a signification of his agreement that any such process against him shall be of the same legal force and validity as if served on him personally. (S.C. Code Ann. § 15-9-350)(emphasis added).

Service on Director of Department of Public Safety as attorney for nonresident motor carriers: The acceptance by a nonresident motor carrier of the rights and privileges conferred by the laws now or hereafter in force in this State, permitting the operation of motor vehicles as evidenced by the operation of a motor vehicle by such nonresident either personally or through an agent or employee on the public highways in this State, or the operation of such nonresident either personally or through an agent, lessee, or employee, of a motor vehicle on the public highways of this State other than as so permitted or regulated, shall be deemed equivalent to the appointment by such nonresident motor carrier of the ***Director of the Department of Public Safety, or his successor in office***, to be his true and lawful attorney and the attorney of his executor or administrator, upon whom may be served all summonses or other lawful process or notice in any action, assessment proceeding, or other proceeding against him or his executor or administrator, arising out of or by reason of any provisions in Chapter 31 of Title 12 relating to such vehicle or relating to the liability for tax with respect to operation of such vehicle on the highways of this State. Acceptance or operation shall be a signification by such nonresident motor carrier of his agreement that any such process against or notice to him or his executor or administrator shall be of the same legal force and validity as if served on him personally or on his executor or administrator. All of the provisions of § 15-9-370, 15-9-380 and 15-9-350 shall be applicable with respect to the service of process or notice pursuant to this section. (S.C. Code Ann. § 15-9-360)(emphasis added).

30 days to answer the complaint in state court; Rule 12(a), SCRCP.

21 days to answer the complaint in federal court. Rule 12(a), Fed. R. Civ. P.

**Minors:**

- For purposes of this section and for any claim exceeding twenty-five thousand dollars in favor of or against any minor or incapacitated person, "court" means the circuit court of the county in which the minor or incapacitated person resides or the circuit court in the county in which the suit is pending. For purposes of this section and for any claim not exceeding twenty-five thousand dollars in favor of or against any minor or incapacitated person, "court" means either the circuit court or the probate court of the county in which the minor or incapacitated person resides or the circuit court or probate court in the county in which the suit is pending. S.C. Code Ann. § 62-5-433(A)(1).

- The settlement of any claim over twenty-five thousand dollars in favor of or against any minor or incapacitated person for the payment of money or the possession of personal property must be effected on his behalf in the following manner:

    1. The petitioner must file with the court a verified petition setting forth all of the pertinent facts concerning the claim, payment, attorney's fees, and expenses, if any, and the reasons why, in the opinion of the petitioner, the proposed settlement should be approved. For all claims that exceed twenty-five thousand dollars, the verified petition must include a statement by the petitioner that, in his opinion, the proposed settlement is in the best interests of the minor or incapacitated person.

    2. If, upon consideration of the petition and after hearing the testimony as it may require concerning the matter, the court concludes that the proposed settlement is proper and in the best interests of the minor or incapacitated person, the court shall issue its order approving the settlement and authorizing the petitioner to consummate it and, if the settlement requires the payment of money or the delivery of personal property for the benefit of the minor or incapacitated person, to receive the money or personal property and execute a proper receipt and release or covenant not to sue therefor, which is binding upon the minor or incapacitated person.

    3. The order authorizing the settlement must require that payment or delivery of the money or personal property be made through the conservator. If a conservator has not been appointed, the petitioner shall, upon receiving the money or personal property, pay and deliver it to the court pending the appointment and qualification of a duly appointed conservator. If a party subject to the court order fails or refuses to pay the money or deliver the personal property as required by the order, he is liable and punishable as for contempt of court, but failure or refusal does not affect the validity or conclusiveness of the settlement.

S.C. Code Ann. § 62-5-433(B)(1)–(B)(3))

- The settlement of any claim that does not exceed twenty-five thousand dollars in favor of or against a minor or incapacitated person for the payment of money or the possession of personal property may be effected in any of the following manners:

    1. If a conservator has been appointed, he may settle the claim without court authorization or confirmation, as provided in § 62-5-424, or he may petition the court for approval, as provided in items (1), (2), and (3) of subsection (B). If the settlement requires the payment of money or the delivery of personal property for the benefit of the minor or incapacitated person, the conservator shall receive the money or personal property and execute a proper receipt and release or covenant not to sue therefor, which is binding upon the minor or incapacitated

person.

2. If a conservator has not been appointed, the guardian or guardian ad litem must petition the court for approval of the settlement, as provided in items (1) and (2) of subsection (B), and without the appointment of a conservator. The payment or delivery of money or personal property to or for a minor or incapacitated person must be made in accordance with § 62-5-103. If a party subject to the court order fails or refuses to pay the money or deliver the personal property, as required by the order and in accordance with § 62-5-103, he is liable and punishable as for contempt of court, but failure or refusal does not affect the validity or conclusiveness of the settlement.

S.C. Code Ann. § 62-5-433 (C)(1)–(C)(2))

- The settlement of any claim that does not exceed two thousand five hundred dollars in favor of or against any minor or incapacitated person for the payment of money or the possession of personal property may be effected by the parent or guardian of the minor or incapacitated person without court approval of the settlement and without the appointment of a conservator. If the settlement requires the payment of money or the delivery of personal property for the benefit of the minor or incapacitated person, the parent or guardian shall receive the money or personal property and execute a proper receipt and release or covenant not to sue therefor, which is binding upon the minor or incapacitated person. The payment or delivery of money or personal property to or for a minor or incapacitated person must be made in accordance with § 62-5-103. S.C. Code Ann. § 62-5-433 (D).

Motorcycles:

- Lights required on at all times. S.C. Code Ann. § 56-5-4460(A).

- Riding between lanes prohibited. S.C. Code Ann. § 56-5-3640(C).

- Helmet required for operators and passengers under 21. S.C. Code Ann. § 56-5-3660.

- Driver's license, vehicle license, and title required. S.C. Code Ann. § 56-1-20; § 56-3-110; and § 56-3-200, respectively.

- Any motorcycle carrying a passenger, other than in a sidecar or enclosed cab, shall be equipped with footrests for such passenger. S.C. Code Ann, § 56-5-3650(a).

- No person shall operate any motorcycle unless it is equipped with a rear-view mirror which will afford the operator ample vision to the rear at all times. S.C. Code Ann. § 56-5-3650(b).

- The provisions of § 56-5-3670 with respect to goggles and face shields shall not apply to the operator of a two–wheeled motorized vehicle equipped with a wind screen meeting specifications established by the department. The department is hereby authorized to adopt and amend regulations covering types of wind screens and specifications therefor. S.C. Code Ann. § 56-5-3680.

Mopeds: Minimum age is 14 (S.C. Code Ann. §56-1-1720).

**Alcohol**:

Chemical Test Law:

- A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of

his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. S.C. Code Ann. § 56-5-2950(a).

- Presumptions—the alcohol concentration at the time of the test, as shown by chemical analysis of the person's breath or other body fluids, gives rise to the following:

    1. If the alcohol concentration was at that time five one-hundredths of one percent or less, it is conclusively presumed that the person was not under the influence of alcohol.

    2. If the alcohol concentration was at that time in excess of five one- hundredths of one percent but less than eight one-hundredths of one percent, this fact does not give rise to any inference that the person was or was not under the influence of alcohol, but this fact may be considered with other evidence in determining the guilt or innocence of the person.

    3. If the alcohol concentration was at that time eight one-hundredths of one percent or more, it may be inferred that the person was under the influence of alcohol.

    4. If the alcohol concentration was at that time eight one-hundredths of one percent or more and the original testing of the person's breath or collection of other bodily fluids was performed within two hours of the time of arrest, the person has violated § 56-5-2933.

S.C. Code Ann. § 56-5-2950(g).

**Property Damage Arbitration**: The court of common pleas, or any inferior courts having concurrent jurisdiction, in and for each county, *shall by order of reference appoint an attorney or attorneys to hear and determine, by arbitration, property damage liability claims arising out of motor vehicle collisions or accidents and to award actual and punitive damages.* This order must be consistent with the provisions of this chapter and may not be inconsistent with the Rules of the Supreme Court of South Carolina. Process and procedure must be as summary and simple as may be reasonable and may provide for the taking of evidence in the form of reports, statements, or itemized bills or in any other manner without the procedural and evidentiary limitations which pertain in jury trials. The court may provide for the taking of depositions of a witness within or without the State. S.C. Code Ann. § 38-77-710, *et seq.* (emphasis added)

**Appraisa**l: Appraisal provision in policy is valid and where demand is made, compliance with the provision is a condition precedent to a suit on the policy. *Miller v. British America Assistance Co.*, 238 S.C 238 S.C. 94, 119 S.E.2d 527 (1961).

Insured who collects basis PIP benefits from insurer of rental car may not also stack additional PIP benefits from its own insurer. *Busby v. State Farm*, 280 S.C. 330, 312 S.E.2d 716 (1984).

Stacking does not depend upon number of automobile insurance policies issued, but on number of additional coverages for which insured has contracted. *Ruppe v. Auto-Owners Ins. Co.,* 329 S.C. 402, 496 S.E.2d 631 (1998).

Generally speaking, proof of physical contact is condition precedent to recover under provision for damage caused by unknown driver and vehicle. *Wynn v. Doe,* 255 S.C. 509, 180 S.E.2d 95 (1971); *Milani v. State Farm Mutual Auto Ins. Co.,* 972 F.2d 166, 169 (7th Cir. 1992) (affirming *Wynn* rationale).

If no proof of physical contact, then a sworn affidavit of witness, neither owner nor operator of vehicle involved, can provide basis for recovery. S.C. Code Ann. § 38-77-170.

Recovery under uninsured motorist provision is not limited to a single policy limit, and stacking of uninsured motorist coverage is permitted where there are two or more policies providing the coverage. *Boyd v. State Farm,* 260 S.C. 316, 195 S.E.2d 706 (1973).

Although other vehicle was not insured by its owner, it was not uninsured where its driver had liability coverage affording protection to injured plaintiff under circumstances involved and so plaintiff could not recover from her own insurer under the uninsured motorist provision of her policy. *Price v. Government Emp. Ins. Co.*, 446 F.Supp. 189 (D.S.C. 1978).

Insured's liability coverage may be stacked so that the limits of two insured vehicles apply to one non-owned vehicle. *Kraft v. Hartford Ins.,* 279 S.C. 257, 305 S.E.2d 243 (1983).

Insured may stack the underinsured motorist coverage provided on more than one vehicle. *(Gambrell v. Travelers Ins.,* 280 S.C. 69, 310 S.E.2d 814 (1983); *Ruppe v. Auto-Owners Ins. Co.,* 329 S.C. 402, 496 S.E.2d 631 (1998). But see also *State Farm Mutual Auto Ins. Co. v. Horny,* 403 S.E.2d 318, 319 (1991) and *Purvis v. State Farm Mutual Auto Ins. Co.,* 403 S.E.2d 662, 665 (1991)('excess' UIM coverage provides benefits to an insured under his own policy at any time the at fault driver's liability coverage is less than the amount of the claimant's actual damages. 'Reduction' UIM coverage provides benefits to an insured under his own policy only when the claimant's underinsured motorist coverage is greater than the at fault driver's liability coverage because the amount of recovery from the claimant's underinsured motorist coverage is reduced by the amount of recovery from the at fault motorist.)

"Underinsured motor vehicle" means a motor vehicle as to which there is bodily injury liability insurance or a bond applicable at the time of the accident in an amount of at least that specified in S.C. Code Ann. § 38-77-140 and the amount of the insurance or bond is less than the amount of the insureds' damages:

Insurers may, at the request of a state agency or on their own initiative, report to an agency, information concerning a fire of suspicious origin. S.C. Code Ann. § 38-77-1130.

When an insurance company has reason to believe that a motor vehicle loss in which it has an interest may involve theft or a fraudulent claim, the company may notify, in writing, an authorized agency and provide it with any or all material developed from the company's inquiry into the loss; however, when this information includes possible evidence of motor vehicle theft or motor vehicle insurance fraud involving specifically named persons, the information in all cases may be furnished to the solicitor in the circuit where the loss occurred and he shall furnish the information to other authorized agencies if he considers the action appropriate. When an insurance company provides any one of the authorized agencies with notice of a theft or fraud, it is sufficient notice for the purpose of this article. S.C. Code Ann. § 38-77-1130(b).

Any insurance company or authorized agency which releases information, whether oral or written, and any person acting in their behalf, pursuant to this article, is immune from any liability arising out of the release. S.C. Code Ann. § 38-77-1130(e).

**Presenting false claims for payment:** A person who knowingly causes to be presented a false claim for payment to an insurer transacting business in this State, to a health maintenance organization transacting business in this State, or to any person, including the State of South Carolina, providing benefits for health care in this State, whether these benefits are administered directly or through a third person, or who knowingly assists, solicits, or conspires with another to present a false claim for payment as described above, is guilty of a:

1. felony if the amount of the claim is ten thousand dollars or more. Upon conviction, the person must be imprisoned not more than ten years or fined not more than five thousand dollars, or both;

2. felony if the amount of the claim is more than two thousand dollars but less than ten thousand dollars. Upon conviction, the person must be fined in the discretion of the court or imprisoned not more than five years, or both;

3. misdemeanor triable in magistrate's court if the amount of the claim is one thousand dollars or less. Misdemeanor triable in magistrate's court or municipal court, notwithstanding the provisions of §§ 22-3-540, -545, -550, and 14-25-65, if the amount of the claim is $2,000 or less. Upon conviction, the person must be filed or imprisoned not more than is permitted by law without presentment or indictment by the grand jury.

S.C. Code Ann. § 38-55-170.

**Making false claim or statement in support of claim to obtain insurance benefits for fire or explosion loss:** Any person who willfully and knowingly presents or causes to be presented a false or fraudulent claim, or any proof in support of such claim, for the payment of a fire loss or loss caused by an explosion, upon any contract of insurance or certificate of insurance which includes benefits for such a loss, or prepares, makes, or subscribes to a false or fraudulent account, certificate, affidavit, or proof of loss, or other documents or writing, with intent that such documents may be presented or used in support of such claim, is guilty of a felony and, upon conviction, must be fined not more than ten thousand dollars or imprisoned for not more than five years or both in the discretion of the court.

The provisions of this section are supplemental to and not in lieu of existing law relating to falsification of documents and penalties therefor. S.C. Code Ann. § 16-11-125.

**South Carolina Contribution Among Tortfeasors Act (S.C. Code Ann. §15-38-10, *et seq.*)**:

Right to Contribution:

(A) Where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(B) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.

(C) There is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death.

(D) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

S.C. Code Ann. §15-38-20

In determining the pro rata shares of tortfeasors in the entire liability (1) their relative degrees of fault shall not be considered; (2) if equity requires, the collective liability of some as a group shall constitute a single share; and (3) principles of equity applicable to contribution generally shall apply. S.C. Code Ann. § 15-38-30.

**Action for Contribution (S.C. Code Ann. § 15-38-40)**:

(A) Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action.

(B) Where a judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action. Provided, however, contribution may not be enforced in the action until the issue of liability and resulting damages against the defendant or defendants named in the action is determined. Once the issue of liability has been resolved, subject to Section 15-38-20(B), a defendant has the right to seek contribution against any judgment defendant and other persons who were not made parties to the action.

(C) If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after appellate review.

(D) If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred unless he has either (1) discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment, or (2) agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution.

(E) The recovery of a judgment for an injury or wrongful death against one tortfeasor does not of itself discharge the other tortfeasors from liability for the injury or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution.

(F) The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

1. it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

2. it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

**South Carolina Frivolous Civil Proceedings Sanctions Act (S.C. Code Ann. § 15-36-10, *et seq.*):**

At the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict, upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous. An attorney, party, or pro se litigant shall be sanctioned for a frivolous claim or defense if the court finds the attorney, party, or pro se litigant failed to comply with one of the following conditions:

(a) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;

(b) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of the civil suit was intended merely to harass or injure the other party; or

(c) a reasonable attorney in the same circumstances would believe that the case or defense was frivolous as not reasonably founded in fact or was interposed merely for delay, or was merely brought for a purpose other than securing proper discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings are based.

(2) Unless the court finds by a preponderance of the evidence that an attorney, party, or pro se litigant engaged in advancing a frivolous claim or defense, the attorney, party, or pro se litigant shall not be sanctioned.

S.C. Code Ann. §15-36-10(C).

In determining if an attorney, party, or a pro se litigant has violated the provisions of this section, the court shall take into account:

(1) the number of parties;

(2) the complexity of the claims and defenses;

(3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4);

(4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and adequate investigation;

(5) previous violations of the provisions of this section;

(6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section; and

(7) other factors the court considers just, equitable, or appropriate under the circumstances

S.C. Code Ann. § 15-36-10(E).

Upon a finding that a person has violated the provisions of this chapter, the court shall determine the appropriate fees and costs and enter judgment accordingly. *See* S.C. Code Ann. § 15-36-10 (F)–(H).

**Unfair Claims Settlement Practices Act**:

1. When an insurer under an insurance policy requires a written proof of loss after the notice of the loss has been given by the insured or beneficiary, the insurer or its representative shall furnish a blank to be used for that purpose. If the forms are not furnished within twenty days after the receipt of the notice, the claimant is considered to have complied with the requirements of the policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss written proof covering the occurrence, character, and extent of the loss for which claim is made. The twenty-day period after notice of loss to furnish forms applies to all types of insurance unless a lesser time period is specifically provided by law. S.C. Code Ann. § 38-59-10.

2. In the event of a claim, loss, or damage which is covered by a policy of insurance or a contract of a nonprofit hospital service plan or a medical service corporation and the refusal of the insurer, plan, or corporation to pay the claim within ninety days after a demand has been made by the holder of the policy or contract and a finding on suit of the contract made by the trial judge that the refusal was without reasonable cause or in bad faith, the insurer, plan, or corporation is liable to pay the holder, in addition to any sum or any amount otherwise recoverable, all reasonable attorneys' fees for the prosecution of the case against the insurer, plan, or corporation. The amount of reasonable attorneys' fees must be determined by the trial judge and the amount added to the judgment. The amount of the attorneys' fees may not exceed one-third of the amount of the judgment. S.C. Code Ann. § 38-59-40(1).

3. If attorneys' fees are allowed and, on appeal by the defendant, the judgment is affirmed, the Supreme Court or the court of appeals shall allow to the respondent an additional sum as the court adjudges reasonable as attorneys' fees of the respondent on the appeal. S.C. Code Ann. § 38-59-40(2).

4. No payment made under an automobile insurance policy of a claim against any insured thereunder arising from any accident or other event insured against for damage to or destruction of property owned by another person is to be construed as an admission of liability by the insured, or the insurer's recognition of liability, with respect to any other claim arising from the same accident or event. S.C. Code Ann. § 38-77-230.

5. The court's jurisdiction over matters involving wrongful death are actions under the survival statute, is concurrent with that of the Circuit Court, and shall extend only to the approval of settlements as provided in § 15-51-44 and 15-51-42. S.C. Code Ann. § 62-1-302(b).

6. Any of the following acts by an insurer doing accident and health insurance, property insurance, casualty insurance, surety insurance, marine insurance, or title insurance business, if committed without just cause and performed with such frequency as to indicate a general business practice, constitutes improper claim practices:

    a. Knowingly misrepresenting to insureds or third-party claimants pertinent facts or policy provisions relating to coverages at issue or providing deceptive or misleading information with respect to coverages.

    b. Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies, including third-party claims arising under liability insurance policies.

    c. Failing to adopt and implement reasonable standards for the prompt investigation and settlement of claims, including third-party liability claims, arising under its policies.

    d. Not attempting in good faith to effect prompt, fair, and equitable settlement of claims, including third-party liability claims, submitted to it in which liability has become reasonably clear.

    e. Compelling policyholders or claimants, including third-party claimants under liability policies, to institute suits to recover amounts reasonably due or payable with respect to claims arising under its policies by offering substantially less than the amounts ultimately recovered through suits brought by the claimants or through settlements with their attorneys employed as the result of the inability of the claimants to effect reasonable settlements with the insurers.

    f. Offering to settle claims, including third-party liability claims, for an amount less than the amount otherwise reasonably due or payable based upon the possibility or probability that the policyholder or claimant would be required to incur attorneys' fees to recover the amount

reasonably due or payable.

g. Invoking or threatening to invoke policy defenses or to rescind the policy as of its inception, not in good faith and with a reasonable expectation of prevailing with respect to the policy defense or attempted rescission, but for the primary purpose of discouraging or reducing a claim, including a third- party liability claim.

h. Any other practice which constitutes an unreasonable delay in paying or an unreasonable failure to pay or settle in full claims, including third-party liability claims, arising under coverages provided by its policies. S.C. Code Ann. § 38-59-20.

7. Every appraiser, while engaged in his duties as such appraiser, shall carry the license issued to him by the Commissioner and shall offer to display it to an owner whose motor vehicle is being inspected, to the repair shop representative involved, or to any authorized representative of the Commissioner. S.C. Ins. Dept. Reg. 69-16.2.

8. An appraiser may agree on a price for repairing a damaged motor vehicle only with a repair shop. S.C. Ins. Dept. Reg. 69-16.3.

9. The appraiser shall leave a legible signed copy of his appraisal with the repair shop selected to make the repairs, which appraisal shall contain the name of the owner of the motor vehicle, the name of the insurer ordering the appraisal and its claim number, if known, the number of the appraiser's license, and the proper number of the motor vehicle inspected. S.C. Ins. Dept. Reg. 69-16.4.

10. All damage to the motor vehicle which is considered by the appraiser to be unrelated or old damage and which is not included in the repair price shall be clearly indicated on the appraisal. S.C. Ins. Dept. Reg. 69-16.4.1.

11. If the appraiser and the repair shop fail to agree on a price for repairs, the appraiser shall not obtain a competitive estimate from another repair shop unless the owner thereof or his authorized agent shall have actually inspected the vehicle. No such competitive estimate shall be obtained by the use of photographs, telephone calls, or in any manner whatsoever other than actual, personal inspection. S.C. Ins. Dept. Reg. 69-16.5.

12. Every appraiser shall re-inspect damaged motor vehicles when supplementary allowances are requested by repair shops. S.C. Ins. Dept. Reg. 69-16.7.

13. S.C. Ins. Dept. Bulletin No. 7-75 dated February 12, 1975, concerns the inclusion on settlement draft or check a payee not authorized by insured nor named in policy. The Chief Insurance Commissioner has stated:

> It has reached my attention that certain insurers are apparently making it a practice in the handling of auto physical damage losses to include on the settlement draft or check the name of a garage or repair agency which made an estimate of the cost of repair even though such garage or repair agency had nothing to do with the effecting of repairs and even though the insured has not authorized payment to be made to that person on the proof of loss. The result is that the insured is unable to negotiate the purported settlement draft or check unless he obtains the endorsement of the garage or repair agency on the draft.
>
> We regard such practice as manifestly unfair and grossly improper. We think it manifest that a loss draft or check made payable jointly to the insured ant to some other person, who is a stranger to the policy, and who has not been authorized to receive payment in the proof of

loss, does not constitute payment of a loss covered by the policy and is equivalent to the failure or refusal of the insurer to fulfill its contractual obligations under the policy.

Accordingly, we direct the cessation of such practice.

**South Carolina PIP**:

Law Concerning Coverage: NOT MANDATORY. There is no personal injury protection (PIP) coverage mandated under the automobile insurance laws of this State. Any reference to personal injury protection in Title 38 or 56 or elsewhere is deleted. If an insurer sells no-fault insurance coverage which provides personal injury protection, medical payment coverage, or economic loss coverage, the coverage shall not be assigned or subrogated and is not subject to a setoff. S.C. Code Ann. § 38-77-144.

Persons Covered: "Insured" means the *named insured* and, while resident of the same household, the *spouse of any named insured and relatives of either,* while in a motor vehicle or otherwise, and *any person who uses with the consent, expressed or implied,* of the named insured the motor vehicle to which the policy applies *and a guest in the motor vehicle to which the policy applies* or the *personal representative of any of the above.* S.C. Code Ann. § 38-77-30 (emphasis added)

Pedestrian who made claim for Personal Injury Protection [PIP] from own insurer after being struck by an automobile cannot be compelled, as a condition to receiving payment, to sign a loan receipt giving his insurer subrogation rights in the event the claimant recovers from the tortfeasors. S.C. Code Ann. § 38-77-260; *Tillotson v. State Farm Mut. Auto. Ins. Co.*, 268 S.C. 248, 233 S.E.2d 295 (1977)(decided under former statute).

Threshold: None.

Medical Payments Limits: No automobile insurance policy may be issued or delivered in this State to the owner of a motor vehicle or may be issued or delivered by an insurer licensed in this State upon any motor vehicle then principally garaged or principally used in this State, unless it contains a provision insuring the persons defined as insured against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of these motor vehicles within the United States or Canada, *subject to limits exclusive of interest and costs, with respect to each motor vehicle, as follows: twenty-five thousand dollars because of bodily injury to one person in any one accident and, subject to the limit for one person, fifty thousand dollars because of bodily injury to two or more persons in any one accident, and twenty- five thousand dollars because of injury to or destruction of property of others in any one accident.* Nothing in this article prevents an insurer from issuing, selling,

delivering a policy providing liability coverage in excess of these requirements. S.C. Code Ann. § 38-77-140 (emphasis added).

Wage Limit: No limitation on the maximum weekly payment. Time limit of 3 years. Subject to aggregate limit of $1,000. Does not continue after death.

Deductible: None.

Subrogation: No subrogation, assignment or setoff. S.C. Code Ann. § 38-77-144.

Territorial Lirnits: Territorial limits of U.S.

Loss of Services: Part of the $41,000 aggregate limit. Time limit of 3 years. Does not continue after death.

Death Benefits: None.

Funeral Benefits: Part of the $1,000 aggregate limit.

Rehabilitation: None.

Tort Action: Plaintiff has the right to sue. (See S.C. Code Ann. §38-77-260).

Coverage of Non-Income Wage Earner: *See Loss of Services.*

Stacking of Policies: Controlled by policy provisions; however, previously was not allowed. Allowed for APIP. *Belk v. Nationwide Mut. Ins. Co.*, 271 S.C. 24, 244 S.E.2d 744 (1978) (*overruled on other grounds*).

Exclusions: None.

Priority of Payment: Controlled by policy provisions; however, generally individuals injured in an accident will proceed to the vehicle in which they were a passenger or from which they were struck to obtain coverage.

Offsets: None. S.C. Code Ann. § 38-77-144.

BI/UM Offsets: None.

Right to Sue: Retained. *See* S.C. Code Ann. § 38-77-260.

Payments Disputes: Controlled by policy provisions.

Primary Coverage: A policy or contract of insurance relating to the maintenance, selling, repairing, servicing, storing, or parking of motor vehicles shall be primary. S.C. Code Ann. § 38-77-143.

**South Carolina Homeowners**:

Value Policy Law: No insurer doing business in this State may issue a fire insurance policy for more than the value stated in the policy or the value of the property to be insured. *The amount of insurance must be fixed by the insurer and insured at or before the time of issuing the policy.* In case of total loss by fire, the insured is entitled to recover the full amount of insurance. In case of a partial loss by fire, the insured is entitled to recover the actual amount of the loss but in no event more than the amount of the insurance stated in the contract. *If two or more policies are written upon the same property, they are considered to be contributive insurance, and, if the aggregate sum of all such insurance exceeds the insurable value of the property, as agreed by the insurer and the insured, each insurer; in the event of a total or partial loss, is liable for its pro rata share of insurance. This section does not apply to insurance on chattels or personal property.* S.C. Code Ann. § 38-75-20 (emphasis added).

Notwithstanding S.C. Code Ann. § 38-75-20, *insurers may, at the request of owners of property used principally for manufacturing purposes, including places of residence for occupancy by employees, issue policies wholly exempt from § 38-75-20.* Riders or endorsements may, in consideration of an adequate premium or premium deposit, be attached to policies insuring property, indemnifying the insured for the difference between the actual value stated in the policy and the amount actually expended to repair, rebuild, or replace with new materials of like size, kind, and quality the insured property that has been damaged or destroyed by fire or other perils insured against. S.C. Code Ann. § 38-75-30 (emphasis added).

Statute of Limitations: The insured has 3 years in which to file an action under the fire policy. S.C. Code Ann. § 15-3-530 (if on or after April 5, 1988; otherwise, 6 years).

**Dog Bite Laws:**

1. Under the dog-bite statute, when a dog attack is unprovoked and the injured party is lawfully on the premises the dog owner is strictly liable. S.C. Code Ann. § 47-3-110; *Harris v. Anderson County Sheriff's Office*, 381 S.C. 357, 673 S.E.2d 423 (2008).

2. Under the dog-bite statute, when a dog attack unprovoked and the injured party is lawfully on the premises, a property owner is liable when he exercises control over, and assumes responsibility for, the care and keeping of the dog. *Id.*

3. Under the dog bite statute, when a dog attack is unprovoked and the injured party is lawfully on the premises, a property owner is not liable when he has no control of the premises and provides no care or keeping of the dog. *Id.*

4. Under the dog-bite statute, a person injured by a dog may pursue a claim for damages against the owner of the dog when the injury occurs while the dog is in the care or keeping of another. *Id.*

**Watercraft**: Any watercraft or outboard motor, both held or principally used in this state must be titled by the department. An owner of a watercraft or outboard motor titled in this state must notify the department within thirty (30) days if ownership is transferred to another person, entity, or transferred out of state, or otherwise disposed. S.C. Code Ann. § 50-23-20.

**Comparative Negligence:**

Introduction (*Nelson v. Concrete Supply Company*, 303 S.C. 243, 399 S.E.2d 783 (1991))

Abolishes the harsh rule of contributory negligence where the negligence of the plaintiff is not greater than that of the defendant (or the combined negligence of the defendants).

Provides a method of apportionment of damages where plaintiff's negligence is less than that of the defendant (or the combined negligence of defendants).

Adopts comparative negligence; not comparative fault.

Should not be read as affecting any other tort law principles other than contributory negligence.

**Impact On Other Doctrines:**

**QUESTION #1**: how does the doctrine of last clear chance operate under the rule of comparative negligence? Is it a rule of proximate cause that will determine the existence or non-existence of liability, or is it simply a factor to be considered in assessing the percentage of a party's negligence after liability is established? *Hubbard*, pp. 15–16; *Traxler*, pp. 9–19.

Under doctrine of **"last clear chance,"** plaintiff who negligently subjects himself to risk of harm may recover when defendant discovers or could have discovered plaintiff's peril had he exercised due diligence, and thereafter fails to exercise reasonable care to avoid injuring plaintiff. *Spahn v. Town of Port Royal*, 330 S.C. 168, 499 S.E.2d 205 (1998).

**ANSWER:** ***doctrine of last clear chance has been subsumed by adoption of comparative negligence*** such that it remains factor for jury's consideration in comparing parties' fault, but that it does not totally relieve plaintiff of his or her negligence. *Id.* In appropriate comparative negligence case, elements of doctrine of last clear chance are to be charged to jury in weighing parties' fault. *Id.*

**QUESTION #2**: what impact does comparative negligence have on the rule of avoidable consequences? Is

it still a rule of proximate cause that will cut off a defendant's liability or is it simply a factor to be considered in assessing percentages of negligence? *Hubbard*, pp. 24-25.

As contrasted to contributory negligence, the doctrine of avoidable consequences does not bar recovery but merely eliminates from the jury's consideration those damages which could have been avoided by the injured party's exercise of proper care. *W.D. Bourne Supply Co. v. Southeastern Freight Lines*, 259 S.C. 139, 191 S.E.2d 4 (1972); *Curie v. Davis*, 130 S.C. 408, 126 S.E. 119 (1923). "The rule of avoidable consequences only comes into play after a legal wrong has occurred, but while some damages may still be averted, and bars recovery only for such damages. *Prosser and Keeton on Torts*, p. 458 (5th Ed. 1984).

**ANSWER**: The doctrine of avoidable consequences is not affected by the adoption of comparative negligence.

**QUESTION #3:** how will assumption of the risk be applied under the rule of comparative negligence? Is it still a complete defense, or is it merely a factor to be considered in assessing percentage of negligence. *Hubbard*, pp. 21–23; *Traxler*, pp. 34–56.

"The defense of assumption of risk is established when the plaintiff freely and voluntarily enters into a known danger and is subsequently injured." *Cutchin v. SCDHPT*, 301 S.C. 35, 389 S.E.2d 646 (1990).

Unlike contributory negligence, which is a tort doctrine, assumption of the risk rests in contract based on a theory of consent. *Daniel v. Tower Trucking Co.*, 205 S.C. 333, 32 S.E.2d 5 (1944); *Storer v. Great Atlantic & Pacific Tea* Co, 184 S.C. 406, 192 S.E. 406 (1937); *Griffin v. Griffin*, 282 S.C. 288, 318 S.E.2d 24 (Ct. App. 1984).

Absolute defense of assumption of risk is inconsistent with South Carolina's comparative negligence system; thus, unless assumption of risk can be characterized as express or primary implied assumption, plaintiff is not barred from recovery if degree of fault arising from assumed risk is lesser than defendant's negligence. *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 333 S.C. 71, 508 S.E.2d 565 (1998).

**ANSWER:** Comparative negligence does not change the defense of assumption of risk.

**QUESTION #4**: will different types of assumption of risk defenses be treated differently? For example, other courts have classified assumption of risk into the following categories:

1. Express assumption of risk (contractual);
2. Implied primary assumption of risk (no duty); and
3. Implied secondary assumption of risk
    a. Unreasonable (most like contributory negligence); and
    b. Reasonable

*Traxler*, pp. 39–53; *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 333 S.C. 71, 508 S.E.2d 565 (1998).

**ANSWER:** Except for distinguishing between express and implied, South Carolina has never broken assumption of the risk down further. The adoption of comparative negligence does not require assumption of the risk to be broken down further.

**QUESTION #5**: are the concepts of reckless, willful, and wanton conduct subsumed under the principles of

comparative negligence? If one or all of the parties are reckless, willful, and wanton, does comparative negligence apply? *Hubbard*, pp. 12–15; *Traxler*, pp 22–24.

Conduct is reckless, willful, and wanton if it is committed in a manner and under circumstances that a person of ordinary reason or prudence would have been conscious of it as an invasion of another's rights. *Suber v. Smith*, 243 S.C. 458, 134 S.E.2d 404 (1964).

Contributory negligence does not bar recovery where the other actor's conduct was reckless, wanton or willful. *Wilson v. Duke Power Co.*, 273 S.C. 610, 258 S.E.2d 101 (1979).

**ANSWER:** the doctrine of recklessness is no longer applicable to the determination of actual damages. Reckless conduct will be compared to lesser forms of negligence.

**EXAMPLE** - Plaintiff (P) sues defendants (D1 and D2), alleging that their negligence proximately caused him $100,000 in damages. P is found to be 20% negligent; D1 is found to be 50% negligent and reckless, and D2 is found to be 30% negligent. The jury also finds damages in the amount of $100,000.

**Results Under Contributory Negligence**: P's action against D2 is barred by contributory negligence. P gets a verdict of $100,000 against Dl.

**Results Under Comparative Negligence**: P recovers a verdict of $80,000 against D1 and D2 since their combined negligence (80%) exceeds P's negligence (20%).

**QUESTION #6**: will comparative negligence affect the award of punitive damages? *Hubbard* pp. 50–51.

Punitive damages are based on conduct of the wrongdoer that the jury finds was reckless, willful, and wanton and/or malicious. *Gilbert v. Duke Power Co.*, 255 S.C. 495, 179 S.E.2d 720 (1971).

In *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991), the Court stated:

> In South Carolina, "punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future." *Laird v. Nationwide Ins. Co*., 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964). Moreover, they serve "as a vindication of private rights when it is proved that such have been wantonly, willfully or maliciously violated." *Harris v. Burnside,* 261 S.C. 190, 196, 199 S.E.2d 65, 68 (1973). Lastly, punitive damages may be awarded only upon a finding of actual damages. *Carroway v. Johnson*, 245 S.C. 200, 139 S.E.2d 908 (1965)

**ANSWER:** Comparative negligence has no affect on punitive damages; the award of punitive damages is not reduced by any negligence by the plaintiff. If plaintiff recovers actual damages, he will be able to seek punitive damages against a reckless defendant.

**QUESTION #7**: will punitive damages be available when both parties are reckless?

**ANSWER:** A plaintiff who is reckless may not recover punitive damages.

**QUESTION #8**: does the law concerning imputed negligence continue to operate in the same manner?

**ANSWER:** Yes. Comparative negligence has no affect.

**QUESTION #9:** what about a manufacturer's duty to design for the foreseeable misuse of a product? Should a foreseeable misuse reduce a plaintiff's recovery?

Under the doctrine of foreseeable misuse, a manufacturer is responsible for damages even where the injured party misuses a product so long as the misuse is foreseeable. *Kennedy v. Custom Ice Equipment Co.*, 271 S.C. 171, 246 S.E.2d 176 (1978); *Mickle v. Blackmon,* 252 S.C. 202, 166 S.E.2d 173 (1969).

**ANSWER:** Comparative negligence has no affect.

**QUESTION #10:** how does a defendant's duty to protect negligent victims figure into the computation?? If a defendant had a duty to protect a negligent victim, why should that victim's negli. once reduce his recovery? *Hubbard*, pp. 16–20.

In many situations, there is a duty created to protect certain classes of victims because of their age, knowledge or experience and relationship to the alleged wrongdoers. *Brarnlette v. Charter Rivers Hospital,* 302 S.C. 68, 393 S.E.2d 914 (1990) (doctor/hospital-patient); *Home v. Beason*, 285 S.C. 518, 331 S.E.2d 342 (1985) (custodian-person in custody); *Easier v. Hejaz Temple of Greenville*, 285 S.C. 348, 329 S.E.2d 753 (1985) (fraternal organization-member); *Kimmerlin v. Wingate,* 274 S.C. 62, 261 S.E.2d 50 (1979) (accountant-client); *Shealy v. Walters,* 273 S.C. 330, 256 S.E.2d 739 (1979) (attorney-client); *Shipes v. P'iggly Wiggly St, Andrews Inc.,* 269 S.C. 479, 238 S.E.2d 167 (1967) (store operator-invitee); *Daniel v. Days Inn of America,* 292 S.C. 291, 356 S.E.2d 129 (Ct. App. 1987) (hotel/motelguest)

**ANSWER:** Comparative negligence has no have an effect on.

Application to Non-Negligence Actions

**QUESTION #11**: will comparative negligence apply in actions based upon strict liability or breach of warranty? *Hubbard,* pp. 27–32; *Traxler,* pp. 56–58.

Contributory negligence is inapplicable to actions based on breach of warranty or strict liability. *Wallace v. Owens-Illinois, Inc.*, 300 S.C. 518, 389 S.E.2d 155 (1989).

**ANSWER**: No.

**QUESTION #12:** if it is not applied in these cases, how is a jury or judge to handle a product liability action asserting causes of action for strict liability/breach of warranty and negligence? Will the jury be required to specify the theory of recovery so that the judge will know whether to reduce the plaintiff's recovery by the amount of his negligence? What if the jury finds liability on all three theories? Will the plaintiff's recovery be reduced in proportion to his negligence?

**ANSWER:** Comparative negligence is only applicable to negligence causes of action. Judges will have to insure the jury understands this.

**QUESTION #13:** will comparative negligence apply in intentional tort actions? *Traxler,* pp. 20–22.

**ANSWER**: No.

**QUESTION #14:** does the rule of comparative negligence alter or abolish the rule of joint and several liability? *Hubbard,* pp 41–43; *Traxler* pp. 74–78.

**ANSWER:** No.

**QUESTION #15:** what is the affect of comparative negligence upon the law of contribution amount torfeasors? S.C. Code Ann. § 15-38-30 and § 15-38-50; *Hubbard*, pp. 41–43; *Traxler*, pp. 82–87.

**ANSWER:** Contribution is controlled by statute. Comparative negligence has no impact.

**QUESTION #16:** should the jury be required to find a separate percentage of negligence for each defendant, or should the combined negligence of all defendants be assigned a single percentage? *Traxler*, pp. 71–74.

**ANSWER:** Since it is unimportant to either comparative negligence or contribution, it is unnecessary to know the separate percentage of negligence for each defendant.

**QUESTION #17:** will there be a set-off or will each party be required to pay in full the damages awarded? *Hubbard,* pp 48.

**ANSWER**: Comparative negligence does not change our law regarding set-off.

**QUESTION #18:** should the negligence of persons not parties to the suit be considered by the jury? Should their negligence be combined with the defendant's for the purpose of determining whether the plaintiff's negligence exceeds the defendant's? *Hubbard*, pp 45–48; *Traxler*, *pp.* 78-82.

PROBLEM: Plaintiff (P) sues Defendants D1 and D2 alleging that their negligence proximately caused him $100,000 M damages. Another joint tortfeasor (X) is not a party to the suit. The P is 30% negligent, D1 and D2 are each 10 % negligent, and X is 50% negligent. The jury also finds damages in the amount of $100,000.

**VIEW A**: Negligence of the non-party X is not considered. Since P's negligence (30%) is greater than the combined negligence of the defendants in the action (20%), P recovers nothing.

**VIEW B**: Negligence of non-party (X) is considered. Since P's negligence (30%) is less than the combined negligence of the defendants in the action and the non-party (D1+D2+X = 70%), P recovers $70,000.

**ANSWER**: VIEW A.

Jury Instruction Issues

**QUESTION #19:** how will the burden of proof(s) be allocated?

1. Plaintiff has the burden of proving the negligence of the defendant(s), to include his (their) percentage of negligence.

2. Defendant has the burden of proving the negligence of plaintiff, to include his (their) percentage of negligence.

3. Since under View A proving the negligence of an absent tortfeasor and his percentage works to the advantage of the defendant(s), defendant(s) should have the burden of proving the negligence of the non-party tortfeasor, to include his percentage of negligence.

**QUESTION #20:** what factors should the jury be instructed to consider when determining the percentages of negligence?

1. Whether the conduct was mere inadvertence or engaged in with an awareness or consciousness that negligence was involved;

2. The magnitude of the risk created by the conduct, including the number of persons endangered and the potential seriousness of the injury;

3. The significance of the goal the actor was seeking to achieve and the need to achieve the goal in the particular manner utilized;

4. The actor's superior or inferior capacities and ability to realize and eliminate the risk involved;

5. The particular circumstances confronting the person at the time his conduct occurred;

6. The relative closeness of the casual relationship of the negligence conduct and the injury to the plaintiff; and

7. Whether the conduct involved a violation of a safety statute (state what statute and describe what constitutes a violation of the statute).

**QUESTION #21:** should the trial judge use a general verdict form or special interrogatories? Is it within his discretion to use either, or will he be required to use a particular verdict form?

"[T]he determination as to whether special verdict forms should be submitted to the jury is within the sound discretion of the trial judge." *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991).

A general charge allows the jury to continue as a "black box." The key underlying question is the extent of control required over the jury to decide the negligence issues. History has shown that juries are quite capable of deciding complex negligence issues, even with contributory negligence acting as a complete bar.

Special interrogatories provide maximum control of the jury on the complex issues of negligence and apportionment. This prevents the jury from deviating from the law on the tough cases.

**ANSWER:** discretionary decision of trial judge.

**QUESTION #22:** how much should be told to the jury concerning the affect of their decisions? Specifically:

1. The "Greater than" Rule (plaintiff is barred if his negligence exceeds that of the defendant;

2. The apportionment of damages according to negligence.

**ANSWER:** if a general charge is used, the jury would have to be told about the "Greater than" Rule and how to make the apportionment damages.

By using a special verdict format, it is possible to instruct the jury without telling them the affect of their findings. The judge would then simply apply the percentages to the damages found by the jury. The question becomes whether the jury should be told about how comparative negligence operates.

# South Dakota

## COVERAGE

**Bodily Injury:** SDCL 32-35-70 requires that each vehicle registered in South Dakota have limits of $25,000 for bodily injury or death per person and $50,000 for bodily injury or death per accident as minimum coverage. This coverage is mandatory. There is no "tort threshold" to be reached under South Dakota law before a bodily injury claim can be made.

**Property Damage:** South Dakota law does not require the purchase of collision coverage on a car. Typically, property damage to another's vehicle is covered under the required liability coverage language. There does not appear to be any specific statutes or cases on salvage, loss of use, tax, title and license fees. However, it is a general proposition of law that an injured party is entitled to recover an amount which will compensate for all detriment proximately caused, whether it could be anticipated or not. SDCL 21-3-1.

**Personal Injury:** $25,000 for injury to or destruction of property. SDCL 32-35-70. Typically, PI coverage is subsumed by medical pay provisions of personal auto policies issued in South Dakota.

**Medical Payments:** Typical policies issued in South Dakota contain med pay coverage for at least $2,000.00. There does not appear to be any statutory minimum limit required, although format of policies must be approved by the South Dakota Division of Insurance. Under South Dakota law, med pay coverage may be subrogated. Schuldt v. State Farm Mut. Auto Ins. Co., 238 N.W.2d 270 (S.D. 1975). Although there is no authority directly on point, a South Dakota court would be unlikely to allow medical pay benefits to offset a bodily injury claim that exceeds the limit of liability in the policy. In other words, a court in South Dakota probably would allow a claimant to recover the full liability limit for bodily injury and an additional amount for med pay if the claimant is injured beyond the limit of liability in the policy. South Dakota has a six-year statute of limitations for contract cases under SDCL 15-2-13. An insured presumably could sue for benefits under a contract at any time within the six- year policy period. However, there is a three-year personal injury statute of limitations under SDCL 15-2-14, which would apply to anyone other than an insured seeking benefits as a result of an injury covered by an insurance policy.

**Uninsured/Underinsured Motorists:** Under SDCL 58-11-9 and 58-11-9.4, uninsured and underinsured motorist coverages are mandatory and are to be equal to the coverage provided for bodily injury. Accordingly, the minimum coverage is $25,000 per person. South Dakota has an anti-stacking provision under SDCL 58-11-9.7 that applies in limited circumstances. Also, see Zenion Ins. v. Storage, 454 N.W.2d 736 (1990). Again, the statute of limitations for contract is six years in South Dakota and for personal injury, three years. Whether coverage can be rejected and whether an employee can prevail on an uninsured or underinsured motorist claim is dependent upon the particular circumstances in the case. Similarly, whether UM coverage is subrogated depends on the policy language and the circumstances of the case.

## OTHER ISSUES

**Negligence:** South Dakota has a modified contributory negligence rule. The plaintiff is barred from recovery if his negligence was more than slight in comparison to the defendant's negligence. In circumstances where the plaintiff is negligent, but his negligence is less than slight, the damages awarded to the plaintiff are to be reduced in proportion to plaintiffs comparative negligence. SDCL 20-9-1 and 20-9-2. As a general rule, the negligence of a driver will not be imputed to an injured passenger. Comparative negligence statute applies in wrongful death cases.

**Statute Of Limitations:** The statute of limitations for bodily injury in South Dakota is three years. SDCL 15-2-14. The statute of limitations for property damage is six years under SDCL 15-2-13(4). Under SDCL 15-2-22, the statute of limitations on a claim of a minor is tolled until the minor reaches the age of majority of 18.

After that time, the minor has one year within which to commence the action. There does not appear to be any South Dakota authority on whether an adjuster must notify the parties of a statute of limitations. However, an adjuster obviously should never mislead or misrepresent to any person, as to the applicable statute of limitation.

**Licensing Requirements:** Please refer to Title 58 of the South Dakota Codified Laws. Assistance with licensing can be provided through this office and in conjunction with the South Dakota Division of Insurance.

**Punitive Damages:** The South Dakota Supreme Court has resolved that insurance policies may exclude coverage of punitive damages. However, whether punitive damages are covered by an insurance policy depends upon the language of the insurance policy itself. Dairyland Ins. Co. v. Wyant, 474 N.W.2d 514 (S.D. 1991). Even when punitive damages are not covered by an insurance policy, punitive damages still may be claimed and recovered from the insured. There is no statutory cap on the amount of recovery of punitive damages. Punitive damages are designed to punish and deter wrongful conduct. They are recoverable under South Dakota law in non-contract cases when a defendant has acted with oppression, fraud, malice (actual or presumed), or has caused injury by willful and wanton misconduct. SDCL 21-3-2. Under SDCL 21-1-4.1, a court is required to make a preliminary finding of a reasonable basis for punitive damages before permitting discovery on a punitive damage claim.

**Joint and Severable Exposure:** South Dakota has adopted the Uniform Contribution Among Joint Tortfeasors Act under SDCL 15-8-11 through 15-8-22. This permits, by cross-claim or third party claim, a determination of the relative degrees of fault among the joint tortfeasors if the degrees of fault are disproportionate. This would cover both economic and non-economic damages. The legislature recently modified joint and several liability by enacting a statute that provides that in no event may a party be required to pay more than double the percentage of total fault allocated to that party. In other words, if a party is jointly and severally liable and 50 percent at fault, that party can be required to pay the entire damage award. However, if a party is only 10 percent at fault and is jointly and severally liable with other parties, that party can be required to pay no more than 20 percent of the fault allocated to him. See SDCL 15-8-15.1.

**Workers' Compensation:** A workers' compensation carrier can subrogate and obtain reimbursement from a tort-feasor who injured a covered employee. An employee who chooses to pursue and recover on a personal injury claim against a negligent tort-feasor in effect makes an election under South Dakota law to recover tort damages in the place of worker's compensation benefits. A worker's compensation carrier can seek to recover its entire subrogated amount by pursuing that interest in a third-party suit. Alternatively, the worker's compensation carrier can recover a portion of the amount subrogated less attorneys' fees if it chooses to permit the injured party's attorney to work alone in pursuit of a recovery of damages from the tortfeasor. A worker's compensation claimant may have a successful uninsured motorist claim depending on the circumstances and the policy at issue. Liens of a worker upon amount due under policy. SDCL 58-20-9.

**Minor Settlements:** In South Dakota, any minor settlement must have court approval, or it is subject to being challenged within one year from the date when the minor turns 18. Under SDCL 26-1-4, a minor may be civilly liable for any wrong done by him, although a lower standard of care may be applicable to a minor than would otherwise be applicable to an adult.

**Bad Faith Issues:** An action for bad faith denial of an insurance claim is recognized under South Dakota law. Punitive damages are available in conjunction with such a claim.

**Alcohol Issues:** The legal limit of intoxication in South Dakota is 0.08 percent. There are no varying degrees of the offense of driving under the influence of alcohol. In Walz v. City of Hudson, 327 N.W.2d 120 (S.D. 1982), the South Dakota Supreme Court held that a dram shop type cause of action existed. The legislature, subsequently, specifically abrogated the decision in Walz v. City of Hudson. See SDCL 35-11-1. In a later decision, the South Dakota Supreme Court held that SDCL 35-11-1 could not be applied retroactively to

injuries sustained before the new statute went into effect. See Baatz v. Arrow Bar, 426 N.W.2d 298 (S.D. 1988). There is some indication by some of the justices on the Supreme Court in the Baatz case that calls into question whether the legislative enactment abrogating the dram shop liability found to exist in Walz is constitutional.

**Legal Age:** Legal age in South Dakota is 18 under SDCL 26-1-1.

**Interfamily and Spousal Immunity:** South Dakota has abandoned the interfamily and spousal immunity doctrine. On a related topic, an insurance policy exclusion of liability coverage for a family member or household member is void to the statutory minimum of $25,000.00/$50,000.00, but is enforceable beyond the statutory minimum. Cimarron Ins. Co. v. Croyle, 479 N.W.2d 881 (S.D. 1992).

**Seatbelt Defense:** South Dakota does not have law requiring adults, who are not operators or front-seat passengers to use a seatbelt. Although it has not been explicitly decided by the South Dakota Supreme Court, several South Dakota circuit courts have held that the failure to use a seatbelt is not admissible as failure to mitigate damages.

**Wrongful Death:** Under South Dakota law, a wrongful death and a survival action may be brought. SDCL 21-5; Plank v. Heirigs, 156 N.W.2d 193 (S.D. 1968). Under these claims, medical expenses, other expenses, pain and suffering of the decedent, and damages sustained by close relatives of the decedent are recoverable. Wrongful death actions have a three-year statute of limitations under SDCL 21-5-3.

**SUMMARY OF SOUTH DAKOTA LAW:** The following is a general summary of South Dakota Law. Any specific questions about South Dakota law and its application to specific cases or facts that should involve consultation with a South Dakota lawyer.

**Premises Liability:**

**(1)** Despite the trend in other jurisdictions to abolish the traditional classifications regarding premises liability, South Dakota still adheres to the classifications of licensee, trespasser, and invitee. As recently as 1990, the South Dakota Supreme Court has refused to abolish these distinctions. Musch v. H-D Electric Coop., Inc., 460 N.W.2d 149 (S.D. 1990). In that case, the court rules in a 3-2 decision that these distinctions still apply. The court reaffirmed its decision in Underberg v. Cain, 348 N.W.2d 145 (S.D. 1984). With respect to an invitee, the possessor or owner of land owes the invitee a duty of exercising reasonable or ordinary care.

A trespasser is an individual who has no title or right to possession and makes entry on the land without the express or implied consent of the owner or possessor.

An invitee is a person who is upon the premises for a purpose connected with the owner or occupier's business or an activity carried on by the owner or occupier or is permitted to be on the property in a mutually beneficial interest with the owner or occupier.

A licensee is a person who is upon the premises for his own purposes with the consent of the owner or occupier and is not on the land for some purpose connected with the owner or occupier's business, or any activity of the owner or occupier.

**(2)** South Dakota law also recognizes the doctrine of attractive nuisance. Hofer v. Meyer, 295 N.W.2d 222 (S.D. 1980). Under that doctrine, the owner or occupier of land can be responsible for an injury to trespassing children. Such liability exists if a condition exists on the premises which the owner or occupier, in the exercise of ordinary care, should have known about and which was recognized to create a reasonably foreseeable risk of harm to children. The owner or occupier of the land must have foreseen that children would likely trespass on the premises and that such minor children would use the premises in the manner foreseen.

**(3)** South Dakota has enacted an outdoor recreational land use act. SDCL 20-9-12 through SDCL 20-9-18. The act generally provides that an owner of land is under no duty of care to keep the land safe for entry or use by others for outdoor recreational purposes or to give any warnings of a dangerous condition, use, structure, or activity on the land to persons entering for outdoor recreational purposes. That protection does not apply to gross negligence or willful or wanton misconduct on the part of the owner of the land and does not apply in cases where the owner of the land charges any person a fee for using the land for outdoor recreational purposes. In addition, the act is not applicable where the owner has violated a county or municipal ordinance or state law which violation is a proximate cause of the injury sustained.

**Negligence:**

**(1)** South Dakota has adopted the common law rule that every person is responsible for injury to another person caused by a person's willful acts or want of ordinary care or skill. SDCL 20-9-1. Any claim of negligence, or the lack of ordinary skill or care is subject to the defense of contributory negligence.

**(2)** South Dakota still follows the common law contributory negligence rule. Any negligence on the part of a plaintiff, greater than slight in comparison to any negligence on the part of the defendant, is a complete bar to any recovery.

**(3)** South Dakota has limited comparative negligence. SDCL 20-9-2. The fact that the plaintiff may have been contributorily negligent is not a bar to recovery if the contributory negligence of the plaintiff was slight in comparison to the negligence of the defendant. In those very limited situations, the damages awarded to the plaintiff should be reduced in proportion to that plaintiffs contributory negligence.

**Statutes of Limitations And Repose:**

**(1)** In South Dakota, a lawsuit is commenced by service of the suit papers on the defendant, not by filing the lawsuit. SDCL 15-2-30. Service is considered completed when the summons is delivered to the sheriff for service provided that service is completed within sixty days thereafter. SDCL 15-2-31.

**(2)** Tort claims for property damage must be commenced within six years. SDCL 15-2-13. Tort claims for personal injury must be commenced within three years. SDCL 15-2-14(3).

**(3)** Any claim based upon breach of contract must be commenced within six years. SDCL 15-2-13(1). However, if the claim is based upon UCC breach of warranty, the applicable statute of limitations is four years. SDCL 57A-2-725.

**(4)** Wrongful death actions must be commenced within three years after the death of the deceased person. SDCL 21-5-3.

**(5)** The time for bringing an action is tolled in the case of a minor or disabled person. Disabled person is defined as someone mentally ill or imprisoned on a criminal charge for a term less than life.

SDCL 15-2-22. In the case of a minor, the statute of limitations is extended to a period of one year after the minor's eighteenth birthday. In the case of a mentally ill person or a person imprisoned, the statute of limitations extends for a period of one year after the disability ceases, but in no event can that period of time be extended more than five years. This statute does not apply to federal civil rights claims. Also, minors with medical malpractice claims have a different statute of limitations. With respect to any disability, the disability must have existed at the time the right of action accrued. SDCL 15-2-23. Also, if a person entitled to bring an action dies before the action is commenced, the legal representative for that person shall have one year after the death to commence the action.

**(6)** An action based upon medical malpractice against any doctor, nurse, hospital clinic or other defendant must be commenced within two years of the alleged malpractice. No discovery rule exists. SDCL 15-2-14.1. Legal malpractice claims have a three- year statute of limitations. SDCL 15-2-14.2.

**(7)** South Dakota has a statute of repose with respect to actions for construction deficiencies. SDCL 15-2A-3. Any action for damages, or personal injury or death, arising out of any deficiency in design, planning, supervision, inspection, construction of an improvement to real property or any action for contribution or indemnity for damages sustained on account of such injury or death must be brought within ten years after substantial completion of such construction. This statute was enacted in 1985 to replace the previous statute of repose relating to construction. deficiencies. Id. That previous statute, SDCL 15-2-9, required any action to be brought within six years of substantial completion and was held unconstitutional and, therefore, was repealed. There have been no cases interpreting whether or not the newly enacted statute, SDCL 15-2A, is constitutional.

**(9)** With respect to product liability actions, any action against a manufacturer, lessor or seller of a product, regardless of the legal theory, must be brought within three years of the date when the personal injury, death or property damage occurred, because known or should have become known to the injured party. SDCL 15-2-12.2. A products liability statute was passed in 1985 to replace SDCL 15-2-12.1 which was a statute of repose with respect to product liability actions. It required that any lawsuit be brought within six years of delivery of the product. That statute was held unconstitutional and was repealed.

**(10)** Any cause of action based on fraud must be commenced within six years. SDCL 15-2-13(6). However, a claim based upon fraud does not accrue until the injured party has actual or constructive notice of the facts constituting the fraud. SDCL 15-2-3.

**Immunity:**

**(1)** Sovereign immunity in this state has been waived to the extent of insurance coverage. That applies to both the state under SDCL 2 1-32-16 and to any other public entity other than the state under SDCL 21-32A-1. It likewise applies to any employees, officers, or agents of any public entity while acting within the scope of his or her employment, whether such acts are ministerial or discretionary.

SDCL 21-32A-2. However, any action against a public entity, including the State of South Dakota, or its employees requires that written notice of the claim be made within one hundred eighty days of the injury. SDCL 3-21-2. If a person is disabled, the time limit for giving notice can be extended for a reasonable period. SDCL 3-21-4. The notice must be given to the appropriate individual of the governmental entity and to the Attorney General of the state. SDCL 3-21-3. Failure to comply with these notice provisions will result in the lawsuit being dismissed. Finck v. City of Tea, 443 N.W.2d 632 (S.D. 1989).

**(2)** Likewise, any claim of charitable immunity is waived to the extent of liability insurance coverage. SDCL 58-23-3. Likewise, immunity of any volunteer of a nonprofit organization is waived to the extent of liability insurance. SDCL 47-23-32. Volunteers of a non-profit organization or governmental entity are immune from civil actions provided that they were acting in good faith. This immunity does not apply to willful and wanton misconduct nor does it apply to negligence in the operation of a motor vehicle. SDCL 47-23-29.

**(3)** There is no interspousal immunity in South Dakota. In 1941, the South Dakota Supreme Court recognized that a husband could sue his wife and vice versa. Scotvold v. Scotvold, 298 N.W. 266 (S.D. 1941). With respect to suits against members of the household, the South Dakota Supreme Court has recently had a change to address the validity of a household exclusion in an automobile liability policy. In Cimarron Ins. Co. v. Croyle, which was decided on January 8, 1992, the court held that the household exclusion in a policy is valid beyond the financial responsibility minimum limits of $25,000.00. The exclusion is not valid to defeat the financial minimum.

**Simple Interest:**

**(1)** Interest is allowed on a judgment at the rate established by statute per official state interest rules. Percent simple interest begins to run on the date of the judgment. See SDCL 54-3-5.1; 54-3-16.

**(2)** In 1990, the South Dakota Legislature enacted a new statute with respect to prejudgment interest. It is computed from the day that the loss or damage occurred. Pre-judgment interest is not recoverable on future damages, punitive damages, or intangible damages such as pain and suffering, emotional distress, loss of consortium, injury to credit, reputation, or fmancial standing, loss of enjoyment of life, or loss of society and companionship. If there is a question of fact as to when the loss or damage occurred, pre-judgment interest shall commence on the date specified in the verdict or decision and shall run to and include the date of the verdict or if there is no verdict, the date the judgment is entered. SDCL 21-l-13.1.

**Punitive Damages:**

**(1)** In an action not arising out of contract, where a defendant has been guilty of oppression, fraud, or malice, whether actual or presumed, or for wrongful injury to animals, committed intentionally or by willful and wanton misconduct, in disregard of humanity, in addition to actual damages, a jury may award damages for sake of example and as punishment. SDCL 21-3-2. The punitive damages awarded should bear some relationship to the compensatory damages. In a recent case, the Eighth Circuit Court of Appeals, interpreting South Dakota law, held that a 20-1 ratio was within an acceptable range for punitive damages. Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 906 F.2d 1206 (8th Cir. 1990). In a claim alleging punitive damages, before discovery may be commenced and before submitted to a fact finder, the court must hold a hearing and find, by clear and convincing evidence, a reasonable basis that there has been willful, wanton or malicious conduct. SDCL 21-1-4.1.

**(2)** In a recent South Dakota Supreme Court decision, the court held that punitive damages were not covered under an automobile liability policy. That ruling, however, was based upon specific language of that particular policy. Dairyland Ins. Co. v. Wyant, 474 N.W.2d 514 (S.D. 1991). In an earlier case of Fort Pierre v. United Fire & Cas. Co., 463 N.W.2d 845 (S.D. 1980), language indicates that an award of punitive damages against a wrongdoer's insurance carrier would violate public policy. However, in the Dairyland case, the court held that this language was merely dicta and did not represent a determination by the South Dakota Supreme Court that coverage for punitive damages in an insurance policy would be against public policy.

Again, in Dairyland, the ruling prohibiting coverage for punitive damages was based upon the specific facts of that case and the language of the policy. If a claim for punitive damages was based upon some vicarious liability rather than personal fault on the part of the insured, that would probably make a stronger case for permitting such damages under the policy. However, the situation where punitive damages are based upon vicarious liability are rather rare.

**(3)** With respect to any duty to defend, normally any claim for punitive damages also covers a claim for actual damages as well. Therefore, there probably would in most cases be a duty to defend. The duty to defend is much broader than the issue of coverage. It represents a separate duty on the part of the insurance company. It is based upon the pleadings and even if the claims are groundless, there is a burden on the insurer to defend. Hawkeye-Security v. Clifford, 366 N.W.2d 489 (S.D. 1985).

**Intentional Acts:**

**(1)** In Tri-State Ins. Co. of Minnesota v. Bollinger, 476 N.W.2d 697 (S.D. 1991), the South Dakota

Supreme Court discussed the issue of insurance coverage for an intentional act.

The policy contained in an exclusion as to acts expected or intended by the insured.

The court noted that the duty to defend and the duty to pay are different and that the duty to defend is far broader. The court held that there was a duty to defend.

In a partial dissent, Justice Wuest noted that the insured was attempting to have this court adopt a subjective standard. Justice Wuest noted that this would place complete control of insurance coverage in the hands of the insured and should be rejected. It is not clear whether the majority opinion specifically recognizes the subjective standard.

The courts of our state have often recognized that any ambiguities in an insurance policy will be construed against the company. However, our court has also said that an exclusion in an insurance policy with respect to intentional acts is "clear and unambiguous." Kiatt v. Continental Ins. Co., 409 N.W.2d 366 (S.D. 1987).

**(2)** If a subjective test is applied, the subjective test just applies to whether the person intended the act. It has been recognized in other jurisdictions if the insured intended the act, he is responsible for the injuries which are natural and probable as a result of his actions. He need not intend the specific injury. Again, however, it is not clear that South Dakota has adopted the subjective test. Certainly, under an objective test, just like with issues of negligence, the age or mental capacity of the actor is a consideration.

**Wrongful Death Statute:**

**(1)** South Dakota's wrongful death statutes are found in SDCL 21-5. The action must be brought in the name of the personal representative of the deceased. The action must be brought within three years of the death of the deceased and is for the exclusive benefit of the wife or husband and children, or if neither exists, then of the parents and next of kin of the deceased. SDCL 21-5-5. The jury in such action may give such damages they think proportionate to pecuniary injury resulting from such death to persons for whose benefit action is brought. Although pecuniary loss does not include any damages for grief and mental anguish suffered by the beneficiaries, damages can be awarded for the loss of decedent's companionship, society, advice, and assistance. Flagtwet v. Smith, 367 N.W.2d 188 (S.D. 1985). All causes of action survive the death of the claimant or person liable. SDCL 15-4-1. This would include any pain and suffering or other damages sustained by the decedent prior to his or her death.

**Products Liability:**

**(1)** A plaintiff may be entitled to separate instructions against a manufacturer based upon implied warranty. However, it may not be reversible error to refuse to instruct on implied warranty when the jury has been instructed on strict liability. Zacher v. Budd Co., 396 N.W.2d 122 (S.D. 1986).

**(2)** The defense of contributory negligence is not available to bar a recovery in a strict liability case. Smith v. Smith, 278 N.W.2d 155 (S.D. 1979) and Berg v. Soukup Mfg. Co., 355 N.W.2d 833 (S.D. 1984). However, the defense of whether the plaintiff had a reasonable opportunity to avoid an open and obvious defect is permitted. Berg, supra, and Bitsos v. Red Owl Stores, Inc., 459 F.2d 656 (8th Cir. 1972). Misuse of the product is a defense.

**Contribution Among Joint Tort-Feasors:**

**(1)** South Dakota has adopted the uniform contribution among joint tortfeasors act. SDCL 15-8-11 through 15-8-22. This permits, by cross claim or third party claim, a determination of the relative degrees of fault among the joint tortfeasors if the degrees of fault are disproportionate. SDCL 15-8-15.

**Bodily Injury:**

**(1)** South Dakota recognizes both the intentional infliction of emotional distress as well as the negligence infliction of emotional distress. In order to recover under the theory of intentional infliction of emotional distress, it is necessary to show extreme and outrageous conduct. It must be conduct exceeding all the bounds usually tolerated by decent society and which is of a nature especially calculated to cause mental distress. Tribke v. McDougall, 479 N.W.2d 898 (S.D. 1992).

**(2)** With respect to intentional torts, one can recover for mental pain though no physical injury results, where the act causing the anguish was done intentional, the act was reasonable, the actor should have recognized it as likely to result in emotional distress. Chisum v. Bebrens, 283 N.W.2d 235 (S.D. 1979).

**(3)** It is not clear under South Dakota law whether a recovery for emotional damages arising out of the negligent infliction of emotional distress requires physical manifestations. Wright v. Coca-Cola Bottling Co., 414 N.W.2d 608 (S.D. 1987). However, in that case, the court recognized that gagging, vomiting, or diarrhea could be sufficient to warrant a recovery.

**Financial Responsibility and Compulsory Insurance:**

**(1)** Prior to 1986, South Dakota's financial responsibility law required proof of financial responsibility only after a motorist was involved in an accident or convicted of certain motor vehicle offenses. SDCL 32-35-43 and Novak v. State Farm Mutual Automobile Ins. Co., 293 N.W.2d 452 (S.D. 1980). In 1986, however, the South Dakota Legislature mandated that all owners and operators of motor vehicles maintain proof of financial responsibility for future events. The financial responsibility minimums in this state are presently $25,000.00 because of bodily injury to or death of one person in any one accident and $50,000.00 because of bodily injury to or death of two or more persons in any one accident. SDCL 32-35-70.

**(2)** In Cimarron Ins. Co. v. Croyle, decision dated January 8, 1992, the South Dakota Supreme Court had recognized that this requirement of financial responsibility cannot be defeated by a household exclusion in an automobile liability policy.

**Stacking:**

**(1)** The stacking of uninsured and underinsured limits is not permitted. SDCL 58-11-9.7. In addition, the stacking of uninsured motorist limits is not permitted nor is the stacking of underinsured motorist limits. SDCL 58-11-9.8 and 9.9.

In Westphal v. AMCO Ins. Co., 209 N.W.2d 555 (S.D. 1973), the South Dakota Supreme Court did permit stacking of coverage between two separate policies. However, in a later decision, Cunningham v. Western Cas. & Surety Co., 243 N.W.2d 172 (S.D. 1976), the court refused to permit the stacking of coverage within one policy where two separate vehicles were covered.

**Bad Faith:**

**(1)** South Dakota does recognize bad faith liability on behalf of an insurer if there is a lack of a reasonable basis for either denial of policy benefits or failure to process a claim in a timely and reasonable fashion. Champion v. U.S.F. & G., 399 N.W.2d 320 (S.D. 1987) and Hollman v. Liberty Mutual Ins. Co., 712 F.2d 1259 (8th Cir. 1983).

**(2)** In additional, SDCL 58-12-3 permits the award of attorney's fees when the denial by an insurance company is either vexatious or without reasonable cause. Punitive damages are also recoverable in a bad faith action.

**(3)** In 1986, South Dakota did enact the unfair deceptive insurance practices act. SDCL 58-33-66 through SDCL 58-33-69. However, it is recognized that this does not create any private right of action. SDCL 58-33-69. However, SDCL 58-33-66 and SDCL 58-33-67 do outline certain responsibilities an insurance company has in dealing with either the Department of Insurance or with an insured. Arguably, the failure to live up to those requirements could be used to establish a deviation from the standard of reasonableness on behalf of the insurance company.

**Loss of Consortium:**

**(1)** A husband or wife may recover for loss of consortium. Wilson v. Hasvold, 86 S.D. 286, 194 N.W.2d251(1972).

**(2)** An action by a spouse for loss of consortium is recognized as being derivative in action. Bitsos v. Red Owl Stores, Inc., 459 F.2d 656 (8th Cir. 1972). Accordingly, if the injured spouse is not awarded any recovery, the other spouse cannot recover on his or her loss of consortium claim. Therefore, if the injured spouse is contributorily negligent, that would prevent a recovery on the loss of consortium claim.

**(3)** The South Dakota Supreme Court has not addressed whether a consortium claim triggers a separate per person limit of liability. That issue would be determined based upon the language of the policy and the trend of authorities elsewhere.

**Liquor Liability:**

**(1)** In Walz v. City of Hudson, 327 N.W. 2d 120 (S.D. 1982), the South Dakota Supreme Court held that a cause of action existed for injured persons against liquor licensees who violated SDCL 35-4-78. That statute prohibited the sale of liquor to a minor or to an obviously intoxicated person.

In response to that Supreme Court decision, the Legislature enacted SDCL 35-11-1. That statute specifically abrogated the decision in Walz v. City of Hudson. In additional, the Legislature enacted SDCL 35-11-2 which provides that no social host who furnishes any alcoholic beverages can be civilly liable to any injured person or estate as a result of damages suffered because of the intoxication of any person due to the consumption of alcoholic beverages. These legislative enactments were considered by the South Dakota Supreme Court in Baatz v. Arrow Bar, 426 N.W.2d 298 (S.D. 1988). In that case, the court held that SDCL 35-11-1 could not be applied retroactively to injuries sustained before the new statute went into effect. It is not clear, however, whether that decision represents a determination that the legislative enactment is unconstitutional.

**No Fault:** South Dakota is occasionally referred to as modified "no fault" state. Certain automobile insurance policy provisions coverage accident, disability and medical benefits have been provided by statute.

See SDCL 58-23-6-8 for supplemental coverage; and SDCL 58-11-9.4 for uninsured motorist coverage.

No automobile policy may be offered in South Dakota without giving the insured an option to purchase supplemental coverage which provides benefits without regard to fault, either when struck while a pedestrian or while occupying, entering or alighting from an automobile.

No fault on health care malpractice claims under SDCL 21-3-12. South Dakota has embraced the collateral source rule under which a defendant tort-feasor may not benefit from the fact that plaintiff has received money from other sources such as health insurance. Degen v. Bayman, 241 N.W.2d 703 (S.D. 1976).

**Salvage:** South Dakota does not have a specific statute regarding disposal of salvage. However, a statute on abandoned vehicles and their disposal exists. SDCL 32-30-12.

**Collision Waiver and Rental Vehicles:** South Dakota does not have a law relating specifically to an insurer's duty to pay a collision waiver. Nor does a law exist regarding the necessity of providing a rental vehicle in the event of a loss.

**Permissive Use:** South Dakota statute provides that:

> An owner's policy of liability insurance referred to in § 32-35-68 shall insure the person named therein and any other person as insured, using any insured vehicle or vehicles with the express or implied permission of the named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of the vehicle or vehicles within the United

> States of America or the Dominion of Canada, subject to limits exclusive of interests and costs, with respect to each insured vehicle, as follows: [list of coverage minimums and exceptions omitted].

SDCL § 32-35-70.

The party asserting coverage bears the burden of proving that the owner of the vehicle gave implied permission for its use. *State Farm v. Gertsema*, 778 N.W.2d 609, 613 (S.D. 2010). In order to establish implied permission, there must be a showing that "a course of conduct or practice" known to the owner of the vehicle suggested permission for its use. *Id.* at 614. Implied permission is found when the "usage and practice" of the parties would reasonably indicate that the driver had permission to use the vehicle. *Id.* Additionally, once permission is given, the protection of the omnibus provision will not terminate unless the permittee "commits a material violation or deviation from the terms of the permission." *Id.* at 616.

Express permission must be established by evidence "of an affirmative character, directly, and distinctly stated, clear and outspoken, and not merely implied or left to inference" *Estate of Trobaugh v. Farmers Ins.*, 623 N.W.2d 497, 502 (S.D. 2001).

# Tennessee

**Bodily Injury Damages**

**A. <u>Compensatory Damages:</u>**

1. Legal standards of recovery

Plaintiff must establish negligence, cause in fact and legal cause by a preponderance of the evidence. The injury arising from the act or omission must have been reasonably foreseeable or anticipated by a person of ordinary intelligence and prudence.

Tennessee applies modified comparative fault, and a plaintiff who is 50% or more at fault is not entitled to recover damages in any amount. Defendant has the burden to prove plaintiff's fault and the comparative fault of any other party or non-party whom the defendant contends to be at fault. Plaintiff's damages are reduced pursuant to the percentage of fault allocated by the trier of fact against the plaintiff.

Violation of a statute or of a state or federal regulation constitutes negligence *per se* if the plaintiff was a member of the class of persons the statute or regulation was designed to protect.[1] The violation of the statute or regulation must be found by the trier of fact to have been a legal cause of plaintiff's injury or damage.[2] A defendant is excused from complying with a statute (or regulation) when compliance would have resulted in a greater risk of harm to himself or others.[3]

Although it is generally recognized that a defendant admitting vicarious liable for any proximate negligence found against its employee, agent or servant may nevertheless be held liable for its own independent negligence, Tennessee law on this issue is not very well defined, and at least one federal trial court in Tennessee applying Georgia substantive law in a trucking accident case has recognized the contrary majority rule and the policy reasons supporting it.[4]

Liability for negligent entrustment claims exists independently of vicarious liability, but a finding of negligent entrustment does not give rise to vicarious liability for the entrustee's negligence.[5]

A plaintiff directly involved in an accident may recover damages for emotional injury or distress that was serious or severe, and the emotional injury must be established by expert medical or scientific proof.[6] A bystander may recover for negligent infliction of emotional distress upon proof that he saw or heard the event causing the injury, believed the physical injury to the other person to be serious and as a consequence thereof sustained a serious or severe emotional injury, which must be established by expert medical or scientific proof. No particular relationship between the party claiming emotional injury and the injured or deceased third party is required.[7]

2. Economic losses

Reasonable and necessary expenses actually incurred for medical care, services and supplies are recoverable, provided the expenses are shown to have been incurred as a result of the injury alleged. The present cash value of future medical expenses is recoverable, provided plaintiff establishes by a reponderance of the evidence that the expenses are likely to be required in the future. Reasonable medical expenses incurred in diagnosing whether an actual injury was caused are recoverable.

If an itemization is served upon the other parties at least 90 days prior to trial, a rebuttable presumption of reasonableness arises. An opposing party must serve notice of its intention to rebut the presumption at least 45 days prior to trial.[8] A plaintiff cannot redact or exclude certain portions of medical bills to avoid exceeding the statutory limit.[9]

The loss of earning capacity in the past and the present cash value of future lost earning capacity are recoverable. The loss of past earning capacity may include, but is not necessarily limited to, the actual loss of income or earnings prior to trial.

Economic damages for loss of business or employment opportunities, expenses incurred to obtain domestic services and other out-of-pocket monetary losses actually sustained, or to be sustained in the future, are recoverable, provided such damages were proximately caused by the alleged injury.

3. Non-economic losses

Reasonable compensation for physical pain and suffering and mental discomfort and the present cash value for pain and suffering likely to be experienced in the future are recoverable. Mental suffering includes anguish, grief, shame or worry.

Separate and apart from physical pain and suffering is the loss of enjoyment of life, which considers the loss of the normal enjoyments and pleasures in life and lifestyle limitations resulting from the injury incurred to the date of trial and the present cash value of any future damages for such claims.

4. Statutory limitations on recoverable compensatory damages

Effective October 1, 2011 as to all causes of action accruing on or after such date, the Tennessee Civil Justice Act of 2011 limits non-economic damages to $750,000, unless an injury or loss is "catastrophic in nature," as defined by the Act.[10] Non-economic damages for catastrophic injuries or the wrongful death of a parent leaving a surviving minor child or children for whom the deceased parent had lawful rights of custody or visitation are limited to $1,000,000. "Catastrophic loss or injury" means one or more of the following: (1) Spinal cord injury resulting in paraplegia or quadriplegia; (2) Amputation of two hands, two feet or one of each; (3) Third degree burns over forty percent (40%) or more of the body as a whole or third degree burns up to forty percent (40%) or more of the face; or (4) Wrongful death of a parent as stated above."[11]

The statutory caps apply in the aggregate to claims of the injured plaintiff as well as the claims of a spouse or children or any other derivative claimant for non-economic damages. The trier of fact determines disputed claims of catastrophic loss or injury. The statutory caps do not apply if the plaintiff establishes by a preponderance of the evidence that the defendant acted with a specific intent to inflict serious physical injury and such conduct did, in fact, injure the plaintiff, or if the defendant "intentionally falsified, destroyed or concealed records containing material evidence with the purpose of wrongfully evading liability" (defendant may avoid this exception to the caps by showing that documents or records were withheld pursuant to applicable privileges or that records were destroyed or lost in the normal course of business or in compliance with a document retention policy or state or federal regulations), or if the defendant was under the influence of alcohol, drugs or any other intoxicant or stimulate resulting in his judgment being substantially impaired, causing the injury or death (defendant may avoid this exception to the caps by showing that he was using lawfully prescribed drugs administered in accordance with a prescription or over-the-counter drugs in accordance with the written instructions of the manufacturer), or if the defendant's act or omission causing the damages or injuries results in the defendant being convicted of a felony under any state or federal law. The trier of fact determines the applicability of the exceptions if a dispute exists.[12]

The Act further specifies that the liability of a defendant for non-economic damages whose liability is alleged to be vicarious "shall be determined separately from that of any alleged agent, employee or representative."[13]

NOTE: The Tennessee Supreme Court has upheld the constitutionality of the statutory damage caps noted above. The cap for non-monetary damages, absent extraordinary circumstances, is $750,000. McClay v. Airport Management Services, No. M2019-00511-SC-R23-CV.

5. Joint and several liability

With few exceptions, such as judgments based on vicarious liability, joint and several liability was abolished in Tennessee upon the adoption of modified comparative fault.

## B. Punitive Damages

1. Legal standards

Punitive damages may be awarded only if compensatory damages have been awarded. Punitive damages require a showing by clear and convincing evidence that the defendant acted either intentionally, maliciously, fraudulently or recklessly.[14]

The "reckless" standard to impose punitive damages requires clear and convincing evidence that the defendant was aware of and substantially disregarded a substantial and unjustifiable risk of such a nature that its disregard constituted a gross deviation from the standard of care that an ordinary person would exercise under all of the circumstances.[15] The defendant must have disregarded a substantial known risk that he "'g[a]ve no thought to'" or "'pa[id] no attention to.'"[16] Effective October 1, 2011, the Tennessee Civil Justice Act establishes the factors for the trier of fact to consider in determining the amount of punitive damages for all causes of action accruing on or after such date.[17]

2. Application to driver and motor carrier

The trier of fact may apportion punitive damages among one or more defendants, and for causes of action accruing prior to October 1, 2011, an employer or other principal may be held liable for punitive damages assessed against an employee or agent; however, when punitive damages are found against an employee or agent, such damages are not legally mandatory as to the employer or other principal.[18]

3. Insurability of punitive damages

Punitive damages are insurable except for injuries "intentionally inflicted."[19]

4. Statutory limitations on the amount of punitive damages

The Tennessee Civil Justice Act of 2011 places caps on punitive damages for all civil causes of action accruing on or after October 1, 2011. With certain statutory exceptions, the amount of punitive damages is limited to **the greater of** two (2) times the total amount of compensatory damages awarded or Five Hundred Thousand Dollars ($500,000).[20]

Significantly, the Tennessee Civil Justice Act of 2011 specifies that the "culpability of a defendant for punitive damages whose liability is alleged to be vicarious shall be determined separately from that of any

alleged agent, employee or representative."[21] Further, the statute specifies that punitive damages "shall not be awarded in any civil action when a defendant demonstrates by a preponderance of the evidence that it was in substantial compliance with applicable federal and state regulations setting forth specific standards applicable to the activity in question and intended to protect a class of persons or entities that includes the plaintiff, if those regulations were in effect at the time the activity occurred."[22]

**Wrongful Death**

**A. Persons Legally Entitled to Recover**

Recovery for wrongful death in Tennessee is purely by statute, and there is only one right of action, which is the right the decedent would have had against the wrongdoer had death not ensued.[23] As an element of the pecuniary value of the decedent's life, however, damages for loss of consortium or services may be awarded to a spouse or child.[24]

**B. Damages Available**

The damages recoverable for wrongful death are of two types. The first type includes:

1. compensation for mental and physical pain and suffering prior to death;
2. medical expenses necessitated by the injury;
3. reasonable funeral expenses; and
4. loss of earning capacity from the date of injury to the date of death.

The second class of damages is the present cash value of the pecuniary value of the life of the decedent. The following factors are to be considered when determining this element of damages:

1. the decedent's age;
2. the decedent's condition of health prior to the injury;
3. the decedent's life expectancy;
4. the decedent's strength and capacity for work and for earning money;
5. the decedent's personal habits as to sobriety and industry; and
6. the reasonable value of the loss of consortium suffered by a spouse and any children of the decedent.

**C. Legal Standards**

Since the statutory claim for wrongful death is limited to the claim the decedent would have had if he had survived the injury, the legal standards are the same as applied to bodily injury damages generally.

**D. Statutory Limitations of Wrongful Death Damages**

Reasonable compensation may be awarded, and effective October 1, 2011 for all causes of action for

wrongful death accruing on or after such date, the statutory limitations set forth in the Tennessee Civil Justice Act of 2011 apply. Those limitations, and exceptions thereto, are discussed above and include limitations to both compensatory and punitive damages. As noted above, the $750,000 cap for non-economic damages in wrongful death cases is increased to $1,000,000 for the wrongful death of a parent leaving a surviving minor child or children for whom the deceased parent had lawful rights of custody or visitation.[25]

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[1] *Bellamy v. Fed. Express Corp.*, 749 S.W.2d 31, 35 (Tenn. 1988); *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 802 (6th Cir. 1984).

[2] *Bennett v. Putnam County*, 47 S.W.3d 438 (Tenn. App. 2000).

[3] *Standridge v. Godsey*, 226 S.W.2d 277 (Tenn. 1949).

[4] *See generally Washington v. The 822 Corporation*, 43 S.W.3d 491 (Tenn. App. 2000); *see Scroggins v. Yellow Freight Systems, Inc.*, 98 F.Supp.2d 928 (E.D. Tn. 2000).

[5] *Ali v. Fisher*, 145 S.W.3d 557, 561-564 (Tenn. 2004).

[6] *Camper v. Minor*, 915 S.W.2d 437 (Tenn. 1996).

[7] *Lourcey v. Estate of Scarlett*, 146 S.W.3d 48, 52 (Tenn. 2004); *see generally Ramsey v. Beavers*, 931 S.W.2d 527 (Tenn. 1996).

[8] Tenn. Code Ann. § 24-5-113. Medical, hospital or doctor bills -- Prima facie evidence of necessity and reasonableness.

[9] *Borner v. Autry*, 2007 Tenn. App. LEXIS 763 (Tenn. Ct. App. December 13, 2007, aff'd in part, rev'd in part, 284 S.W.3d 216 (Tenn. 2009)).

[10] See "Tennessee Civil Justice Act of 2011," Public Chapter No. 510, Tenn. Code Ann. § 29-39-101, *et seq*. Compensation for Economic and Noneconomic Damages.

[11] *Id.* at § 29-39-102(d).

[12] *Id.* at § 29-39-102(h), (i).

[13] *Id.* at § 29-39-102.

[14] *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992).

[15] *Goff v. Elmo Greer & Sons Constr. Co.*, 297 S.W.3d 175, 187 n. 11 (Tenn. 2009), cert. denied, 130 S. Ct. 1910 (2010).

[16] *Doe v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22, 37 (Tenn. 2005) (quoting *Webster's Third Int'l Dictionary* 655 (1971).

[17] See Tennessee Civil Justice Act of 2011, Public Chapter No. 510, Tenn. Code Ann. § 29-39-104(a)(4).

[18] *Huckeby v. Spangler*, 563 S.W.2d 555 (Tenn. 1978).

[19] *Lazenby v. Universal Underwriters Insurance Company*, 383 S.W.2d 1 (Tenn. S. Ct. 1964).

[20] See Tennessee Civil Justice Act of 2011, Public Chapter No. 510, Tenn. Code Ann. § 29-39-104(a)(5), (7).

[21] *Id.* at § 29-39-104(a)(9).

[22] *Id.* at § 29-39-104(e).

[23] Tenn. Code Ann. § 20-5-106.

[24] *Jordan v. Baptist Three Rivers Hospital,* 984 S.W. 2d 593, 601 (Tenn. 1999); *Hancock v. Chattanooga-Hamilton County Hospital Authority*, 54 S.W.3d 234 (Tenn. 2001).

[25] See Tennessee Civil Justice Act of 2011, Public Chapter No. 510, Tenn. Code Ann. § 29-39-102(c), (d).

# Texas

**Bodily Injury:** The minimum amounts of motor vehicle liability insurance coverage required to establish financial responsibility under the Motor Vehicle Safety Responsibility Act are $30,000 per person and $60,000 per accident. TEX. TRANSP. CODE ANN. 601.072. There is no tort or dollar amount of injury threshold that must be reached before a bodily injury claim can be made.

Mental anguish damages suffered by a person not involved in an actual accident are not "bodily injuries" under the terms of an automobile policy. *Eshtary v. Allstate Ins. Co.*, 767 S.W.2d 291, 293 (Tex.. App. –Fort Worth 1989, writ denied). The Fort Worth Court of Appeals has held that ―bodily injury‖ cannot be reasonably construed to incorporate a claim for mental pain and anguish if the claim is being asserted as a derivative claim arising only as a consequence of injuries to another person. *Id.* (citing *McGovern v. Williams,* 741 S.W.2d 373, 374 (Tex.1987)).

Collateral sources of recovery, such as worker's compensation benefits, group insurance, etc. cannot be used as an offset of the policy coverage. Coverage under the policy can be offset by Personal Injury Protection benefits and/or Uninsured/Underinsured Motorist benefits.

**Property Damage:** Minimum limits of $25,000 for property damage are mandatory in Texas. TEX. TRANSP. CODE ANN. 601.072 (2007 Mathew Bender & Co.).

A plaintiff who has suffered injury to personal property may elect between two methods of measuring the property loss in order to be made whole under the liability coverage of the policy. He may recover the diminution in value of the property resulting from the injury or the reasonable cost of repairing the property, provided such repairs are economically feasible. *Pasadena State Bank v. Isaac*, 228 S.W.2d 127 (Tex. 1950). However, liability to a first-party claimant under an automobile policy is limited to the damaged vehicle's "actual cash value" or the amount needed "to repair or replace" the vehicle, whichever is less. *American Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 158 (Tex. 2003). Interpreting an automobile policy's "repair or replace" language to include diminished value would render other provisions of the policy meaningless. *Id.* at 159.

In most cases, the market value of the property is the value used in both diminution in value and feasibility of repairs. ―Market value‖ is defined as the amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but is under no necessity of selling. *Exxon Corp. v. Middleton*, 613 S.W.2d 240, 246 (Tex. 1981). If the property has no market value, other methods of valuation may be used, such as replacement cost. The court in *J & D Towing, LLC v. Am. Alternative Ins. Corp.*, 478 S.W.3d 649, 676 (Tex. 2016), held that the owner of personal property that has been totally destroyed may recover loss-of-use damages in addition to the fair market value of the property immediately before the injury. (abrogating *Export Ins. Co. v. Herrera*, 426 S.W.2d 895, 901 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.)

**Personal Injury Protection:** Each Texas automobile liability insurance policy must contain personal injury protection (―PIP‖) with minimum limits of $2,500.00 (aggregate, per person) unless rejected in writing by any insured named in the policy. TEX. INS. CODE ANN., § 1952.151-1952.161 (2008 Mathew Bender & Co.).

PIP covers the named insured, members of the insured's household and any authorized operator or passenger of the named insured's motor vehicle including a guest or occupant. *Id.* at § 1952.151.

PIP benefits include all reasonable and necessary expenses arising from the accident that are incurred within

three years from the date of the accident. *Id.* These benefits include medical, surgical, x-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services. *Id.*

In the case of an income producer, payment of reasonable and necessary expenses associated with loss of income as a result of the accident are recoverable. *Id.* The Texas Department of Insurance has interpreted the reasonable and necessary expenses to include 80% of the loss of income and has approved the standard Texas automobile policy language to reflect the same. However, § 1952 does not have the 80% limiting language. In addition, loss of income benefits are not recoverable after the covered person dies. *Sterling v. U.S. Fidelity & Guaranty Co.*, *555* S.W.2d 889, 890 (Tex.App.--Beaumont 1977, writ ref'd n.r.e).

If the person injured was not an income or wage producer at the time of the accident, benefits must be made as reimbursement of necessary and reasonable expenses incurred for essential services ordinarily performed by the injured person for care and maintenance of the family or family household. TEX. INS. CODE ANN., § 1952.151.

An insurance company cannot subrogate against any other person or insurer to recover PIP benefits. *Id.* at § 1952.155. PIP cannot be offset by any medical, hospital, or wage continuation benefits *Id.* Per the Texas Department of Insurance, PIP cannot be offset against uninsured motorist protection if the offset would result in less uninsured motorist protection than the statutory minimum for either type of benefit.

PIP benefits can offset a bodily injury claim in limited circumstances. If the liability claim is made by a guest or passenger eligible for PIP coverage against the owner or operator of the motor vehicle in which he was riding or the liability carrier, then the owner or operator or liability carrier shall be entitled to an offset, credit or deduction against any award made to such guest or passenger equal to the amounts paid by the owner, operator or liability carrier to such guest or passenger. *Id.* at § 1952.159.

PIP coverage is a per-policy coverage. If a policy has more than one automobile, the benefits cannot be stacked within that policy. However, where there are two separate policies covering the same cars, PIP benefits are not stacked but the insured is required to pay up to the limits under each policy. *Travelers Indemnity Co. of Rhode Island v. Lucas*, 678 S.W.2d 732 (Tex. App.—Texarkana 1984, no writ).

**Medical Payment Coverage:** Because medical payment coverage (—Med-pay‖) is not mandatory in Texas, it is not covered by the Motor Vehicle Safety Responsibility Act.

If Med-pay is selected by the insured, the minimum limit is usually $2,500 and coverage does not have to be rejected in writing. Med-pay covers the insured or any family member while occupying or when struck by a motor vehicle or a trailer or any other person while occupying the insured automobile (—covered persons.‖)

Med-pay will pay reasonable and necessary medical and funeral expenses because of a bodily injury caused by an accident and suffered by a covered person. The expenses must be incurred within three years of the accident. There is no dollar or injury threshold that must be met to make a Med-pay claim.

The insurance carrier usually has the right to subrogation with respect to benefits paid under Med-pay coverage. There is usually no Med-pay coverage if the accident occurred during the course of employment because worker's compensation benefits are usually available. Med-pay may be offset by amounts paid for the same expenses under a bodily injury claim or uninsured/underinsured motorist claim. In some circumstances, Med-pay coverage may be stacked.

**Uninsured/Underinsured Coverage:** Bodily injury coverage limits under the UM/UIM policy must be no less than $30,000 per person/$60,000 per accident, but may be more, based on the insured's discretion. This amount is in the minimum amount listed as part of the required Financial Responsibility Law. TEX.

TRANSP. CODE § 601.072. These limits, however, may not be larger than those specified in the bodily injury liability provision(s) of the insured's auto policy. TEX. INS. CODE § 1952.105. This also applies to UM/UIM property damage coverage, subject to a $250 deductible. *Id.* The insured may choose between his or her ―collision coverage‖ or UM/UIM property damage liability coverage and may recover under both, if neither of the coverages are sufficient to cover the damages resulting from a single occurrence. TEX. INS. CODE § 1952.107 coverages are necessary to make the insured whole, then the insured must choose one of the coverages as primary and pay the corresponding deductible. *Id.* The insured shall not be required to pay the deductible for the secondary insurance, if it is the same or less than the deductible applicable to the primary insurance. *Id.* If the secondary insurance policy's deductible is larger than that of the primary insurance policy's deductible, then the insured must also pay the difference between the two deductibles. *Id.*

If the negligent driver is underinsured, then the underinsured motorist policy will cover the bodily injury and property damage the insured incurs up to the specified policy limits TEX. INS. CODE § 1952.105, 1952.106. The specified policy limits will, however, be reduced by the amount that recovered or recoverable from the insured of the underinsured motor vehicle. TEX. INS. CODE § 1952.106.

**Worker's Compensation:** Worker's Compensation benefits are subrogable. TEX. LAB CODE ANN. § 417.001(b) (Vernon 2003). The insurance company is subrogated to the rights of the injured employee and may enforce the liability of a third party in the name of the injured employee. *Id.* The insurance company's right to subrogation is limited to the total benefits paid or assumed to the claimant by the insurance carrier less any amounts reduced by the court based on the employer's percentage of responsibility (if any). *Id.*

A worker's compensation subrogation interest can be asserted as a lien against an income or death benefit. TEX. LAB CODE ANN. § 408.203(a)(3) (Vernon 2003). The subrogation lien takes priority over liens other than liens for attorney's fee and/or court-ordered child support. *Id.*

To file a claim for payment of a benefit, an employee has one year from the date on which the injury occurred or, if the injury is an occupational disease, the date the employee knew or should have known that the disease was related to the employee's employment. TEX. LAB CODE ANN. § 409.003 (Vernon 2003). Filing of a claim after this time relieves the employer and the employer's insurance carrier of liability unless good cause exists for failure to timely file or the employer or the employer's insurance carrier does not contest the claim. *Id.* at § 409.004.

**Negligence:** Texas uses a modified comparative responsibility standard. *See* TEX. CIV. PRAC. & REM. CODE

§ 33.001 et al. (Vernon 1995). If the plaintiff's percentage of responsibility is 51% or more (greater than 50%), the plaintiff cannot recover any damages at all. TEX. CIV. PRAC. & REM. CODE § 33.001 (Vernon 1995). If more than one plaintiff is found responsible for the harm, the court cannot combine the plaintiffs' percentages of responsibility to reach the 51% threshold and bar them from recovering damages. *See Sanchez*

*v. Brownsville Sports Ctr.*, 51 S.W.3d 643, 656 (Tex.App. –Corpus Christi 2001, pet. denied). If the plaintiff's percentage of responsibility is 50% or less, the court must reduce the amount of the plaintiff's recovery by that percentage. TEX. CIV. PRAC. & REM. CODE § 33.012(a) (Vernon 1995).

**Statute of Limitations:** The statute of limitations for torts, resulting in personal injury, death or property damage, such as an automobile accident, is two years. TEX. CIV. PRAC. & REM. CODE § 16.003. (Vernon 2005). The statute of limitations for a minor begins to run when the minor turns 18 years old. *Id.* at § 16.001. Therefore, the statute of limitations for a minor will expire when he turns 20 years old.

Representations (by statement or conduct) by the insurer or the insurer's agent which induce the claimant to delay filing suit within the applicable limitations period may bar the insurer from raising this defense.

*Zimmerman v. First American Title Ins.* Co., 790 S.W.2d 690 (Tex.App—Tyler 1990, writ denied); *Cook v. Smith*, 673 S.W.2d 232 (Tex.App.—Dallas 1984, writ ref'd n.r.e.); *Berry v. Allstate Ins. Co.*, 252 F.Supp.2d 336 (E.D. Tex. 2003). Therefore, it would be prudent to advise a claimant with a pending claim of a limitations statute so as not to result in an inadvertent tolling of the limitations period.

**Exemplary Damages:** Chapter 41 of the Texas Civil Practice & Remedies Code, applies to all causes of action filed after September 1, 2003. This chapter governs the awarding of damages, including exemplary damages, also called punitive damages. These damages are most often awarded in the following typical suits: gross negligence, fraud, intentional infliction of emotional distress, defamation, malicious prosecution, fiduciary duty and in some whistleblower statutes. To recover exemplary damages, the plaintiff must recover actual damages against the defendant. *Safeway Managing Gen. Agency v. Cooper*, 952 S.W.2d 861, 869-70 (Tex.App.—Amarillo 1997, no writ).

In lawsuits filed before September 1, 2003, an award of nominal damages can support an award of exemplary damages if the plaintiff proves the aggravated conduct of specific-intent malice as defined by the 2001 version of the Texas Civil Practice & Remedies Code section 41.001(7)(A). However, in lawsuits filed on or after September 1, 2003, an award of nominal damages cannot support an award of punitive damages. TEX. CIV. PRAC. & REM. CODE § 41.004(a) (Vernon 2003).

For lawsuits filed on or after September 1, 2003, exemplary damages may be awarded for personal injury, property damage, death or other harm for which the claimant seeks recovery only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from fraud, malice or gross negligence. TEX. CIV. PRAC. & REM. CODE § 41.003(a) (Vernon 2003). —Malice is defined as a specific intent by the defendant to cause substantial injury or harm to the claimant. TEX. CIV. PRAC. & REM. CODE § 41.001(7) (Vernon 2003). —Gross negligence means an act or omission: (1) which when viewed from the standpoint of the actor at the time of the occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others and (2) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others. TEX. CIV. PRAC. & REM. CODE § 41.001(11) (Vernon 2003). In lawsuits filed prior to September 1, 2003, a claimant can recover punitive damages for showing fraud, malice, or willful act or omission or gross neglect in wrongful death actions brought by or on behalf of a surviving spouse or heirs of the decedent's body.

Exemplary damages awarded against a defendant may not exceed: (1) two times the amount of economic plus an amount equal to any noneconomic damages found by the jury, not to exceed $750,000 or (2) $200,000 whichever is greater. TEX. CIV. PRAC. & REM. CODE § 41.008(b) (Vernon 2003).

Depending on the language of the liability policy and the circumstances under which punitive damages are imposed on an insured, a liability policy may or may not cover an award of punitive damages. In *Westchester Fire Insurance Company v. Admiral Insurance Company*, No. 2-01-227-CV, slip op., 2003 WL 21475423 (Tex.App.—Fort Worth June 26, 2003, no pet. h.), the Fort Worth Court of Appeals held that insurance coverage for punitive damages was not void as against public policy. Citing *Am. Home Assurance Co. v. Safway Steel Prods. Co.*, 743 S.W.2d 693, 704 (Tex.App.—Austin 1987, writ denied), the *Westchester* court stated that in the absence of any clear indication from either the Texas Legislature or the Texas Supreme Court on this issue, the Court declined to hold that insurance coverage for punitive damages under Admiral's policy violates the public policy of the State of Texas.

The cautious adjustor is advised to check policies for specific exclusions that include punitive or exemplary damages.

**Joint and Several Liability** Joint and several liability means that the plaintiff may collect all damages from one of several defendants even if all defendants are liable. The defendant that pays the damages cannot

protest the decision, his only recourse is to seek contribution from his liable co-tortfeasors.

An objective of the recent tort reform amendments was to reduce defendants' exposure to joint and several liability. The 2003 amendments make a defendant jointly and severally liable if any one of the following is true:

- He acted with specific intent to do harm to others and acted in concert with another person to engage in certain conduct prohibited by the Penal Code, thereby proximately causing damages legally recoverable by the claimant. TEX. CIV. PRAC. & REM. CODE § 33.013(b)(2) (Vernon 2003).

- His percentage of responsibility is greater than 50 percent. *Id.*

Therefore, for most causes of action, only one defendant will be held jointly and severally liable because only one defendant can meet or exceed the 51% threshold in a multi-defendant case.

**Contribution:** Two sections of Chapter 33 create contribution rights. The first states:

If a defendant who is jointly and severally liable under Section 33.013 pays a percentage of the damages for which the defendant is jointly and severally liable greater than his percentage of responsibility, that defendant has a right of contribution for the overpayment against each other liable defendant to the extent that the other liable defendant has not paid the percentage of the damages found by the trier of fact equal to that other defendant's percentage of responsibility.

TEX. CIV. PRAC. & REM. CODE ANN. § 33.015(a) (Vernon 1997). This provision applies to a defendant's contribution rights against another tortfeasor who has also been sued by the claimant. The following section permits a defendant to seek contribution from tortfeasors who have *not* been sued by the claimant:

Each liable defendant is entitled to contribution from each person who is not a settling person and who is liable to the claimant for a percentage of responsibility but from whom the claimant seeks no relief at the time of submission.

*Id.* at § 33.016(b).

Anyone jointly responsible for the damages sought by the claimant is an appropriate target for contribution, whether or not that person has been sued by the claimant, unless they are a settling person or they have immunity from the claim. A defendant can seek contribution from a ―liable defendant‖, which is ―a defendant against whom a judgment can be entered for at least a portion of the damages awarded to the claimant.‖ *Id.* at

§ 33.011(3). A defendant does not have ―a right of contribution against any settling person.‖ *Id.* at § 33.015(d). But defendants can settle with the plaintiff and determine their proper shares of liability at a later date.

Among non-parties, a defendant has contribution rights against a ―contribution defendant,‖ defined as ―any defendant, counterdefendant, or third-party defendant from whom any party seeks contribution with respect to any portion of damages for which that party may be liable, but from whom the claimant seeks no relief at the time of submission.‖ *Id.* at § 33.016(a).

A defendant has no contribution rights against a party who enjoys immunity from liability to the claimant. *See Shoemake v. Fogel, Ltd.*, 826 S.W.2d 933, 935 (Tex. 1992) (―A defendant's claim of contribution is

derivative of the plaintiff's right to recover from the joint defendant against whom contribution is sought.).

**Minors:** Settlements involving a minor require the approval of the court. *American Gen Fire & Cas. Co. v. Vandewater*, 907 S.W.2d 491, 492-93 (Tex. 1995); Tex. R. Civ. P. 44. When approved by the court the settlement is binding and conclusive on the minor. *Id.* Thus, a parental release on the minor's claim would avoid court approval but would allow the minor to later sue on his own. The only remedy in this instance would be to sue the parents for contractual indemnity pursuant to the parental release.

A child under the age of 5 cannot be held to any degree of care because a child under 5 is incapable of negligence as a matter of law. Y*arbrough v. Berner*, 467 S.W.2d 188, 190 (Tex. 1971). When a child is between the ages of 5 and 14, the child will be held to the same level of care that a child of the same age would be held to. *Guzman v. Guajardo*, 761 S.W.2d 506, 510 (Tex.App.—Corpus Christi 1988, writ denied); *MacConnell v. Hill*, 569 S.W.2d 524, 526 (Tex.App.—Corpus Christi 1978, no writ). However, if a child between the ages of 5 and 14 assumes to act as an adult, the child will be considered an adult and held to an adult's standard of care. *City of Austin v, Hoffman*, 379 S.W.2d 103, 108 (Tex.App.—Austin 1964, writ dism'd). Children assume to act as an adult when they operate an automobile, truck, airplane, boat, or engage in other activities that put the general public in danger. *Id.* A child over the age of 14 will be held to an adult's standard of care, unless it can be shown the child lacks discretion or is under the handicap of some mental disability. *Id.* at 107.

**Alcohol Issue:** For purposes of operating a motor vehicle, a person is ―intoxicated‖ if he has an alcohol concentration of 0.08 or more per 100 milliliters of blood, 210 liters of breath or 67 milliliters of urine OR does not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body. TEX. PEN. CODE ANN. § 49.01 (Vernon 2003).

The Texas Dram Shop Act, states that a ―provider‖ can be held responsible if at the time he/she serves, sells or provides alcohol to a person, that it was apparent to the provider that the person was obviously intoxicated to the extent that he presented a clear danger to himself and others AND the intoxication of the recipient of the alcoholic beverage was a proximate cause of the damages suffered. TEX. ALCO. BEV. CODE ANN. § 2.02 (Vernon 2003).

A ―provider‖ is defined as a person who sells or serves an alcoholic beverage under authority of a license or permit issued under the terms of this code or who otherwise sells an alcoholic beverage to an individual TEX. ALCO. BEV. CODE ANN. § 2.01 (Vernon 2003).

The liability of providers under the Dram Shop Act for the actions of their employees, customers, members, or guests who are or become intoxicated is in lieu of common law or other statutory law warranties and duties of providers of alcoholic beverages. TEX. ALCO. BEV. CODE ANN. § 2.03 (Vernon 2003). The Dram Shop Act provides the exclusive cause of action that can be brought against a ―provider' for providing an alcoholic beverage to a person 18 years of age or older. *Id.*

The Dram Shop Act has an important limitation. Actions of the employee, when acting as a ―provider‖ of alcoholic beverage to an intoxicated person or a minor, will not be attributable to the employer if:

a) the employer requires its employees to attend a seller training program approved by the Texas Alcoholic Beverage Commission;

b) the employee actually attends the training program; and

c) the employer has not directly or indirectly encourage the employee to violate the law.

TEX. ALCO. BEV. CODE ANN. § 106.14(a) (Vernon 2003). In other words, even if the employee serves alcohol to an obviously intoxicated person (or even a minor) if the above conditions are met, the employer will not be held liable under the Dram Shop Act.

Therefore, an adjuster should do is determine if the employee(s) of the employer providing alcoholic beverages have attended a server training program certified by the Texas Alcoholic Beverage Commission.

The Texas Supreme Court, held that a social host has no common law duty to avoid making alcohol available to intoxicated adult guest whom the host knows will be driving. *Graff v. Beard*, 858 S.W.2d 918 (Tex. 1993).

**Legal Age:** The legal age for consuming an alcoholic beverage in Texas is twenty-one. TEX. ALCO. BEV. CODE ANN. § 106.01 (Vernon 2003). For purpose of consuming an alcoholic beverage, anyone under 21 years of age is considered a ―minor.‖ *Id.* It makes no difference whether that ―minor‖ is married or unmarried. *Id.* An ―alcoholic beverage‖ includes alcohol, or any beverage containing more than one-half of one percent of alcohol by volume. TEX. ALCO. BEV. CODE ANN. § 1.04(1) (Vernon 2003).

**Intrafamily And Interspousal Immunity:** Because Texas has abolished interspousal tort immunity in all cases and parental tort immunity in some cases, an individual may become liable to a family member for damages arising from his or her negligence. *Jilani v. Jilani*, 767 S.W.2d 671 (Tex. 1988); *National County Mutual Fire Ins. Co. v. Johnson*, 829 S.W.2d 322, 324 (Tex..App.―Austin 1992, writ granted), *affirmed* 879 S.W.2d 1

(Tex. 1993).

For example, a child may sue his/her parents if they are the owner or operator of the motor vehicle and the accident was intentional on the part of the parent or was caused by the parent's heedlessness or reckless disregard of the rights of others. *See id.*

**Miscellaneous – Safety Belt:** The use or nonuse of a safety belt by a driver or passenger is now admissible as evidence in a Texas court. The 74th Texas Legislature, Ch. 204 (2003) repealed former TRANSP. CODE ANN

§ 545.413(g).

**Survival and Wrongful Death Statutes:** A personal injury claim does not die with the claimant. TEX. CIV. PRAC. & REM. CODE § 71.021(a) (Vernon 1985). It survives him and may be brought by the deceased's heirs, legal representatives or estate as a survival action. TEX. CIV. PRAC. & REM. CODE § 71.021(b) (Vernon 1985).

The damages available to a surviving spouse, child or parent of the deceased include pecuniary loss, loss of companionship and society, mental anguish, loss of inheritance, medical expenses, funeral expense. *Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986); *Estate of Clifton v. Southern Pacific Transp. Co.*, 709 S.W.2d 636 (Tex. 1986); *Yowell v. Piper Aircraft Corp.*, 703 S.W.2d 630, 634 (Tex. 1986). Punitive damages are recoverable if the death is caused by the willful act or omission or gross negligence of the defendant. TEX. CIV. PRAC. & REM. CODE § 71.009 Vernon 1985).

Wrongful death and survival claims are entirely derivative of the decedent's injury and therefore, any defenses to a decedent's cause of action for his or her own injuries is applicable in a subsequent action for wrongful death. *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 344-45 (Tex. 1992); *Davenport v. Phillip Morris, Inc.*, 761 S.W. 2d 70, 71-72 (Tex.App.―Houston [14th Dist.] 1988, no writ).

A wrongful death action can be brought to recover damages only on behalf of the surviving spouse, children

(minor or adult) or parents of the deceased. TEX. CIV. PRAC. & REM. CODE § 71.004(a) (Vernon 1985). Any of those persons may file the action for the benefit of all. *Id.* The executor shall file the action if it has not been filed within three months of an injured persons death unless all of the possible beneficiaries ask him not to. *Id.* at 71.004(c).

The decedent must have been a person who was born alive. *Witty v. American General Capital Distributors, Inc.*, 727 S.W.2d 503, 505 (Tex. 1987). An unborn child is not included within the scope of the Survival Statute. Id. at 506. When a child is born alive, a survival action can be maintained, even if the injury causing the death was received *in utero. Yandell v. Delgado*, 471 S.W.2d 569, 570 (Tex. 1971); When a fetus is stillborn, no survival action can be maintained. *Pietila v. Crites*, 851 S.W.2d 185, 187 (Tex. 1993).

**Permissive Use:** In Texas, permissive use generally arises as a construct for determining coverage under the "omnibus clause" of commercial automobile liability insurance. *Wilson v. Davis*, 305 S.W.3d 57 (Tex. App. -- Houston 2009, no pet.). An omnibus clause is a "provision in an automobile-insurance policy that extends coverage to all drivers operating the insured vehicle with the owner's permission." *Old Am. County Mut. Fire Ins. Co. v. Renfrow*, 130 S.W.3d 70 (Tex. 2004). Under the standard omnibus clause of an automobile liability policy, an operator is entitled to protection as an additional insured if his use of the vehicle is with either the express or the implied permission of the named insured. While express permission must be affirmatively stated, implied permission may be inferred from a course of conduct or relationship between the parties in which there is mutual acquiescence or lack of objection signifying consent. It is usually shown by usage and practice of the parties over a period of time preceding the occasion on which the automobile was being used.

*Royal Indemnity Co. v. H. E. Abbott & Sons, Inc.*, 399 S.W.2d 343 (Tex. 1966). In *Royal Indemnity*, the driver was a ranch hand who had on three or four prior occasions been given permission by the owner to drive his truck off of the ranch to pick up children at a bus stop. *Id.* at 345. The owner of the truck had never explicitly told the driver that he could not drive the truck off of the ranch. *Id.* The Texas Supreme Court held that this evidence did not show a relationship or a prior course of conduct from which implied permission to drive the truck off of the ranch could be inferred. *Id.* at 347. *Distinguished by Dao v Garcia*, 486 S.W.3d 618 (Tex. App2016; implied permission may be inferred from a course of conduct or relationship between the parties in which there is mutual acquiescence or lack of objection signifying consent. Implied permission is usually shown by usage and practice of the parties over a period of time preceding the occasion on which the automobile was being used).

The rule in Texas is that a person may deviate from the permitted usage of an insured vehicle and still be covered under an omnibus provision if the use is not a material or gross violation of the terms of the initial permission. Under this rule, the court must determine in each instance -- taking into account the extent of deviation in actual distance or time, the purposes for which the vehicle was given, and other factors -- whether the deviation was "minor" or "material." *Coronado v. Employers' Nat'l Ins. Co.*, 596 S.W.2d 502 (Tex. 1979). Depending upon the circumstances, where a named insured grants permission to a person to use an insured vehicle, the scope of permission may be broad enough to include the insured's implicit authorization for the first permittee to allow others to drive it. Consequently, someone a permissive user allows to use an automobile could also be a permissive user and thus an additional insured under the omnibus clause. *Southern Farm Bureau Casualty Ins. Co. v. Hartford Acci. & Indem. Ins. Co.*, 620 S.W.2d 779 (Tex. App. -- Dallas 1981, writ ref'd, n.r.e.) (summary judgment precluded by fact issue whether insured's permission for his daughter to use his car included authorization for her to allow her roommate to drive it).

A person need not be driving a vehicle to be a permissive user. *State Farm Mut. Auto. Ins. Co. v. Francis*, 669 S.W.2d 424 (Tex. App. -- Houston [1st Dist.] 1984, writ ref'd, n.r.e.), held a passenger who loaned a boat and trailer to the insured automobile owner was a permissive user of the vehicle because securing the trailer to the vehicle was a "use" of the vehicle.

# Utah

**Bodily Injury:** Economic damages are not recoverable under non-intentional tort theories absent physical property damage or bodily injury. Liability for economic losses (e.g., diminution in value) can be recovered only according to the contractual obligations between the parties, and cannot be recovered on a pure negligence theory. *HealthBanc Int'l, LLC v. Synergy Worldwide, Inc.*, 2018 UT 61, 435 P.3d 193; *SME Industries v. Thompson, Ventulett, Stainbeck & Assoc.*, 2001 UT 54, 28 P.3d 669; *American Towers v. CCI Mechanical*, 930 P.2d 1182 (Utah 1996); *Snow Flower Homeowners Ass'n v. Snow Flower, Ltd.*, 2001 UT App 207, 31 P.3d 576. However, plaintiffs may recover purely economic losses in cases involving intentional torts such as fraud, business disparagement, and intentional interference with contract. *American Towers v. CCI Mechanical*, 930 P.2d 1182 (Utah 1996).

Liability policy minimum limits are $25,000 per person and $65,000 per accident for bodily injury or death, and $15,000 per accident for property damage; or $80,000 per accident for loss arising from personal injury, death and/or property damage. *UCA* § 31A-22-304.

Loss of consortium is not a cognizable bodily injury for the purposes of minimum liability policies. The wife of a man who was killed in an automobile accident could therefore recover only $25,000 from her insurer, not $50,000. *Progressive Cas. Ins. Co. v. Ewart*, 2007 UT 52, 2007 WL 2033735.

*UCA* § 31A-22-321 amended Utah's arbitration provision for motor vehicle claims. Plaintiffs must now make a claim for bodily injury in order to request arbitration of third-party claims. Property claims may only be arbitrated if the parties agree in writing. Any request for arbitration must also be submitted within fourteen (14) days of the date on which the complaint was answered.

**Settlements With Minors:** A parent or guardian may maintain an action for the death or injury of a minor child when such injury or death is caused by the wrongful act of another. *UCA* § 78B-3-102; *Moreno v. Bd. of Educ.*, 926 P.2d 886 (Utah 1996). Such an action must be brought within two years after death, but if the judgment for plaintiff is reversed or if plaintiff fails otherwise than on the merits, a new action may be commenced within one year from such reversal or failure. *UCA* § 78B-2-304; § 78B-2-111; *In re Estate of Garza*, 725 P.2d 1328 (Utah 1986). Damages for wrongful death may include compensatory damages, loss of support, services, society, prospective inheritance, and mental anguish. *Oxendine v. Overturf*, 1999 UT 4, 973 P.2d 417; *Evans v. Oregon Short Line R. Co.*, 108 P. 638 (Utah 1910).

The two-year statute of limitations for a wrongful death claim is tolled by *UCA* § 78B-2-108 if the claimants are minors. *In re Estate of Garza*, 725 P.2d 1328 (Utah 1986).

Absent a relevant, contrary expression intent from the legislature, a parent may not release or waive a minor's prospective claims for negligence. Also, a parent's agreement to indemnify a third party for that party's own negligence is void based upon public policy. By shifting financial responsibility to a minor's parent, such indemnity provisions would allow negligent parties to circumvent the rule voiding waivers signed on behalf of a minor. *Rutherford v. Talisker Canyons Fin., Co., LLC*, 2019 UT 27, 445 P.3d 474; *Hawkins v. Peart*, 2001 UT 94, 37 P.3d 1062. A release of a minor's claims signed by a parent that relate to defined equine and livestock activities may be enforceable if it complies with other statutory requirements. UCA § 78B-4-203.

Disabilities; Minority: If a person entitled to bring an action, other than for the recovery of real property, is at the time the cause of action accrued either under the age of majority or mentally incompetent and without a legal guardian, the statute of limitations may not run during the time the person is underage or incompetent. *UCA* § 78B-2-108. *But see UCA* § 63G-7-401 (governmental immunity); *Smith v. Four Corners Medical Health Center, Inc.,* 2003 UT 23, 70 P.3d 904 (Medical malpractice plaintiff must comply with procedural requirements of UCA § 78B-3-401 et seq.)

A parent or guardian may maintain an action for the death or injury of a minor child. *UCA* § 78B-3-102. The heirs or personal representative of the deceased may maintain an action for the wrongful death of an adult. *UCA* § 78B-3-106.

**Personal Injury:** Insurers are required to pay for damages and injuries caused by a covered driver while stricken by an unforeseeable paralysis, seizure, or other unconscious condition. *UCA* § 31A-22-303.

A policy of motor vehicle liability coverage may limit coverage to statutory minimum policy limits if the insured motor vehicle is operated by a person who has consumed any alcohol or illegal substance, if the policy or a specifically reduced premium was extended to the insured with a written stipulation that the vehicle would not be operated in this manner. *UCA* § 31A-22-303(7).

The insurance coverage provided by a rental company is secondary to other valid or collectible insurance. *UCA* § 31A-22-314.

Personal Injury Protection / No Fault

Personal injury protection coverage is mandatory and minimum coverage must include medical expenses up to $3000, lost income allowance of 85% of gross income up to $250 per week for 52 consecutive weeks, special damage allowance up to $20 per day for a maximum of 365 days, funeral/ burial/cremation expenses up to $1500, and death benefit of $3000. *UCA* § 31A-22-307(1).

A person who has direct benefit coverage under PIP may not maintain a cause of action for general damages unless he has sustained death, dismemberment, permanent disability, or permanent impairment based upon objective findings, permanent disfigurement, and/or medical expenses in excess of $3000. *UCA* § 31A-22--309(1).

A plaintiff whose medical expenses fail to meet the PIP threshold of $3,000 has the burden of demonstrating a permanent disability or impairment with something more than his say so. The express language of section 31A-22-309(1)(c) requires that any permanent disability or impairment be based on objective findings. *McNair v. Farris*, 944 P.2d 392 (Utah 1997). An objective finding of permanent disability or permanent impairment may be established by a current or past treating physician. *Pinney v. Carrera*, 2019 UT App 12, 438 P.3d 902, *cert. granted,* 440 P.3d 691 (Utah 2019).

The term "disability" under the Act means an inability to work as contrasted with the term "physical impairment," which generally refers to loss of bodily function. *Jones v. Transamerica Ins. Co.*, 592 P.2d 609 (Utah 1979)*, overruled on other grounds by Bear River Mutual Ins. Co. v. Wall,* 1999 UT 33, 978 P.2d 460.

A no-fault insurer has no right to subrogation under Utah's no-fault statute, and as a general rule may not seek reimbursement for PIP payments its insured subsequently recovers from the tortfeasor. However, no-fault insurers may obtain reimbursement for PIP payments directly from their insureds' settlement with tortfeasors when it is clear the parties to the settlement intended that settlement amount include PIP reimbursement. Since a tortfeasor is not personally liable for PIP benefits, the settlement between the no-fault insured and the tortfeasor or tortfeasor's insurer is presumed to exclude PIP benefits in the absence of evidence to the contrary. *Bear River Mut. Ins. Co. v. Wall*, 978 P.2d 460 (Utah 1999).

Personal injury protection provisions for lost income and lost household services do not apply to the heirs or estate of a person killed in an automobile accident; they are personal to a living person injured in an automobile accident. *Regal Ins. Co. v. Bott*, 2001 UT 71, 31 P.3d 524; UCA § 31A-22-307(1).

The insurer may issue policies providing greater than the minimum personal injury protection coverages, but the insurer may not require a deductible. *UCA* § 31A-22-307(5), (6).

Minimum coverages extend to the insured, persons related to the insured, and other natural persons whose injuries arise out of an automobile accident involving the automobile identified in the policy, including pedestrians. *UCA* § 31A-22-308.

A set-off for PIP benefits includes benefits a person is entitled to receive under workers compensation or from the military service. *UCA* § 31A-22-309(3).

When an injured person is insured under more than one policy, the PIP policy insuring the motor vehicle in use at the time of the accident is primary. *UCA* § 31A-22-309(4). Non-stacking provisions in the policy are valid and enforceable. *Crowther v. Nationwide Mut. Ins. Co.*, 762 P.2d 1119 (Utah Ct. App. 1988).

Where the insured is or would be legally liable for injuries sustained by another, his insurer must reimburse any insurer or workers compensation fund for no-fault benefits paid to the other. The issue of liability for reimbursement is subject to mandatory, binding arbitration. *UCA* § 31A-22-309(6). *Ohio Casualty Ins. Co. v. Brundage*, 674 P.2d 101 (Utah 1983).

The auto liability insurer is not entitled to recover no-fault payments it made to its insured out of the proceeds of a settlement with a third-party tortfeasor. *Allstate Ins. Co. v. Anderson,* 608 P.2d 235 (Utah 1980). However, the Act does grant the insurer a limited, equitable right to seek reimbursement in arbitration against the third party's liability insurer. *Allstate Ins. Co. v. Ivie*, 606 P.2d 1197 (Utah 1980); *Christensen v. Farmers Ins. Exchange*, 669 P.2d 1236 (Utah 1983).

Twelve-year-old boy's household chores of taking out the garbage, doing dishes, vacuuming, etc., were not chores for which his family would "reasonably have incurred" expenses within meaning of no-fault statute. *Jamison v. Utah Home Fire Ins. Co.*, 559 P.2d 958 (Utah 1977).

PIP benefits extend to items not covered by workers compensation such as loss of household services and second job wage loss. A provision in an auto insurance policy which prohibited payments or benefits to those covered by workers compensation is invalid. *Neel v. State*, 889 P.2d 922 (Utah 1995).

**Medical Payments:** Once injuries have been shown, evidence is required to show that the medical expenses accurately reflect the necessary treatment that resulted from the injuries and that the charges are reasonable. *Gorosteita v. Parkinson,* 2000 UT 99, 17 P.3d 1110*; Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 981 (Utah 1993).

Although a physician or insurance representative's testimony may be offered to show that medical bills were necessitated by the accident and were reasonable, such testimony is not required. A plaintiff can testify that the proffered bills were for medical expenses arising from the injuries received from the incident in question, were forwarded for payment to her insurance company, and were paid without objection by the insurance company. The Court held that this testimony was sufficient to lay a foundation for the admission of plaintiff's medical bills. *Stevenett v. Wal-Mart Stores*, 1999 UT App 80, 977 P.2d 508.

**Uninsured/ Underinsured Motorist Coverage:**

Uninsured Motorist Coverage

Relevant Statute: *UCA* § 31A-22-305

Utah Code Ann. § 31A-22-305 prohibits "interpolicy stacking," which means recovering benefits for a single incident of loss under more than one insurance policy, except in certain circumstances.

An insurer providing uninsured motorist coverage to an insured involved in an accident may intervene in an action to determine the liability of an uninsured motorist. The intervening insurer may be required to provide independent legal counsel to its insured or to reimburse its insured for reasonable legal expenses incurred in defending against the insurer's intervention. *Chatterton v. Walker*, 938 P.2d 255 (Utah 1997).

Receipt of workers compensation benefits precludes claims by employees against their own insurer under underinsured motorists provisions. *Peterson v. Utah Farm Bureau Ins. Co.,* 927 P.2d 192 (Utah Ct. App. 1996). Uninsured motorist coverage may not be reduced by any benefits provided by workers compensation insurance. *UCA* § 31A-22-305(5).

This coverage must be included in the policy unless affirmatively rejected by an express writing to the insurer. However, persons engaged in the business of transportation of people must provide uninsured motorist coverage of at least $25,000 per person and $500,000 per accident. *UCA* § 31A-22-305(5).

When a person claims that a phantom vehicle caused the accident without touching the covered person or vehicle occupied by the covered person, the covered person must show the existence of the other vehicle by clear and convincing evidence, which shall consist of more than the covered person's testimony. *UCA* § 31A-22-305(6).

"Uninsured motor vehicle" includes a vehicle insured for less than the statutory minimum, an unidentified vehicle that left the scene of an accident which the operator caused, and a vehicle where the insurer has been competently declared insolvent. *UCA* § 31A-22-305(2).

The statute does not require the insurer to provide coverage on a vehicle which is owned by the insured but is not specifically named as an insured vehicle. Uninsured coverage was intended to rest with the vehicle and not with the named insured. The uninsured coverage on claimant's car did not extend to cover the claimant during use of a motorcycle that claimant owned but failed to insure. *Clark v. State Farm Mut. Auto. Ins. Co.*, 743 P.2d 1227 (Utah 1987). However, where the policy did not define "unlisted automobile" to include the motorcycle under the exclusion, motorcycle was not an unlisted "automobile." *Bear River Mut. Ins. Co. v. Wright*, 770 P.2d 1019 (Utah Ct. App. 1989).

The terms of the uninsured motorist coverage limiting liability to the statutory minimum were enforced where the insured was injured while riding as a passenger in his insured vehicle that was being driven by an uninsured permissive user. *Wagner v. Farmers Ins. Exchange*, 786 P.2d 763 (Utah Ct. App. 1990), *abrogated on other grounds by Nielsen v. O'Reilly*, 848 P.2d 664 (Utah 1992).

A common law spouse may receive uninsured motorist benefits under a provision allowing coverage for the insured and "family members." *Whyte v. Blair*, 885 P.2d 791 (Utah 1994).

UM policies written after January 1, 2001, must have limits equal the insured's liability limits or the maximum uninsured coverage limits available under the policy, whichever is less. Insured may elect a lower limit or waiver coverage only after their insurer explains the consequences of denying UM coverage and the insured gives a written acknowledgment. *General Security Indemnity Co. of Arizona v. Tipton*, 2007 UT App 109, 158 P.3d 1121.

<u>Uninsured Motorist Property Damage Coverage</u>

Relevant Statute: *UCA* § 31A-22-305.5

Passengers who were injured in automobile accident sought to recover supplementary underinsured motorist (SUM) benefits from their insurer. The statute allowing the stacking of SUM benefits did not apply to automobile policy that was renewed in New York while insureds were still living there. *Travelers/Aetna Ins. Co. v. Wilson*, 2002 UT App 221, 51 P.3d 1288, *cert. denied*, 59 P.3d 603.

Even if the uninsured motorist coverage of the insurance policy does not include a provision for reimbursement of rental vehicle expenses incurred, if the insurer breaches its contractual obligation to promptly pay the insured, the insurer may be liable for actual costs incurred in renting a replacement vehicle. *Castillo v. Atlanta Casualty Co.*, 939 P.2d 1204 (Utah Ct. App. 1997).

Underinsured Motorist Coverage

Relevant Statute: *UCA* § 31A-22-305.3.

The limitations on damages contained in Utah's Survival Statute do not apply to a claim for payment of underinsured motorist coverage benefits by an insured's heirs. *Estate of Dorothy Berkemeir v. Hartford Ins. Co.*, 2004 UT 104, 106 P.3d 700.

UIM policies written after January 1, 2001, must have limits equal the insured's liability limits or the maximum uninsured coverage limits available under the policy, whichever is less. *UCA* § 31A-22-305.3. The insured can waive UIM coverage by signing a document provided by the insurer that explains the coverage and explains what is waived. The insured must file the waiver with the department.

**Negligence:** "Fault" means any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification, or abuse of a product. *UCA* § 78B-5-817 et seq. The definition of fault encompasses both negligent and intentional conduct. *Field v. Boyer Co.*, 952 P.2d 1078 (Utah 1998).

Comparative Negligence

Fault to be apportioned under UCA § 78B-5-818 is not limited to negligence but extends to intentional torts. *Graves v. North Eastern Services, Inc.,* 2015 UT 28, 345 P.3d 619.

Utah's Liability Reform Act, which requires the fault of an immune employer who is less than 40% at-fault to be reallocated amongst all other at-fault parties, supersedes the common law doctrine of *respondeat superior* (doctrine holding that employers are vicariously liable for employees' acts committed within the scope of employment). A plaintiff-employee's fault is not combined with nor reallocated to its immune employer's fault for purposes of determining whether the employer is less than 40% at-fault. The immune employer's fault is allocated on a proportional basis to remaining at-fault parties, using the percentages of fault apportioned to each party of the total remaining fault. *Bishop v. GenTec, Inc.*, 2002 UT 36, 48 P.3d 218.

A person seeking recovery may recover from any defendant or group of defendants whose "fault" exceeds his own. If his fault is equal to or greater than the fault of the defendant, then his recovery is barred. *UCA* § 78B-5-818.

The maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant. *UCA* § 78B-5-820.

No defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant. The one exception is that if the fault attributed to immune defendants is less than 40%, that percentage will be reduced to zero and the trial court will reallocate this percentage to other parties in proportion to their fault. After reallocation, cumulative fault will equal 100% with those immune being allocated no fault. Therefore, no defendant is entitled to contribution. *UCA* §§ 78B-5-818 to -820.

While the Liability Reform Act limits a party's liability to its proportion of fault, this does not prohibit a fact-finder from assigning liability to a party under a claim for strict liability, as indicated by the statute's inclusion of strict liability along with negligence, assumption of risk, breach of express or implied warranty of a product, and products liability as causes of action subject to the Utah Liability Reform Act. *See UCA* § 78B-5-817 and *S. H. ex rel. Robinson v. Bistryski,* 923 P.2d 1376, 1382-83 (Utah 1996) (using Utah Liability Reform Act to apportion liability under Utah's strict liability dog-bite statute and also a negligence theory).

A party may join as a defendant any person other than one immune from suit who may have caused or contributed to the injury or damage, for the purpose of having determined their respective proportions of fault. *UCA* § 78B-5-821. An immune employer may be included on the special verdict form for purposes of apportioning fault. Apportionment of an immune employer's fault does not subject the employer to liability, but ensures that no defendant is held liable to any claimant for an amount of damages in excess of the percentage of fault attributable to that defendant. *UCA* § 78B-5-818; *Dahl v. Kerbs Constr. Corp.* 853 P.2d 887 (Utah 1993). Note, reallocation of fault to persons immune from suit is allowed only in cases where the fault of all parties immune from suit is less than 40 percent. *See UCA* § 78B-5-819. *See also UCA* § 78B-5-818 (providing for the attribution of fault to immune persons when requested by a party).

The court must consider a plaintiff's comparative negligence and comparative assumption of the risk in determining liability for a claim of breach of warranty. *Interwest Construction v. Palmer*, 886 P.2d 92 (Utah Ct. App. 1994), *aff'd in part, vacated in part*, 923 P.2d 1350 (Utah 1996).

Any fault allocated to a person immune from suit is considered only to accurately determine the fault of the person seeking recovery and a defendant and may not subject the person immune from suit to any liability, based on the allocation of fault, in this or any other action. *UCA* § 78B-5-818.

If requested, the trial court must inform the jury of the legal consequences of apportioning to the plaintiff 50% or more of the negligence it finds in a comparative negligence case, if the effect of the instruction will not be to confuse or mislead the jury. *Dixon v. Stewart*, 658 P.2d 591 (Utah 1982).

For purposes of apportioning comparative fault in an action with multiple defendants, a jury may not consider the "fault" of parties who have been dismissed from the lawsuit on the merits of the issue of liability. *Sullivan v. Scoular Grain Co. of Utah*, 853 P.2d 877, 878 (Utah 1993) (superseded by statute on other grounds).

The Utah Liability Reform Act expressly bans suits for contribution. See *National Svc. Indus. Inc.*, 937 P.2d 551 (Utah Ct. App. 1997); *see also UCA* § 78B-5-820 (defendant is not entitled to contribution from any other person).

Where the alleged negligence consists of a failure to act, the injured person must demonstrate the existence of a special relationship which creates a duty to act. *Owens v. Garfield*, 784 P.2d 1187 (Utah 1989). A contractual relationship may give rise to a relationship on which a tort duty is premised. *DCR Inc. v. Peak Alarm Co.*, 663 P.2d 433 (Utah 1983). However, if the contact does not require the performance of the allegedly omitted act, there is no basis for tort liability arising from the contract on account of the omission. *Hill v. Superior Prop. Mgmt. Servs. Inc.,* 2013 UT 60, 321 P.3d 1054.

A person's negligence is not superseded by the negligence of another if the subsequent negligence of the other is foreseeable; superseding cause is generally a jury question. *Williams v. Melby*, 699 P.2d 723 (Utah 1985); *Godesky v. Provo City Corp.*, 690 P.2d 541 (Utah 1984); *Harris v. Utah Transit Auth.*, 671 P.2d 217 (Utah 1983).

The failure to wear a seat belt does not constitute contributory or comparative negligence and may not be introduced as evidence in a civil action on the issue of negligence, injuries or the mitigation of damages. *UCA* § 41-6a-1806. *Whitehead v. American Motors Sales Corp.*, 801 P.2d 920 (Utah 1990) (citing statute).

**Statute of Limitations:**

Time for Commencement of Actions: Civil actions must be commenced within the prescribed periods, after the cause of action has accrued, except in specific cases where a different limitation is prescribed by statute. *UCA* § 78B-2-102.

Product liability claims are subject to a two-year statute of limitations which runs from the time the plaintiff knew, or in the exercise of reasonable diligence should have known, of the injury, its cause, and the identity of the seller. *UCA* § 78-15-3; *Aragon v. Clover Club Foods, Co.*, 857 P.2d 250 (Utah Ct. App. 1993).

Actions for wrongful death may be brought by the heirs or the personal representative on behalf of the heirs. *UCA* § 78B-3-106; *Haro v. Haro*, 887 P.2d 878 (Utah Ct. App. 1994). A parent or guardian may maintain an action for the death or injury of a minor child when such injury or death is caused by the wrongful act of another. *UCA* § 78B-3-102; *Moreno v. Bd. of Educ.*, 926 P.2d 886 (Utah 1996). Such an action must be brought within two years after death, but if the judgment for plaintiff is reversed or if plaintiff fails otherwise than on the merits, a new action may be commenced within one year from such reversal or failure. *UCA* § 78B-2-304; § 78B-2-11; *In re Estate of Garza*, 725 P.2d 1328 (Utah 1986).

The two-year statute of limitations for a wrongful death claim is tolled if the claimants are minors. *In re Estate of Garza*, 725 P.2d 1328 (Utah 1986).

Generally, Utah's statutes of limitations apply to actions brought in Utah. *Financial Bancorp. v. Pingree & Dahle*, 880 P.2d 14 (Utah Ct. App. 1994). The statute of limitations begins to run from the day the cause of action arises. Discovery of the claim at a later date will only toll the statute of limitations under limited circumstances. *Williams v. Howard*, 970 P.2d 1282 (Utah 1998).

In *Russell Packard Development Inc. v. Carson,* 2005 UT 14, 108 P.3d 741, the Utah Supreme Court ruled that the "equitable discovery rule" tolls the relevant statutes of limitations where defendants have concealed wrongful acts and plaintiff acted reasonably in filing a complaint after expiration of limitations period.

Time Periods: Time periods for commencement of actions involving other than acquisition of real property are:

Eight Years: An action upon a judgment or decree of any court of the United States or any of its states or territories. *UCA* § 78B-2-311.

Six Years: Actionupon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in *UCA* § 78B-2-311. *UCA* § 78B-2-309. A cause of action does not accrue upon an anticipatory breach or repudiation of a contract. *Koulis v. Standard Oil Co.*, 746 P.2d 1182 (Utah Ct. App. 1987). "Liability," as used in this section, refers to contract rather than tort actions. *Brigham Young Univ. v. Paulsen Constr. Co.*, 744 P.2d 1370 (Utah 1987). Settlement agreements are governed by rules and statute of limitations applied to general contract actions. *Butcher v. Gilroy*, 744 P.2d 311 (Utah Ct. App. 1987).

Four Years: An action upon a contract, obligation, or liability not founded upon a writing; upon an open account for goods and merchandise; on an open account for services or materials furnished; and for claims under specified sections of the Utah Fraudulent Transfer Act; and for actions for relief not otherwise provided by law. *UCA* § 78B-2-307.. The statute applies to legal malpractice actions from the time the act complained of was or should have been discovered. *Merkley v. Beaslin*, 778 P.2d 16 (Utah Ct. App. 1989). Tort actions not otherwise provided for by statute are embraced by this section. *Thomas v. Union Pac. R.R.*, 1 Utah 235 (1875). This section applies to the tort of reckless misconduct, it being a form of negligence and not an intentional tort. *Matheson v. Pearson*, 619 P.2d 321 (Utah 1980).

Three Years: Actions for waste, trespass or injury to real property; for taking, detaining, or injuring personal property (discovery rule applies to claim involving underground mining); for relief on the ground of fraud or mistake (discovery rule applies); actions for a liability created by the statutes of this state, other than for a penalty or forfeiture, except where a different period is proscribed; actions involving nuclear incidents is governed by *UCA* § 78B-3-603 (discovery rule applies). *UCA* § 78B-2-305.

The statute applies to actions for negligently damaging personal property, *Holm v. B & M Serv. Inc.*, 661 P.2d 951 (Utah 1983), and to actions for injury to real property grounded in tort. *Brigham Young Univ. v. Paulsen Constr. Co.*, 744 P.2d 1370 (Utah 1987). In an action for fraud or one where the cause of action has been concealed, the three-year statute of limitations will not begin to run until discovery. *Attorney Gen. v. Pomeroy*, 73 P.2d 1277 (Utah 1937).

The "discovery rule," applicable to actions based on fraud or mistake, does not apply to a property vendor's negligence cause of action against a surveyor. *Klinger v. Kightly*, 791 P.2d 868 (Utah 1990). The three-year statute of limitations applies to claims of fraud brought under the Utah blue sky laws (*UCA* § 61-1-22), *Clegg v. Conk*, 507 F.2d 1351 (10th Cir. 1974), *cert. denied*, 422 U.S. 1007 (1975), but the United States Supreme Court has held that the three-year statute of limitations no longer applies to federal claims brought under § 10(b) of the Securities and Exchange Act of 1934. Actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created, by law must be brought within three years after discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability accrued. *UCA* § 78B-2-306. In an action for breach of fiduciary duty, it was not necessary for the board of directors to have had all details of the transaction, but only that they have had enough information to be on notice of a possible wrong. *Webb v. R.O.A. Gen., Inc.*, 804 P.2d 547 (Utah Ct. App. 1991).

An action on a written policy or contract of first-party insurance must be commenced within three (3) years after the inception of the loss. *UCA* § 31A-21-313.

Two Years: Causes of action against a political subdivision of the State and its employees, for injury to the personal rights of another. *UCA* § 78B-2-304. Actions for wrongful death and medical malpractice, *see* Death, Wrongful Death and Medical Malpractice/Statute of Limitations; *UCA* § 78B-3-404; Product Liability action, *UCA* § 78B-6-706. Actions against a marshal, sheriff, constable, or other officer for acts or omission of official duty. *UCA* § 78B-2-304.

One Year: Actions for liability created by the statutes of a foreign state; upon a statute for a penalty of forfeiture where the action is given to an individual, or to an individual and the state, except when a different period is proscribed; upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the state; for libel, slander, false imprisonment, or seduction; against a sheriff or other officer for the escape of a prisoner; against a municipal corporation for damages or injuries to property caused by a mob or riot. *UCA* § 78B-2-302. Applies to the tort of false arrest. *Tolman v. K-Mart Enters.*, 560 P.2d 1127 (Utah 1977).

The one-year statute of limitations for libel did not commence running until the plaintiff knew or had reason to know of the libel. *Allen v. Ortez*, 802 P.2d 1307 (Utah 1990). An action challenging a decision of a county legislature body or executive. *UCA* § 78B-2-303.

Six Months: An action against a tax collector to recover goods seized or damages done to goods seized; for money paid to such officer under protest or seized, and claimed should be refunded. *UCA* § 78B-2-301.

**Punitive Damages:** Punitive damages may be awarded only if compensatory or general damages are awarded and the plaintiff establishes through clear and convincing evidence that the defendant's conduct was willful and malicious or intentionally fraudulent or manifested a knowing and reckless indifference toward and a disregard of the rights of others. Awarding punitive damages must not merely "vent vindictiveness," give additional compensation to the plaintiff, or give the plaintiff an "in terrorem" weapon in settlement negotiations. *UCA* §

78B-8-201(1)(a). See *Behrens v. Raleigh Hills Hosp.*, 675 P.2d 1179 (Utah 1983); *Gleave v. Denver & R. G. W. R.R.*, 749 P.2d 660 (Utah Ct. App.), *cert. denied*, 765 P.2d 1278 (Utah 1988).

The standards of conduct identified above do not apply to a claim for punitive damages arising out of the operation of a motor vehicle while voluntarily intoxicated or under the influence of any drug or combination of alcohol and drugs. *UCA* § 78B-8-201(1)(b)(i); *Johnson v. Rogers*, 763 P.2d 771 (Utah 1988) (to recover punitive damages in a drunk driving case, plaintiff must show that defendant acted with knowing and reckless disregard of the rights of others and that the drunken driving contributed to the accident).

Punitive damages not recoverable against a governmental entity. *UCA* § 63G-7-603(1)(a).

Fifty percent of the amount of punitive damages in excess of $50,000 after attorney fees and costs are to be remitted to the state treasurer for deposit into the General Fund. *UCA* § 78B-8-201(3)(a)(ii).

Utah adheres to the more conservative Restatement (Second) of Torts § 909 view of corporate liability for punitive damages. A corporation is only liable for punitive damages if the acts were ratified, authorized, or performed by a managerial agent or principal, or if the managerial agent or principal recklessly hired or retained the unfit employee who caused injury. This is termed the "complicity" rule. *Johnson v. Rogers*, 763 P.2d 771 (Utah 1988).

Under Utah case law, the following factors are to be considered when awarding punitive damages: (i) the relative wealth of the defendant; (ii) the nature of the alleged misconduct; (iii) the facts and circumstances surrounding each conduct; (iv) the effect thereof on the lives of the plaintiff and others; (v) the probability of future recurrence of the misconduct; (vi) the relationship of the parties; and (vii) the amount of actual damages awarded. *Crookston*, 817 P.2d 789. Evidence of the effect of the defendant's conduct on others may only be used to demonstrate the reprehensibility of the defendant's conduct and not for calculating the appropriate punishment. *Westgate Resorts, Ltd. v. Consumer Prot. Grp., LLC, Appellee*, 2012 UT 55, ¶ 23, 285 P.3d 1219, 1226.

Evidence of a defendant's relative worth is not a prerequisite for punitive damage awards. However, the courts encourage plaintiffs to submit evidence of a defendant's relative worth, or risk losing punitive damages based on excessiveness. *Hall v. Wal-Mart Stores, Inc.*, 959 P.2d 109 (Utah 1998); *Bennett v. Huish,* 2007 UT App 19, 155 P.3d 917.

The United States Supreme Court reversed the Utah Supreme Court's decision in *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89, 65 P.3d 1134, finding that the Utah Supreme Court erred in reinstating the jury's $145 million punitive award, which violated due process. The Court held that under the three guideposts set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (degree of reprehensibility of defendant's misconduct; disparity between actual or potential harm suffered by plaintiff and punitive award; and difference between punitive award and civil penalties authorized or imposed in comparable cases), the punitive award of $145 million was neither reasonable nor proportionate to the wrong committed, and was an arbitrary deprivation of the property of State Farm. In reaching this conclusion, the Court held that a State cannot punish a defendant for conduct that may have been lawful where it occurred, nor does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside the State's jurisdiction. Moreover, dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. Last, the wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003).

**Joint and Several Liability:** Utah's legislature abolished joint and several liability and contribution among joint tortfeasors, and enacted the Liability Reform Act of 1986. Tort reform is based on concepts of "fault" and "causation." *UCA* § 78B-5-817 et seq.

The civil liability of a minor is imputed to the adult who signed the minor's driver license application, and that adult is subject to joint and several liability with the minor.. That liability is satisfied, however, by having minimum liability insurance on the minor driver. *UCA* § 53-3-211.

**Workers Compensation:** Workers compensation statutes are construed liberally in favor of employee coverage when statutory terms reasonably admit such a construction, and are intended to favor substantive rights over technicalities. *Reinsurance Fund v. Labor Comm'n*, 2012 UT 76, ¶ 22, 289 P.3d 572, 579.

The requirement that the accident arise in the course of employment is satisfied if it occurs while the employee is rendering service to his employer, which he was hired to do, at the time and place his employer directed him to render such service. *Walker v. U.S. General, Inc.,* 916 P.2d 903 (Utah 1996). Injuries must be unexpected or unintended to be an accident compensable under workers compensation. *Crapo v. Industrial Comm'n,* 922 P.2d 39 (Utah Ct. App. 1996).

Workers compensation statutes focus on the status of the employment relationship rather than on fault. Those parties who are not part of the employment relationship do not participate in the benefits or burdens of workers compensation. *Kunz v. Beneficial Temporaries,* 921 P.2d 456 (Utah 1996).

Where a general employer loans one of its employees to another employer ("special employer"), a new temporary employment relationship is formed. In determining liability under workers compensation, the court analyzes the relative right of control maintained by both general and special employers. An employee of a special employer who is injured by a loaned employee may bring a tort action against a general employer. *Kunz v. Beneficial Temporaries,* 921 P.2d 456 (Utah 1996). The loaned employee's claims against the special employer are limited to those provided by workers compensation if (1) the loaned employee has made an express or implied contract with the special employer; (2) the work performed is essentially that of the special employer; and (3) the special employer has the right to control the details of the work. An implied contract will be found if the employee, having a choice whether to accept the assignment, accepts the assignment. *Walker v. U.S. General, Inc.,* 916 P.2d 903 (Utah 1996).

In workers compensation cases, generally the substantive law in effect at the time of the employee's injury applies throughout the course of that injury. *Olsen v. Samuel McIntyre Investment Co.,* 956 P.2d 257 (Utah 1998).

An appellate court will confirm the Commissions's findings as long as those findings are based on substantial evidence, even if another conclusion from the evidence is permissible. *Brady v. Labor Comm'n*, 2010 UT App 58U, para. 7, 2010 UT App 58 (cleaned up).

If there is no medical controversy (i.e., conflicting doctor reports), the Commission is not required to refer the case to a medical panel. *Brown & Root Industrial Service v. Industrial Commission of Utah*, 947 P.2d 671 (Utah 1997).

Utah's Workers Compensation Act is compulsory and not permissive and imposes an unconditional obligation on employers to be properly insured. An employer's good faith attempt to obtain coverage is irrelevant, and the employer is liable for benefits paid the employee by the Uninsured Employers Fund. *Thomas A. Paulsen Co. v. Industrial Comm'n*, 770 P.2d 125 (Utah 1989).

The insurer bears a proportionate share of the costs and attorneys' fees incurred in obtaining a recovery against the third party. *Lanier v. Pyne*, 508 P.2d 38 (Utah 1973). However, an insurer has no right to recover out of that part of a wrongful death recovery due to heirs who received no workers compensation benefits. *Oliveras v. Caribou-Four Corners*, 598 P.2d 1320 (Utah 1979).

Disbursements of proceeds recovered in a third-party tort action due to injuries or death arising from a work-related accident is controlled by *UCA* § 34A-2-106(5). Double recovery for injuries or death sustained in conjunction with an accident covered by workers compensation is not permitted. Therefore, a third-party

recovery must reimburse the employer or insurer for workers compensation sums already paid as well as offset for future liability of sums owed. However, the employer or insurer must first bear a proportionate share of the expenses for obtaining the recovery. *Esquivel v. Labor Comm'n*, 2000 UT 66, 7 P.3d 777.

Injuries received from fight while intoxicated compensable; trucker claimed he was trying to protect his cargo when he chased men into field, so incident arose out of employment. *Commercial Carriers v. Industrial Comm'n*, 888 P.2d 707 (Utah Ct. App. 1994).

Disability benefits for total permanent disability are not subject to reduction on the basis of the potential for reemployment of the claimant. *Intermountain Slurry Seal v. Labor Comm'n*, 2002 UT App 164, 48 P.3d 252.

Evidence is sufficient for a jury to find that an employer knew or should have known that working conditions could cause employees to develop carpal tunnel syndrome, where a plaintiff-employee presents evidence about the nature of his work and offers expert opinion testimony as to causation. *Brewer v. Denver & Rio Grande Western*, 2001 UT 77, 31 P.3d 557.

In *Ameritemps, Inc. v. Labor Comission,* 2005 UT App 491, ¶25, 128 P.3d 31, 39-40 Aff'd sub nom. *Ameritemps, Inc. v. Utah Labor Commission*, 2007 UT 8, 152 P.3d, the court ruled that Labor Commission's interim order finding that a workers compensation claimant qualified for permanent total disability was a final agency action and therefore could be appealed.

In *Martinez v. Media-Paymaster Plus*, 2005 UT App 308, 117 P.3d 1074, the Court of Appeals held that the Labor Commission erred in placing the burden on Martinez to show that he was not gainfully employed or that he was otherwise not prevented from seeking other work reasonably available. The Court of Appeals stated that if a claimant proves that he has been injured, that he is permanently disabled, and that the workplace accident was the direct cause of the disability, the claimant is presumed by the court to be entitled to permanent disability benefits.

The Utah Supreme Court reversed the holding of the Court of Appeals in *Martinez v. Media-Paymaster Plus.* A workers compensation claimant has the burden of proving that he has suffered total permanent disability in order to receive benefits. *Martinez v. Media-Paymaster Plus,* 2007 UT 42, 117 P.3d 384.

**Bad Faith:** The court may award reasonable attorneys' fees to a prevailing party if the court determines that a claim or defense was without merit and was not brought or asserted in good faith. *UCA* § 78B-5-825. "Without merit" means frivolous or having no basis in law or fact. Bad faith must be established by one or more of the following conditions: (1) absence of an honest belief in the propriety of the activities in question; (2) intent to take unconscionable advantage of others; or (3) intent or knowledge that the action will hinder, delay, or defraud others. *Baldwin v. Burton*, 850 P.2d 1188 (Utah 1993).

Before an award of attorneys' fees can be made in a declaratory judgment action, the insurer must have acted fraudulently, in bad faith, or have been stubbornly litigious. *American States Ins. Co. v. Walker*, 486 P.2d 1042 (Utah 1971); *Farmers Ins. Exch. v. Call*, 712 P.2d 231 (Utah 1985).

An insurer owes its insured a duty to accept an offer of settlement within the policy limits when there is a substantial likelihood of a judgment being rendered against the insured in excess of those limits. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 840 P.2d 130, 138 (Utah Ct. App. 1992).The insurer has a duty to protect a policyholder's interests as zealously as it would its own from third-party claimants. A bad faith cause of action in tort exists for breach of this fiduciary duty. *Ammerman v. Farmers Ins. Exch.*, 430 P.2d 576, 578 (Utah 1967); *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 799-800 (Utah 1985); *Campbell v. State Farm Mut. Auto Ins. Co.*, 840 P.2d 130, 138-39 (Utah Ct. App.), *cert. denied*, 853 P.2d 897 (Utah 1992). The test of the insurer's conduct is reasonableness under the circumstances. *Campbell*, 840 P.2d at 138.

An injured third party who obtains a judgment in excess of policy limits has no direct cause of action against the insurer who refused to settle within policy limits. *Ammerman v. Farmers Ins. Exch.*, 430 P.2d 576 (Utah 1967).

There is no duty of good faith and fair dealing imposed upon an insurer running to a third-party claimant seeking to recover against the insured. *Pixton v. State Farm Mut. Auto. Ins. Co.*, 809 P.2d 746 (Utah Ct. App. 1991); *Sperry v. Sperry*, 1999 UT 101, 990 P.2d 381.

A breach of contract (implied obligation to perform the contract in good faith), and not a tort cause of action for bad faith, is recognized in a first-party situation. *Beck v. Farmers Ins. Exch.*, 701 P.2d 795 (Utah 1985); *Gagon v. State Farm Mut. Auto. Ins. Co.*, 746 P.2d 1194 (Utah Ct. App. 1987), *cert. denied*, 771 P.2d 325 (Utah 1988). However, in some cases the acts causing the breach may cause breaches of other duties that may lead to an action in tort independent of the contract. *Beck*, 701 P.2d at 800 n.3.

The implied obligation of good faith performance on the part of the insurer at the very least requires "that the insurer will diligently investigate the facts to enable it to determine whether a claim is valid, will fairly evaluate the claim, and will thereafter act promptly and reasonably in rejecting or settling the claim." *Beck*, 701 P.2d at 801.

A claim for bad faith denial of an insurance claim in the first-party context is eliminated if the evidence creates a legitimate factual issue concerning the validity of the insurance claim. *Campbell v. State Farm Mutual Ins. Co.*, 840 P.2d 130, 138-39 n.16 (Utah Ct. App.), *cert. denied*, 853 P.2d 897 (Utah 1992); *Callioux v. Progressive Ins. Co.*, 745 P.2d 838 (Utah Ct. App. 1987).

Third-party claimant who is not in privity of contract with the insurer has no cause of action against the carrier for breach of the duty to good faith and fair dealing. *Savage v. Educators Ins. Co.*, 874 P.2d 130 (Utah Ct. App. 1994), *aff'd*, 908 P.2d 862 (Utah 1995) (employee not in privity with employer's workers compensation carrier).

The insured is not obliged to pay the amount of the judgment exceeding policy limits as a condition precedent to an action against the insurer for failure to settle the claim within policy limits. *Ammerman v. Farmers Ins. Exch.*, 450 P.2d 460 (Utah 1969).

Although bad faith actions in Utah cannot sound in tort, damages for bad faith breach of the insurance contract include both general and consequential damages. Consequential damages are "those reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made." *Horton v. Gem State Mut.*, 794 P.2d 847 (Utah Ct. App. 1990). Consequential damages may include attorneys' fees, but only in the context of insurance contracts and the third-party exception. *Canyon Country Store v. Bracey*, 781 P.2d 414 (Utah 1989); *Collier v. Heinz*, 827 P.2d 982 (Utah Ct. App. 1992).

After a denial of coverage by an insurer, the insured may enter into a reasonable settlement with a third party without prejudicing its rights against the insurer. *Gibbs M. Smith, Inc. v. United States Fidelity & Guaranty Co.,* 949 P.2d 337 (Utah 1997).

The knowledge of a corporation's agent, acting within the scope of his authority, may be imputed to the corporation for the purpose of determining whether attorney fees should be awarded under this section. *Wardley Better Homes & Gardens v. Cannon*, 2002 UT 99, 61 P.3d 1009.

When an insured brings extra-contractual claims against an insurer, such as a claim for a bad-faith denial of coverage, the existence of an "appraisal" clause in the insurance contract does not mean that the prescribed appraisal process should settle the dispute. Rather, absent an arbitration clause, the insured has the right to a full and fair opportunity to litigate the bad faith claim in court. *Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, 44 P.3d 663.

If an insurer acts reasonably in denying a claim, then the insurer did not contravene the covenant of good faith and fair dealing. The denial of a claim is reasonable if the insured's claim is fairly debatable. An insurer is not required to affirmatively plead a fairly debatable defense in its answer. Denying benefits under an insurance policy in reliance on an expert's report, such as a doctor's report, even if the expert's opinion is provided in exchange for remuneration, is not a bad faith denial because the expert's report creates a legitimate factual question regarding the validity of an insured's claim for benefits, making the insured's claim at least fairly debatable. *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, 56 P.3d 524.

In *Christiansen v. Farmer's Ins. Exchange,* 2005 UT 21, 116 P.3d 259, the Utah Supreme Court ruled that a showing of breach of insurance contract is not a prerequisite for pursuing discovery related to a bad faith claim.

**Alcohol:** Utah's Dramshop Liability Act, *UCA* § 31B-15-201 et seq., imposes strict liability on persons, employers, and establishments that provide alcohol to any individual under age 21 or who is intoxicated and who, as a result of the alcohol provided, causes injury or death to a third person. In such situations, the injured third person of the person's heirs have a cause of action against the provider of the alcoholic beverage. For actions arising after January 1, 2010, total damages under the Act are limited to $1,000,000 per individual and $2,000,000 in the aggregate to all persons per occurrence. [The limits for actions arising prior to January 1, 2010 are 500,000 and $1,000,000 respectively.] The state and its agencies and employees are immune from liability under the Act.

In *Red Flame, Inc. v. Martinez*, 2000 UT 22, 996 P.2d 540, the Utah Supreme Court held that the Utah Liability Reform Act, which abolished joint and several liability, applies to the strict liability of the Dramshop Liability Act.

Only "third persons" may recover under the Dramshop Act, not the intoxicated person. *Horton v. Royal Order of the Sun*, 821 P.2d 1167 (Utah 1991). The term "third person" does not include the claims by the spouse, child, or parent of the intoxicated person for injury or death to the intoxicated person. *Richardson v. Matador Steak House, Inc.*, 948 P.2d 347 (Utah 1997). *See also Miller v. Gastronomy, Inc.*, 2005 UT App 80, 110 P.3d 144 (Utah does not recognize a common law first-party action or wrongful death action brought by heirs against Dramshops for injuries suffered by intoxicated persons).

Other changes in the Act, effective January 1, 1998, include: no distinction is made between liquor and alcoholic beverages with less than 4% alcohol; the Act will not apply to private hosts of social functions, unless those served are under 21 years of age; general food stores and other stores selling beer for off-premises consumption are expressly exempt from Dramshop actions; and, an employer may not terminate an employee as a result of the employee having exercised his or her independent judgment to refuse to provide alcohol to a person pursuant to the Act.

Some question remains whether the Dramshop Act has superseded common law theories of liability and whether the statutory limits apply to such theories.

The statutory prohibition on drinking alcoholic beverages and having open alcoholic beverage containers in motor vehicles, *see UCA* § 41-6a-526(1) & (2), does not apply to passengers in motorboats. *UCA* § 41-6a-526(4)(c).

A person may not operate or be in actual physical control of a vehicle within this state if the person: (1) has sufficient alcohol in his body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .05 grams or greater at the time of the test; (2) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle; or (3) has a blood or breath alcohol concentration of .05 grams or greater at the time of operation or actual physical control. *UCA* § 41-6a-502. The amounts reflected in this statute have been changed effective December 30, 2018 (down from 0.8 grams).

A finding that the defendant was driving while under the influence alone is insufficient to submit the issue of punitive damages to a jury. Punitive damages are recoverable against a drunken driver where the driver acted with actual malice or a reckless disregard of the rights and safety of others, and his drunken driving was a cause of the accident. *Johnson v. Rogers*, 763 P.2d 771 (Utah 1988); *Biswell v. Duncan*, 742 P.2d 80 (Utah Ct. App. 1987). *See also UCA* § 78B-8-201(1)(b)(i). Breathalyzer test reading .27 was sufficient to sustain the court's finding that the defendant had operated his vehicle in a willful and wanton disregard for the safety of others. *Ellefsen v. Roberts*, 526 P.2d 912 (Utah 1974).

*UCA* § 32B-4-209 permits state store employees, beer retailers, and certain others to detain other citizens, if the employees or retailers have reason to believe that the citizen is an intoxicated minor, a minor attempting to buy alcohol, an intoxicated person attempting to buy alcohol, or an interdicted person possessing or attempting to buy alcohol. For the detention to be lawful, however, the person must be in the facility where liquor or beer is sold. The person is not in the facility if he or she is actually in the parking lot of the facility, or on neighboring property. *Eddy v. Albertson's, Inc.*, 2001 UT 88, 34 P.3d 781.

The standards of conduct identified above do not apply to a claim for punitive damages arising out of the operation of a motor vehicle while voluntarily intoxicated or under the influence of any drug or combination of alcohol and drugs. *Johnson v. Rogers*, 763 P.2d 771 (Utah 1988) (to recover punitive damages in a drunk driving case, plaintiff must show that defendant acted with knowing and reckless disregard of the rights of others and that the drunken driving contributed to the accident).

To date, Utah Law states that a policy of motor vehicle liability coverage may limit coverage to statutory minimum policy limits if the insured motor vehicle is operated by a person who has consumed any alcohol or illegal substance, if the policy or a specifically reduced premium was extended to the insured with a written stipulation that the vehicle would not be operated in this manner. *UCA* § 31A-22-303(7) (2010). However, during the 2020 legislative session, the Utah legislature adopted amendments to this provision, to become effective January 1, 2020, which requires a finding of guilt regarding driving under the influence before policy coverage is reduced. The amendments also allow extension of the coverage change to the insured's spouse or other permissible users of the vehicle. 2020 Utah Laws H.B. 159.

The legal drinking age in Utah is 21.

**Intra Family and Spousal Immunity:** Parent-child immunity and spousal immunity probably do not exist in Utah. Parent-child immunity has never been recognized by the State of Utah. *Bishop v. Nielsen*, 632 P.2d 864 (Utah 1981); *Farmers Ins. Exch. v. Call*, 712 P.2d 231 (Utah 1985). In *Bishop v. Nielsen*, 632 P.2d 864 (Utah 1981), the court ruled that even if the doctrine were followed in Utah, it would not prevent the joinder of the plaintiff's daughter as a third-party defendant. In *Farmers Ins. Exch. v. Call*, 712 P.2d 231 (Utah 1985), the court acknowledged that the doctrine has never been established by the legislature and does not exist in Utah. More importantly, the court held that the household or family exclusion often found in automobile liability policies is void to the extent of coverage required by the financial responsibility laws. (The exclusion has been enforced above that limit.) In this context the court noted that it did not consider the threat of intra-family collusion to be a valid rationale for that exclusion. *State Farm Mut. Auto. Ins. Co. v. Mastbaum*, 748 P.2d 1042 (Utah 1987) has since confirmed that the household exclusion is valid over and above the statutory minimum required by the No-Fault Insurance Act. *See* Motor Vehicle Insurance, Personal Injury Protection/No Fault, Section II. 2.2.

In *Stoker v. Stoker*, 616 P.2d 590 (Utah 1980), the court ruled that the doctrine of interspousal tort immunity did not bar a wife's action for intentionally caused personal injuries. Since that decision, there has been some question whether the doctrine, which previously had been followed, was repudiated in negligence actions as well.

In *State Farm Mut. Auto. Ins. Co. v. Mastbaum*, 748 P.2d 1042 (Utah 1987), a dissenting judge indicated that *Stoker v. Stoker*, 616 P.2d 590 (Utah 1980) eliminated the doctrine of interspousal tort immunity. *See also Laney v. Fairview*

*City*, 2002 UT 79, 57 P.3d 1007 (concurring and dissenting opinion noting that the Supreme Court "determined that the legislature had completely abolished the antiquated doctrine of Interspousal Tort Immunity"). Other courts have been less definite. *See Forsman v. Forsman*, 779 P.2d 218 (Utah 1989); *Noble v. Noble*, 761 P.2d 1369 (Utah 1988); *see also Lucero v. Valdez*, 884 P.2d 199 (Ariz. Ct. App. 1994) (reviewing Utah case law on interspousal immunity).

There is no clear rule concerning when a child is old enough to have a duty of due care. A child is expected to exercise that degree of care which would ordinarily be observed by children of the same age, intelligence, and experience under similar circumstances. *Donohue v. Rolando*, 400 P.2d 12 (Utah 1965). A child participating in an adult activity, however, is held to the same standard of care as an adult. *Summerill v. Shipley*, 890 P.2d 1042 (Utah Ct. App. 1995).

One has an insurable interest in another person, for persons closely related by blood or by law if they have a "substantial interest engendered by love and affection." One has an insurable interest in property or liability if he has a "lawful and substantial economic interest in the nonoccurrence of the event insured against." *UCA* § 31A-21-104. In *National Farmers Union Property & Casualty Co. v. Thompson*, 286 P.2d 249 (Utah 1955), the Utah Supreme Court concluded that a person having such interest in property that he may derive pecuniary benefit from the property's continued existence or suffer pecuniary loss from its destruction has a substantial economic interest such that he or she can enforce an insurance policy.

An innocent coinsured is not necessarily precluded from recovering on a fire insurance policy because a coinsured, her husband, intentionally destroyed the property. *Error v. Western Home Ins. Co.*, 762 P.2d 1077 (Utah 1988). If, however, the insurance policy contains an unambiguous exclusion for intentional acts, an innocent spouse may be precluded from recovery under the policy. *Utah Farm Bureau Ins. Co. v. Crook*, 1999 UT 47, 980 P.2d 685.

Despite a divorce decree that awarded the home to the wife and a restraining order prohibiting the husband from returning to the home, the husband had an insurable interest in the home, albeit minimal. *Error v. Western Home Ins. Co.*, 762 P.2d 1077 (Utah 1988).

**Seat Belt Defense:** The driver of a motor vehicle shall wear a safety belt. *UCA* § 41-6a-1803. The driver shall provide for the protection of each person younger than eight years old by using a child-restraint device for each person in the manner prescribed by the manufacturer of the device. *UCA* § 41-6a-1803. The driver shall provide for the protection of those eight years to sixteen years old by using the proper restraint device to restrain each person or by causing a safety belt to be secured on each person. *UCA* § 41-6a-1803.

A safety belt is not required if the vehicle was built before July 1, 1966, if a physician has provided written verification that the passenger is unable to wear it, the vehicle is not required to have safety belts, or if all seats are otherwise occupied. *UCA* § 41-6a-1804.

A person who violates *UCA* § 41-6a-1803 is guilty of an infraction and shall be fined $45.00; all but $15.00 of it is waived if an approved two-hour course is completed. *UCA* § 41-6a-1805.

The failure to wear a seat belt does not constitute contributory or comparative negligence and may not be introduced as evidence in a civil action on the issue of negligence, injuries or the mitigation of damages. *UCA* § 41-6a-1806. *Whitehead v. American Motors Sales Corp.*, 801 P.2d 920 (Utah 1990) (citing statute).

**Premises Liability**: Utah follows the premises liability rule, in the Restatement (Second) of Torts, that a possessor of land is subject to liability for physical harm caused to his invitees (including employees) by a condition on the land if, but only if, he: (1) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees; (2) should expect

that they will not discover or realize the danger, or will fail to protect themselves against it; and (3) fails to exercise reasonable care to protect them against the danger.

However, a possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness, with the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, taken as a factor of importance when determining whether the possessor should anticipate harm from a known or obvious danger.

Utah has adopted the Retained Control Doctrine, which precludes the assignment of liability to a general contractor for injuries sustained by a subcontractor where the general contractor does not exercise control over the manner or method of the work. General supervision is not enough to overcome this rule.

**Rental Coverage:** Providers of ski equipment, for either rental or purchase, have a duty of care commensurate with the standards of the industry to install and adjust the bindings, considering factors such as the experience level of the skier. A breach of that duty would constitute negligence. *Meese v. Brigham Young University*, 639 P.2d 720 (Utah 1981).

In 1990, the Utah legislature enacted the Utah Fit Premises Act, *UCA* § 57-22-1 et seq. This Act pertains only to residential rental units. Under the Act a landlord may not rent residential properties until they are safe, sanitary, and fit for human occupancy as defined by the Act. While a landlord may evict for any legal reason or for no reason at all, he is not free to evict in retaliation for his tenant's report of housing code violations to the authorities. *Building Monitoring Sys. v. Paxton*, 905 P.2d 1215 (Utah 1995).

The Utah Court of Appeals ruled that *UCA* § 31A-22-314 does not relieve rental car companies of their obligation to provide minimum insurance under Utah's Financial Responsibility of Motor Vehicles Owners and Operators Act, even when other valid and collectible coverage exists. *Li v. Zhang*, 2005 UT App 246, 120 P.3d 30.

Car rental companies are required to maintain the statutory minimum required insurance coverage for all vehicles in the case that the renter does not have other valid or collectible insurance. *UCA* § 31A-22-314.

**Releases:** To be enforceable, a release "must at a minimum be unambiguous, explicit and unequivocal." *Simonson v. Travis*, 728 P.2d 999 (Utah 1986).

A defendant is not discharged by release unless the release identifies the defendant with specificity. *Child v. Newsom*, 892 P.2d 9 (Utah 1995). The contrary holding in *Krauss v. Utah State Depart. of Transp.*, 852 P.2d 1014 (Utah Ct. App. 1993) is overruled.

*Thornock v. Jensen*, 950 P.2d 441 (Utah Ct. App. 1997), citing to *Child v. Newsom*, indicates that Utah courts will narrowly apply releases which attempt to discharge defendants not listed by name. With this in mind, releasors should take care to list each releasee by name and not rely solely on boiler-plate release language.

A release can be challenged on the same grounds as any contract can, such as fraud, mutual mistake, unilateral mistake, and duress. *Horgan v. Industrial Design Corp.*, 657 P.2d 751 (Utah 1982).

In *Campbell v. Stagg*, 596 P.2d 1037 (Utah 1979), a release was set aside for mutual mistake where both parties entered into the agreement based on a physician's statements that the plaintiff's injuries were minor when they were not.

Emotional distress does not amount to duress and economic necessity alone is insufficient to invalidate a signed release. *Berube v. Fashion Centre*, 771 P.2d 1033 (Utah 1989).

That an unknown consequence of a known injury arises following the execution of a release is no basis to set aside or otherwise challenge the release. *Blackhurst v. Transamerica Ins. Co.*, 699 P.2d 688 (Utah 1985).

The basis for challenging a release must be set forth in the complaint. *Norton v. Blackham*, 669 P.2d 857 (Utah 1983).

Under Utah's Liability Reform Act, a release given by a person seeking recovery to one or more defendants does not discharge any other defendant unless the release so provides. *UCA* § 78B-5-822.

Any release of liability or settlement agreement entered into within15 days from the date of occurrence causing physical injury to any person or entered into prior to discharge from any hospital is voidable by the injured person. *UCA* § 78B-5-812.

The court upheld a wrongful death action dismissal on the basis of a hold-harmless agreement in the construction contract. The court also rejected the argument that the agreement's bar of an action by the widow of a home buyer killed on the construction site violated public policy. *Russ v. Woodside Homes*, 905 P.2d 901 (Utah Ct. App. 1995).

A parent may not release a minor's prospective claims for negligence. A parent's agreement to indemnify a third party for that party's own negligence is void based upon the public policy that by shifting financial responsibility to a minor's parent, such indemnity provisions would allow negligent parties to circumvent the rule voiding waivers signed on behalf of a minor. *Hawkins v. Peart*, 2001 UT 94, 37 P.3d 1062. The holding in *Hawkins v. Peart* was recognized as superseded by statute in *Penunuri v. Sundance Partners, Ltd.* with regard to cases involving Utah's statutory limitations on liability involving equine and livestock activities that allow a parent or guardian to sign a release of liability for their minor child relating to specified inherent risks of equine and livestock activities. *Penunuri v. Sundance Partners, Ltd.*, 2013 UT 22, 301 P.3d 984.

A defendant employee can release his employer from liability for damages resulting from the employee's acts within the scope of employment. If the employee is a defendant but the defendant's employer is not, the plaintiff's release of the defendant employee and "any and all other persons, firms or corporations, whether herein named or referred to or not," has the effect of releasing the defendant's employer from liability. *Peterson v. Coca-Cola, Inc.*, 2002 UT 42, 48 P.3d 941.

**Wrongful Death:** Actions for wrongful death may be brought by the heirs or the personal representative on behalf of the heirs. *UCA* § 78B-3-106. A parent or guardian may maintain an action for the death or injury of a minor child when such injury or death is caused by the wrongful act or neglect of another. *UCA* § 78B-3-102; *Moreno v. Bd. of Educ.*, 926 P.2d 886 (Utah 1996). Such an action must be brought within two years after death, but if the judgment for plaintiff is reversed or if plaintiff fails otherwise than on the merits, a new action may be commenced within one year from such reversal or failure. § 78B-2-304; § 78B-2-111; *In re Estate of Garza*, 725 P.2d 1328 (Utah 1986). Damages for wrongful death may include compensatory damages, loss of support, services, society, prospective inheritance, and mental anguish. *Oxendine v. Overturf*, 1999 UT 4, 973 P.2d 417; *Evans v. Oregon Short Line R. Co.*, 108 P. 638 (Utah 1910).

Survival actions are allowed in some circumstances. If the decedent died as a result of the wrongful act, a claim for special and general damages of the decedent survives, under *UCA* § 78B-3-107 (1)(a).

Decedent's brothers and sisters could not recover their losses because they were not "heirs," as defined by the Utah Uniform Probate Code. *Kelson v. Salt Lake County*, 784 P.2d 1152 (Utah 1989). "Heirs" are defined for purposes of the wrongful death act in *UCA* § 78B-3-105.

In a wrongful death action for a child's death, recoverable damages include loss for intangible injuries such as loss of security, love, companionship, protection, and affection. A mother's ability to bear additional children

is a material factor in considering damages. However, the mother was not entitled to income she lost by devoting her full time to rearing the deceased child. *Jones v. Carvell*, 641 P.2d 105 (Utah 1982).

The estate of a deceased person may not bring a wrongful death action; however, a mere lack of capacity makes a wrongful death case voidable, not void, and when faced with this defect, the proper remedy is substitution. *Estate of Faucheaux v. City of Provo*, 2019 UT 41, ¶ 29, 449 P.3d 112, 119 (overruling *Haro v. Haro*, 887 P.2d 878 (Utah Ct. App. 1994).

Grandparents cannot maintain wrongful death action for death of an unborn grandchild because they were not parents or guardians under *UCA* § 78B-3-102. *State Farm v. Clyde*, 920 P.2d 1183 (Utah 1996).

A guardian of a deceased ward may not maintain a wrongful death action on his or her own behalf but must instead maintain the action on behalf of the deceased ward's heirs. *Moreno v. Bd. of Educ.*, 926 P.2d 886 (Utah 1996).

The two-year statute of limitations for a wrongful death claim is tolled by *UCA* § 78B-2-108 if the claimants are minors. *In re Estate of Garza*, 725 P.2d 1328 (Utah 1986).

**No Fault:** A no-fault insurer has no right to subrogation under Utah's no-fault statute, and as a general rule may not seek reimbursement for PIP payments its insured subsequently recovers from the tortfeasor. However, no-fault insurers may obtain reimbursement for PIP payments directly from their insureds' settlement with tortfeasors when it is clear the parties to the settlement intended that settlement amount include PIP reimbursement. Since a tortfeasor is not personally liable for PIP benefits, the settlement between the no-fault insured and the tortfeasor or tortfeasor's insurer is presumed to exclude PIP benefits in the absence of evidence to the contrary. *Bear River Mut. Ins. Co. v. Wall*, 937 P.2d 1282 (Utah Ct. App. 1997) (cert. granted).

Where the insured is or would be legally liable for injuries sustained by another, his insurer must reimburse any insurer or workers compensation fund for no-fault benefits paid to the other. The issue of liability for reimbursement is subject to mandatory, binding arbitration. *UCA* § 31A-22-309(6). *Ohio Casualty Ins. Co. v. Brundage*, 674 P.2d 101 (Utah 1983).

The auto liability insurer is not entitled to recover no-fault payments it made to its insured out of the proceeds of a settlement with a third-party tortfeasor. *Allstate Ins. Co. v. Anderson,* 608 P.2d 235 (Utah 1980). However, the Act does grant the insurer a limited, equitable right to seek reimbursement in arbitration against the third party's liability insurer. *Allstate Ins. Co. v. Ivie*, 606 P.2d 1197 (Utah 1980); *Christensen v. Farmers Ins. Exchange*, 669 P.2d 1236 (Utah 1983).

An insurance company cannot create an exclusion which would prevent a resident family member of the insured from recovering statutorily required no-fault benefits under the insured's motor vehicle policy. *State Farm Mut. Auto. Ins. Co. v. Mastbaum*, 748 P.2d 1042 (Utah 1987); *McCaffery on Behalf of McCaffery v. Grow*, 787 P.2d 901 (Utah Ct. App. 1990).

The tort immunity created by *UCA* § 31A-22-309(1) (no-fault threshold) does not extend to a person who fails to have the security in effect at the time of an accident, and the owner is personally liable for payment of no-fault benefits. *UCA* § 41-12A-304.

*UCA* § 31A-22-302 identifies components of the operators' required security as liability coverage, no-fault coverage (except for motorcycles, trailers and semitrailers, which may be offered first party medical coverage), uninsured motorist coverage unless affirmatively waived, and underinsured motorist coverage unless affirmatively waived. If the insured requests, coverage must also include property damage protection. *UCA* § 31A-22-305.5.

The No-Fault Insurance Act does not confer on the no-fault insurer the right of subrogation to funds received by its insured for personal injuries in a subsequent legal action. The insurer has a limited, equitable right to seek reimbursement in an arbitration proceeding against the liability insurer. *Allstate Ins. Co. v. Ivie*, 606 P.2d 1197 (Utah 1980).

**Liens:**

Generally: Liens are afforded by statute for: mechanics and materialmen to real property, UCA §§§ 38–1a–101 to 38-1b–203; care and feeding of animals, §§ 38-2-1; hotels, §§ 38-2-2; repairs of personal property, §§ 38-2-3; services rendered by laundries and shoe repair shops, §§ 38-2-3.1; attorneys, §§ 38-2-7; lessors, §§§ 38-3-1 to -8; hospitals, which attaches to a judgment, settlement, or compromise, §§§ 38-7-1 to -8; self-storage facilities, §§§ 38-8-1 to -5; mechanics' and materialmen to oil, gas and mining properties, §§§ 38-10-101 to -115; docketed judgments, §§ 78B-5-202 and §§ 38-5-1; child support, §§ 62A-11-312.5; and taxes of various types.

Hospital Liens: A hospital may file a lien upon a judgment, damages, and a settlement as a compromise in certain accident cases. UCA § 38-7-1. Any person, firm, or corporation, including an insurer, who pays a party or his attorney compensation for injuries, without paying the hospital lien, shall be liable to the hospital for the amount the hospital was entitled to receive. UCA §§ 38-7-1 to §-8.

**Permissive Use:** Utah law requires that all motor vehicle policies insure any "person using any named motor vehicle with the express or implied permission of the named insured" *UCA* § 31A-22-303(1)(a)(ii)(a). Utah case law does not make clear which party will hold the initial burden of proving whether a "user" has been given the consent or permission of the vehicle owner.

It is clear that mere ownership of a motor vehicle does not, in and of itself, subject the owner to liability for the negligence of an operator. "As a general rule, ownership of a motor vehicle does not alone subject the owner to liability for the negligence of permissive users." *Lane v. Messer*, 731 P.2d 488, 491 (Utah 1986) (citing 60A C.J.S. Motor Vehicles § 428).

There are some notable exceptions to this general rule. An owner may be liable for the negligence of the operator if the owner negligently entrusts the vehicle to an operator that the owner "knows or in the exercise of reasonable care should have known to be an incompetent, careless, reckless, or inexperienced driver or an intoxicated driver." *Lane v. Messer*, 731 P.2d 488, 491 (Utah 1986). Also, if an employee is the operator of his or her employer's motor vehicle, the employee's negligence may be imputed to the employer under the doctrine of respondeat superior. *Saltas v. Affleck*, 102 P.2d 493, 494 (Utah 1940); 43 Tort Trial & Ins. Prac. Law Journal 71, "Vicarious Liability for Negligence of a Vehicle's Driver," Fall 2007, pp. 75-77.

Notably, in Utah, the statute does not limit permissive users to those who are given permission to drive or "operate" a vehicle, passengers may also be permissive users. *Speros v Fricke*, 2004 UT 69, ¶ 35. In *Speros*, the Utah Supreme Court held that an invited passenger, who caused an accident by grabbing the steering wheel from the driver, was considered a permissive user, and covered under the insurance policy. 2004 UT 69 at ¶ 40 (finding that a "user" is different from an "operator" because the term "operator" has been defined in the statute and was deliberately not used in this subsection.)

# Vermont

## BODILY INJURY

Vermont's financial responsibility statute requires mandatory liability coverage of not less than $25,000 for the injury or death of one person and $50,000 for the injury or death of two or more persons in one accident. 23 V.S.A. § 800.

There is no minimum threshold of damages for assertion of a tort claim for bodily injury. Vermont is not a no-fault state.

Vermont follows the "collateral source doctrine" which means that any collateral sources used to pay a claimant's bodily injury claim cannot be introduced in evidence at trial and further cannot be used as an offset against any recovery against a defendant. *Aquino v. Watts*, 2014 WL 2208183, at *1 (D. Vt. May 28, 2014); *Hall v. Miller*, 143 Vt. 135, 141, 465 A.2d 222, 225 (1983).

## PROPERTY DAMAGE

Vermont's financial responsibility statute requires mandatory liability coverage of at least $10,000 for damage to property in any one accident. 23 V.S.A. § 800.

Regarding salvage value of a vehicle, common practice in Vermont is to deduct the salvage value from insurance settlement proceeds unless the insurance carrier retains the vehicle. Pursuant to regulations promulgated under Vermont's Unfair Trade Practices Act, any deductions for salvage must be appropriate in amount and fully explained to the claimant.

The loss of use of a vehicle is usually compensable to an injured party and the measure of damages is the cost of rental of like vehicle. Moreover, pursuant to regulations promulgated under Vermont's Unfair Trade Practices Act, no insurer shall refuse to negotiate claims for loss of use with respect to third party auto claims. Generally, loss of use does not cover insurance for the rental.

## SETTLEMENTS WITH MINORS

A settlement with a minor for a claim that does not exceed $1,500 must be approved by a Superior Court (court of general jurisdiction) Judge. A release approved by the court and executed by a parent is binding on the minor, both parents, and their respective heirs, administrators or assigns. 14 V.S.A. § 2643(a). A claim settled for a sum in excess of $1,500 requires the approval of a court-appointed guardian. 14 V.S.A. § 2643(b).

## PERSONAL INJURY

Vermont is not a PIP state.

## MEDICAL PAYMENTS

There is no compulsory coverage for medical payments in Vermont. This coverage is optional and is subject to subrogation rights.

## UM/UIM COVERAGE

Vermont law requires that any new or renewed policy insuring against liability arising out of the ownership, maintenance, or use of any motor vehicle must include uninsured/underinsured motorist coverage. 23 V.S.A. § 941.

The coverage for property damage must be sufficient to indemnify a claim for damages to which the claimant is legally entitled of no more than $10,000, with a deductible of $150.

The coverage for bodily injury shall be not less than $50,000 for one person and $100,000 for two or more persons killed or injured. If the underlying liability coverage on the policy exceeds $50,000/$100,000, then the UM/UIM coverage must be the same, unless the policyholder directs otherwise.

Vermont law generally upholds policy language that prohibits intra-policy stacking, but nullifies as violative of statutory requirements policy language that prohibits inter-policy stacking. *Monteith v. Jefferson Ins. Co.*, 159 Vt. 378, 383, 618 A.2d 488, 491 (1992).

## NEGLIGENCE

Vermont has adopted a modified comparative negligence scheme. A plaintiff may recover when his negligence is "not greater than the causal total negligence of the defendant or defendants". Thus, if a plaintiff is more than 50% responsible for his own injuries, his conduct will bar any recovery. The damages recovered by a plaintiff who is less than 50% liable is reduced "in proportion to the amount of negligence attributed to the plaintiff". 12 V.S.A. § 1036. It is a defendant's burden to establish the plaintiff's contributing negligence, if any.

## STATUTE OF LIMITATIONS

Vermont has a three year statute of limitations from the date of an accident with respect to negligence claims involving both bodily injury and property damage claims. 12 V.S.A. § 512.

A minor child (under 18 years of age) would be considered to be under a disability for the purposes of the statute of limitations. During the time when the minor was under age, the statute of limitations would not run with respect to the minor claimant. Therefore, the minor could bring the claim after their 18th birthday even if the statute of limitations would have expired if they were an adult. 12 V.S.A. § 551(a).

## LICENSING REQUIREMENTS

In Vermont, all insurance producers, surplus lines insurance brokers, managing general agents, reinsurance intermediaries, limited lines producers, consultants, insurance adjusters and insurance appraisers must be duly licensed. 8 V.S.A. § 4793(a). Additionally, no insurance producer, surplus lines insurance broker or limited lines producer shall make application for, procure, negotiate for or place for others, any insurance as to which he or she is not qualified and duly licensed. 8 V.S.A. § 4793(b) Finally, no person shall investigate or negotiate settlement of any claim arising under Vermont's Employer's Liability and Workers' Compensation statute or its Compensation for Occupational Diseases statute unless the person is licensed as a Workers' Compensation adjuster. 8 V.S.A. § 4793(c).

## PUNITIVE DAMAGES

In general, punitive damages are available where a defendant's conduct supports a showing of malice (*e.g.*, conduct evidencing personal ill will or a reckless disregard to the rights of others). *Bolsta v. Johnson*, 176 Vt. 602, 824 A.2d 306 (2004). However, it has been held that punitive damages are generally not recoverable for an ordinary accident caused by negligence on a highway. *Walsh v. Segale*, 70 F.2d 698 (2d Cir. 1934) (interpreting Vermont law). Where punitive damages are recoverable, they do not require a particular relationship to the amount of compensatory damages. *Crump v. P & C Markets, Inc.*, 154 Vt. 284, 576 A.2d 441 (1990).

With respect to coverage under liability insurance policies, punitive damages are covered unless specifically excluded. *State v. Glens Falls Ins. Co.*, 137 Vt. 313, 404 A.2d 101 (1979); *American Protection Ins. Co. v. McMahan,* 151 Vt. 520, 562 A.2d 462 (1989).

## JOINT AND SEVERAL LIABILITY

Under Vermont's comparative negligence statute, 12 V.S.A. § 1036, joint and several liability has been replaced with several liability. Accordingly, the amount for which each tortfeasor is financially liable is proportionate to his or her share of fault. However, the Vermont Supreme Court has indicated that in the absence of a plaintiff's comparative fault under 12 V.S.A. § 1036, joint and several liability could still be applied to joint defendants. *See Levine v. Wyeth*, 944 A.2d 179 (Vt. 2006).

## WORKERS' COMPENSATION

Vermont's Workers' Compensation Act, 21 V.S.A. §§ 601-711, generally provides the exclusive remedy to an employee against an employer for work-related injuries. 21 V.S.A. § 622. The Act defines "employee" and "worker" to mean "an individual who has entered into the employment of, or works under contract of service or apprenticeship with, an employer." 21 V.S.A. § 601(14). The term "worker" or "employee" does not include "[a]n individual whose employment is of casual nature, and not for the purpose of the employer's trade or business." *Id.* at § 601(14)(A).

If an employer fails to secure workers' compensation, an injured employee may elect to bring a civil action against the employer for full damages resulting from the injury. 21 V.S.A. §§ 622, 618(b). Additionally, in cases of dual liability, an employee's acceptance of compensation benefits from a liable third-party, or the commencement of an action against such a third-party, shall not act as an election of remedies, but the injured employee shall reimburse the employer or its workers' compensation carrier for any amounts recovered as damages from the liable third-party. 21 V.S.A. § 624.

The Act does not prohibit an injured employee from maintaining an action for negligence against a fellow employee who caused injury. *Garrity v. Manning*, 164 Vt. 507, 671 A.2d 808 (1996); *Martel v. Connor Contracting, Inc.*, 208 Vt. 498, 200 A.3d 160 (2018).

A workers' compensation carrier has no right to reimbursement from, nor a future credit against, UIM proceeds an employee recovers under an automobile liability policy purchased by an employer, except to prevent "double recovery." *Travelers Ins. Co. v. Henry*, 178 Vt. 287, 882 A.2d 1133 (2005). To determine if a double recovery has occurred, the nature and extent of the injured employee's damages must first be ascertained. *Id.* Then the employee must reimburse the workers' compensation carrier out of the economic damages portion of the UIM award. *Id.*

## BAD FAITH

Vermont recognizes a cause of action for bad faith against an insurance company in handling both third-party and first-party claims. In the third-party context, an insurer has a fiduciary duty to the insured to act in good faith when handling a claim against an insured, which obligates the insurer to take into account the insured's financial interests. *Myers v. Ambassador Ins. Co.*, 146 Vt. 552, 508 A.2d 689 (1986). Also, the insurer must inform the insured of the results of its risk assessment, including potential excess liability, and convey any demands for settlement that may have been made. *Id.* Whether an insurer acts in bad faith is a fact question in each case.

To establish a claim for bad faith in the first-party context (*i.e.*, where an insurer fails to pay a claim filed by its insured), a plaintiff must show (1) the insurer had no reasonable basis to deny policy benefits, and (2) the insurer knew or recklessly disregarded the fact that no reasonable basis existed for denying the claim. *Bushey v. Allstate Ins. Co.*, 164 Vt. 399, 670 A.2d 807 (1995); *Town of Ira v. Vermont League of Cities and Towns*, 198 Vt. 12, 109 A.3d 893 (2014).

The Vermont Insurance Trade Practices Act, 8 V.S.A. § 4721 et seq., provides administrative sanctions against unfair and deceptive acts within the insurance industry but does not create a private right of action for "bad faith" claims. *Wilder v. Aetna Life & Cas. Ins. Co.*, 140 Vt. 16, 433 A.2d 309 (1981); *Messier v. Bushman*, 208 Vt. 261, 197 A.3d 882 (2018).

## ALCOHOL

Under Vermont law, a person shall not operate a vehicle: (1) when the person's alcohol concentration is 0.08 or more, or 0.02 or more if the person is operating a school bus; or (2) when the person is under the influence of alcohol; or (3) when the person is under the influence of any other drug or under the combined influence of alcohol and any other drug; or (4) when the person's alcohol concentration is 0.04 or more if the person is operating a commercial motor vehicle. 23 V.S.A. § 1201(a).

The following permissive inferences apply: (1) alcohol concentration of 0.08 or more shall be a permissive inference of intoxication; and (2) alcohol concentration at any time within two hours of the alleged offense was 0.10 or more shall be a permissive inference of intoxication. 23 V.S.A. § 1204(a).

Every person who operates a vehicle in Vermont is deemed to have given consent to a breath or blood test. 23 V.S.A. § 1202(a)(1), (2). If a person refuses to submit to such a test, it shall not be given (except where an accident has resulted in serious bodily injury or death and a search warrant is obtained), but a refusal may be introduced as evidence in a criminal proceeding. 23 V.S.A. § 1202(b). Additionally, if a person refuses such a test and the request is reasonable, a person's license will be suspended for six months. 23 V.S.A. § 1202(d)(2)

Vermont has enacted a "Dram Shop" statute, which provides a cause of action to third persons injured by an intoxicated person against any person or persons who have caused such intoxication by selling or furnishing alcohol to: (1) a minor; (2) a person apparently under the influence of alcohol; (3) a person after the legal serving hours; or (4) a person whom it would be reasonable to expect would be intoxicated as a result of the amount served. 7 V.S.A. § 501(a).

## INTRA FAMILY AND SPOUSAL IMMUNITY

There is no spousal immunity in Vermont for claims arising out of automobile accidents. *Richard v. Richard*, 131 Vt. 98, 300 A.2d 637 (1973). Additionally, Vermont law does not recognize the doctrine of parental immunity. *Wood v. Wood*, 135 Vt. 1999, 370 A.2d 191 (1977).

## SEAT BELT DEFENSE

Vermont does not allow a seat belt defense. 23 V.S.A. §§ 1258 & 1259(c)-(d). With some exceptions, seat belts are required for all passengers. 23 V.S.A. § 1259.

## LABOR LAW

Under the Vermont Fair Employment Practices Act, an employer cannot discriminate against any individual because of race, color, religion, ancestry, national origin, sex, sexual orientation, gender identity, place of birth, age, crime victim status, HIV status, or a qualified disabled individual. 21 V.S.A. § 495. The standards and burdens of proof are the same as those under Title VII of the U.S. Civil Rights Act. *Robertson v. Mylan Labs, Inc.*, 2004 VT 15 ¶ 16, 176 Vt. 356, 363. In absence of direct evidence of unlawful discrimination, a three-step burden shifting analysis is applied: plaintiff must show circumstantial evidence creating a presumption of illegal discrimination by the defendant; the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action; and if the employer meets this burden of production, the burden of production shifts back to plaintiff to prove by a preponderance of evidence that the legitimate reasons given by the employer are a pretext for discrimination. *Boulton v. CLD Consulting Engineers, Inc.*, 2003 VT 72 ¶ 15, 175 Vt. 413, 421.

All employers, employment agencies, and labor organizations have an obligation to ensure a workplace free of sexual harassment and must adopt, post, and distribute a sexual harassment policy that includes certain mandatory provisions. 21 V.S.A. § 495h.

No employer may take retaliatory action against a whistleblower who discloses or threatens to disclose a violation of law, improper quality of patient care, provides information or testimony to any public body, or objects or refuses to participate in an activity, policy, or practice the employee believes is a violation of the law or constitutes improper patient care. 21 V.S.A. § 507(b). With the exception of testimony provided to a public body, the employee must first report the alleged violation to the employer, supervisor, or other person so designated. 21 V.S.A. § 507(c).

Under Vermont law, an employer cannot, as a condition of employment, promotion, change in employment status, or as an express or implied condition of a benefit or privilege of employment request or require an employee or prospective employee to take a drug test. 21 V.S.A. §§ 512 & 513. Random or company-wide tests are not permissible unless required by federal law or regulation. 21 V.S.A. § 513(b). There is an exception for prospective employees if the applicant has been given an offer of employment conditioned on the applicant receiving a negative test result; however, the applicant must receive written notice of the drug testing procedure and a list of the drugs to be tested. 21 V.S.A. § 512(b). There is also an exception when an employer or agent of employer has probable cause to believe an employee is using or under the influence of a drug on the job. 21 V.S.A. § 513(c). For this exception to apply, there must be an employee assistance rehabilitation program, the employee cannot be terminated for a positive test result, and the employee must participate in the assistance program if a positive test results. 21 V.S.A. § 513(c). An employee may be fired if a test administered after participation in the assistance program is positive. 21 V.S.A. § 513(c)(3).

**RENTAL COVERAGE**

"No owner of a motor vehicle required to be registered, or operator required to be licensed or issued a learner's permit, shall operate or permit the operation of the vehicle upon the highways of the State without having in effect an automobile liability policy or bond in the amounts of at least $25,000.00 for one person and $50,000.00 for two or more persons killed or injured and $10,000.00 for damages to property in any one accident. In lieu thereof, evidence of self-insurance in the amount of $115,000.00 must be filed with the commissioner of motor vehicles." 23 V.S.A. § 800(a). This provision requires rental agencies to maintain adequate insurance. *Champlain Cas. Co. v. Agency Rent-A-Car, Inc.*, 168 Vt. 91, 93 (1998). Nonetheless, there may be questions of allotment of payments if there is coverage from more than one policy. *Id.* at 100-101; *State Farm Mut. Auto Ins. Co. v. Powers*, 169 Vt. 230, 235 (1999).

Federal law has eliminated vicarious liability on owners of leased or rented cars. 49 U.S.C. § 30106 ("Graves Amendment").

**RELEASES**

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. *Investment Properties, Inc. v. Lyttle*, 169 Vt. 487, 497 (1999). "A release is required to be specific in order to be valid." *Id.*

**WRONGFUL DEATH**

Under Vermont law, a legal representative of a decedent's estate may bring a civil action when the death was caused by the wrongful act, neglect or default of a person or corporation, and the act, neglect or default would have entitled the decedent to maintain an action to recover damages. 14 V.S.A. § 1491. Unless the death results from a homicide or if the responsible party is out of state, an action must be brought within two years of the decedent's death. 14 V.S.A. § 1492.

Per § 1492(c), proceeds from any recovery are distributed as follows:

(1) In case the decedent shall have left a spouse surviving, but no children, the damages recovered shall be for the sole benefit of such spouse;

(2) In case the decedent leaves neither spouse nor children, but leaves a mother and leaves a father who has abandoned the decedent or has left the maintenance and support of the decedent to the mother, the damages or recovery shall be for the sole benefit of such mother;

(3) In case the decedent leaves neither spouse nor children, but leaves a father and leaves a mother who has abandoned the decedent, the damages or recovery shall be for the sole benefit of such father;

(4) No share of such damages or recovery shall be allowed in the estate of a child to a parent who has neglected or refused to provide for such child during infancy or who has abandoned said child whether or not such child dies during infancy, unless the parental duties have been subsequently and continuously resumed until the death of the child;

(5) No share of such damages or recovery shall be allowed in the estate of a spouse to his or her surviving spouse who has abandoned the decedent or in the estate of a wife to a husband who has persistently neglected to support his wife prior to her death;

(6) The superior court or superior judge, as the case may be, shall have jurisdiction to determine the questions of abandonment and failure to support under subdivisions (2), (3), (4) and (5) of this section and the probate court having jurisdiction of the decedent's estate shall decree the net amount recovered pursuant to the final judgment order of the superior court or superior judge.

Wrongful death actions are not necessarily based on negligent acts. *Clymer v. Webster*, 156 Vt. 614, 621 (1991). There exists statutory wrongful death liability for the negligently caused death of an unborn, viable fetus. *Vaillancourt v. Medical Center Hospital of Vermont, Inc.*, 139 Vt. 138, 143 (1980). Where an adoption has not become final at time of the child's death, prospective adoptive parents cannot maintain a wrongful death action. *Whitchurch v. Perry*, 137 Vt. 464, 471-72 (1979).

**NO FAULT**

Vermont does not have a no-fault insurance law.

**LIENS**

A "hospital" furnishing medical care or other services to an accident victim has a lien on any damages recovered as a result of a suit arising from that accident. 18 V.S.A. § 2251. The lien, however, cannot attach to one-third of the recovery or $500.00 - whichever is less; the lien is also subordinate to an attorney's lien. *Id.* A "'hospital' includes public health centers and general, tuberculosis, mental, chronic disease, and other type of hospitals and related facilities, such as laboratories, out-patient departments, nurses homes and training facilities, and central service facilities operated in connection with hospitals, but does not include any hospital furnishing primarily domiciliary care." 18 V.S.A. § 1801.

The Agency of Human Services has a lien for Medicaid expenditures incurred in connection with an accident which results in a later recovery. 33 V.S.A. § 1910.

A contractor who has provided material or labor for "erecting, repairing, moving or altering improvements to real property" has a lien on the lot of land or the new improvements. 9 V.S.A. § 1921. After notice to the debtor, the lien must be recorded in the town where the real property lies within 180 days from the time when payment became due for the last labor performed or materials furnished. *Id.* The lien expires within 180 days of its initial filing with the town unless the lien is perfected. 9 V.S.A. §§ 1921, 1924. It is not enough to file suit to prevent expiration of the lien; approval and service of a nonpossessory writ of attachment within 180 days is necessary. *Filter Equipment Co., Inc. v. International Business Machines Corp.*, 142 Vt. 499, 501-02 (1983).

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A "hospital" furnishing medical care or other services to an accident victim has a lien on any damages recovered as a result of a suit arising from that accident. 18 V.S.A. § 2251. The lien, however, cannot attach to one-third of the recovery or $500.00 - whichever is less; the lien is also subordinate to an attorney's lien. *Id.* A "'hospital' includes public health centers and general, tuberculosis, mental, chronic disease, and other type of hospitals and related facilities, such as laboratories, out-patient departments, nurses homes and training facilities, and central service facilities operated in connection with hospitals, but does not include any hospital furnishing primarily domiciliary care." 18 V.S.A. § 1801.

The Agency of Human Services has a lien for Medicaid expenditures incurred in connection with an accident which results in a later recovery. 33 V.S.A. § 1910.

A contractor who has provided material or labor for "erecting, repairing, moving or altering improvements to real property" has a lien on the lot of land or the new improvements. 9 V.S.A. § 1921. After notice to the debtor, the lien must be recorded in the town where the real property lies within 180 days from the time when payment became due for the last labor performed or materials furnished. *Id.* The lien expires within 180 days of its initial filing with the town unless the lien is perfected. 9 V.S.A. §§ 1921, 1924. It is not enough to file suit to prevent expiration of the lien; approval and service of a nonpossessory writ of attachment within 180 days is necessary. *Filter Equipment Co., Inc. v. International Business Machines Corp.*, 142 Vt. 499, 501-02 (1983).

# Virginia

**Structure of the Court System:** Virginia has a four-tier court system. At the bottom of the tier is the General District Court. This is a court not of record that has exclusive jurisdiction over matters under $4,500. It has concurrent jurisdiction with the Circuit Court on matters between $4,500 and $25,000. It has no jurisdiction over matters exceeding $25,000. There is no discovery in the General District Court, though subpoenas *duces tecum* are allowed. There are no juries in the General District Court and all judgments are appealable as of right to the Circuit Court for a trial *de novo*.

The Circuit Court has appellate jurisdiction over all General District Court matters and it has original jurisdiction in civil matters over $4,500. Appeals from the General District Court are heard *de novo*. Jury trials are granted on request. Civil cases are appealed directly to the Supreme Court.

The Court of Appeals hears appeals of the Administrative Agencies, the Workers' Compensation Commission and the Domestic Relations Court. General civil matters are not heard by the Court of Appeals. The Court of Appeals has no original jurisdiction.

The Supreme Court has appellate jurisdiction over civil appeals from the Circuit Court and criminal appeals from the Court of Appeals. All appeals are purely discretionary. The Supreme Court also has original jurisdiction over certain issues not relevant in the civil context, such as habeus corpus, mandamus and prohibition.

**Bodily Injury:** Regarding motor vehicle insurance, Virginia is not a compulsory insurance state; motorists are free to choose whether to purchase insurance. However, a $500 uninsured motorist fee is required when an uninsured vehicle is registered, and these fees are placed in a fund that is disbursed to automobile insurers in Virginia to reimburse them for losses caused by uninsured motorists.

There is no statutory requirement for minimum limits on Virginia liability policies. However, most insurers in Virginia have adopted minimum limits in automobile policies of $25,000 per person and $50,000 per accident.

**Property Damage:** Regarding motor vehicle insurance, Virginia is not a compulsory insurance state; motorists are free to choose whether to purchase insurance and there is no statutory requirement for minimum limits on Virginia liability policies. However, most insurers in Virginia have adopted minimum limits in automobile policies of $20,000 for property damage.

Where property is a total loss, the measure of damages is the dimunition in value of the property plus the necessary and reasonable expenses incurred as a result of the damage.

When property is a partial loss, the measure of damages is the lesser of dimunition (plus necessary and reasonable expenses) or the cost of repair plus any depreciation (plus necessary and reasonable expenses).

**Settlements with Minors:** Court approval is required for the settlement of any action or claim involving a person under a disability (minor, incarcerated person or incapacitated person). Va. Code § 8.01-424(A). Any interested party to the settlement may petition the court where the action is pending for approval of the settlement or, if no action is pending, to any circuit court in Virginia. Va. Code § 8.01-424(B).

If the minor is not represented by counsel, then a Guardian *ad litem* must be appointed to represent the minor's interests. In some jurisdictions, a Guardian *ad litem* is required even if the minor is represented by counsel. Most courts require the settlement proceeds to be paid into the court to hold and invest until the minor turns eighteen (18). However, courts do allow structured settlements through the purchase of an annuity, and in certain cases involving small amounts the court may pay the proceeds directly to the parents.

**Personal Injury Protection:** Virginia does not require personal injury protection ("PIP") insurance.

**Medical Payments:** Virginia's Medical Expense Insurance Statute ("Med Pay Statute") requires that with all motor vehicle liability policies issued or delivered in Virginia, the insurer must provide notice to the insured that the insured "may purchase" medical expense and loss of income benefits. The insured has the option of purchasing, at an increased premium, either or both coverages.

The Med Pay Statute provides coverage for all reasonable and necessary expenses for medical, chiropractic, hospital, dental, surgical, ambulance, prosthetic, rehabilitation, and funeral expenses resulting from the accident and incurred within three (3) years of the accident.

There is no statutory prohibition on inter-policy stacking by an insured who qualifies as an insured under more than one policy. As for intra-policy stacking, in any personal automobile policy a named insured or resident relative may stack up to four (4) separate vehicles per policy when recovering under the med pay provisions of an insurance policy.

The Limits of Liability section of the standard Virginia auto policy provides the following order of priority for payment of med pay benefits: 1) med pay insurance of the owner of the vehicle occupied by the injured person at the time of the accident; 2) med pay insurance of the operator of the vehicle occupied by the injured person at the time of the accident; and 3) med pay insurance of the injured person.

**Uninsured/Underinsured Motorist Coverage:** Although liability insurance is not required in Virginia, any policy issued or delivered in Virginia relating to the ownership, maintenance or use of a motor vehicle must contain a UM/UIM endorsement with limits equal to the limits of the liability insurance provided by the policy, but no less than $25,000 per person, $50,000 per accident, and $20,000 for property damage. Va. Code § 38.2-2206. Any named insured can reject the additional uninsured motorist insurance coverage through written notification to the insurer.

When multiple uninsured coverages are applicable, coverage on the host vehicle is primary, while all other applicable uninsured coverages are excess. The excess coverages are pro-rated.

When multiple underinsured coverages are applicable, coverage on the host vehicle is primary, coverage on a motor vehicle not involved in the accident where the injured person is a named insured is secondary, and coverage on a motor vehicle not involved in the accident where the injured person is an insured other than a named insured is tertiary. Va. Code § 38.2-2206(B). Where there is more than one insurer providing coverage at a priority level, liability is pro-rata as to their respective underinsured motorist coverages.

Inter-Policy Stacking: An insured may stack UM/UIM coverages on separate policies.

Intra-Policy Stacking: An insured may not stack multiple UM/UIM coverages on the same policy, even though separate premiums are paid, if the policy contains clear and unambiguous language precluding intra-policy stacking.

A motor vehicle is deemed uninsured if its owner or operator is unknown. The plaintiff bears the burden of proving the existence of the John Doe vehicle and that John Doe is liable for the injuries alleged. In order to recover under the uninsured motorist provisions of an insurance policy when the insured has sustained injury or damage as a result of a no-contact accident involving an unknown motorist, the insured must make a prompt report to either the insurer or a law enforcement official.

Virginia made significant changes to the UIM statute (Va. Code 38.2-2206) in 2016. A liability insurer and a plaintiff may settle a claim and release the tortfeasor while still allowing the plaintiff to proceed against the UIM insurer. The statute also may shift the duty to defend entirely to the UIM insurer while extinguishing its subrogation rights, resulting in increased costs to an underinsured motorist carrier with no ability to recover from the tortfeasor. The law was updated again in 2019 to address issues that arose with attempts to shift the duty to defend and release the tortfeasor.

**Negligence:** Negligence is the failure to use ordinary care. Ordinary care is the care a reasonable person would have used under the circumstances of the case. The plaintiff has the burden of proving by the greater weight of the evidence that the defendant was negligent and that the defendant's negligence proximately caused the accident and any of the plaintiff's injuries.

Gross negligence is a degree of negligence that shows such indifference to others as to constitute an utter disregard of caution amounting to a complete neglect of the safety of another. It is negligence that would shock fair-minded people, although it is something less than willful recklessness.

Contributory negligence is the failure to act as a reasonable person would have acted for his own safety under the circumstances of the case. This is an objective standard. Virginia is a pure contributory negligence state. This means that the negligence of the plaintiff and defendant cannot be weighed. If the plaintiff is even one percent (1%) contributorily negligent, then the plaintiff is barred from recovery.

An exception to the contributory negligence bar is the doctrine of last clear chance. Contributory negligence will not bar a plaintiff's recovery if the plaintiff placed himself in a situation of peril and was either helpless or was unaware of his peril and the defendant saw (or should have seen) the plaintiff and realized (or should have realized) the plaintiff's peril, and the defendant could have avoided the accident using ordinary care.

**Statutes of Limitations:**

Personal Injuries: Virginia has a two (2) year statute of limitations for personal injury actions. Va. Code § 8.01-243(A). The limitations period begins to run from the date of injury. Va. Code § 8.01-230.

Property Damages: Virginia has a five (5) year statute of limitations for property damages. Va. Code § 8.01-243(B). The limitations period begins to run from the date of damage to property. Va. Code § 8.01-230.

Contribution: Virginia has a three (3) year statute of limitations for contribution between or among joint tortfeasors.

Wrongful Death: The personal representative must bring an action for wrongful death within two (2) years after the death of the injured person. If the injured decedent died more than two years after the accident without having brought suit, then the wrongful death action is barred.

**Licensing Requirements:** Any insurance company that wishes to transact a business of insurance in Virginia must first be licensed by the State Corporation Commission. Va. Code § 38.2-135 and -200. This license is in addition to certificates of authority required of foreign corporations. Va. Code § 38.2-200(B).

Anyone acting as an insurance agent for an insurance business must first be licensed by the State Corporation Commission. Va. Code § 38.2-1822(A). It is a Class 1 misdemeanor for an agent to act for an unlicensed insurance business. Va. Code § 38.2-1802(B). Agents are also prohibited from sharing commissions or fees with persons who are not licensed as agents in return for assistance in soliciting or procuring a policy. Va. Code § 38.2-1812(F). However, a referral fee may be paid to an individual not licensed as an agent if the referral does not include a discussion of specific insurance policy terms and conditions, the referral fee is a one-time payment of a nominal fixed amount per referral, and the referral fee does not depend on whether the referral results in a purchase of insurance by the customer. Va. Code § 38.2-1821(B)(8).

A license as an insurance producer is not required of any officer, director or employee of the insurer so long as they do not receive any direct or indirect commission on policies written or sold to insure risks residing, located or to be performed in Virginia and their duties relate to the processing, adjusting, investigating or settling of a claim on a contract of insurance. Va. Code § 38.2-1821.1.

**Punitive Damages:** Under the common law, a person can recover punitive damages where the defendant acted with actual malice toward the plaintiff or where the defendant's actions amounted to willful and wanton conduct. Actual malice is a sinister or corrupt motive such as hatred, personal spite, ill will or a desire to injure the plaintiff. Willful and wanton conduct is acting consciously and in disregard of another person's rights or acting with a reckless indifference to the consequences to another person when the defendant is aware of his conduct and that it would probably result in injury to another. There is a statutory cap on punitive damages of $350,000. Va. Code § 8.01-38.1. Punitive damages are not recoverable against a deceased tortfeasor.

By statute, a blood alcohol content of .15 or greater creates a presumption of willful and wanton conduct in order to recover for punitive damages in motor vehicle cases. Va. Code § 8.01-44.5.

Punitive damages cannot be awarded against an employer for the acts of his employee or agent unless the plaintiff shows: 1) the act was committed in the scope of employment; 2) either actual or implied malice; and 3) that the employer expressly authorized, subsequently ratified, or participated in the act.

**Joint and Several Liability:** Virginia follows joint and several liability for joint tortfeasors. If two or more defendants are negligent and if each of their negligence is a proximate cause of the plaintiff's injury, then they are both liable to the plaintiff and there can be no apportionment of negligence or of damages. This does not apply to punitive damages.

**Workers' Compensation:** By statute, any employer with three or more employees regularly in service in Virginia is obligated to provide workers' compensation insurance. Because benefits under the Workers' Compensation Act ("Act") provide the exclusive remedy for an injured employee, no civil lawsuit can be maintained by an employee against his employer, any co-employee or any statutory employer. However, a third-party action may be maintained by the employee against an "other party" or "stranger" to the employment. And while the employer cannot be impleaded in a third-party tort suit for common-law contribution or indemnity, if the employer has contractually obligated itself to indemnify the tortfeasor, then the employer can be impleaded.

In a recovery in a third party tort action, the workers' compensation insurer has a lien and is entitled to be reimbursed for the monies it has paid for indemnity and medical bills, less its proportional share of attorneys' fees and costs.

Settlements of any claims arising under the Act must be approved by the Virginia Workers' Compensation Commission. Therefore, the Commission must approve any settlement of a compensation claim that is part of a global settlement in a third party tort suit.

Virginia is an "actual risk" versus "positional risk" state, meaning that in order to be compensable an injury must occur not only while the employee is "in the course of employment," but the injury must also "arise out of" a risk causally related to the circumstances under which the work is being performed. This means that an injury to which the general public is equally exposed is not considered to "arise out of" the employment (i.e., a worker who is injured in a fall at work is not entitled to compensation benefits unless the conditions under which he was performing the work contributed to the injury, such as a defect in the flooring). Where the employee willfully violates a known and enforced safety rule or statute, however, compensation will be denied.

An employee suing a third party for injuries suffered can make an uninsured/underinsured motorist claim. While the employee's compensation carrier is subrogated to any employer-provided uninsured/underinsured coverage, the compensation carrier has no right of subrogation against the employee's personal uninsured/underinsured motorist's coverage.

**Bad Faith:** Virginia does not recognize an independent tort cause of action for bad faith against an insurer. However, an insured has a first-party cause of action in contract for bad faith against its insurer for a loss the insured has incurred directly. In evaluating the conduct of an insurer in a first-party action, courts apply the "reasonableness" standard as set forth in CUNA Mutual Insurance Society v. Norman, 237 Va. 33 (1989), which requires a consideration of whether: 1) reasonable minds could differ in the interpretation of the policy provisions defining coverage and exclusions; 2) the insurer conducted a reasonable investigation of the facts and circumstances of the claim; 3) the evidence reasonably supports a denial of liability; 4) it appears the insurer's refusal to pay was used as a tool in settlement negotiations; and 5) the defense the insurer asserts at trial raises an issue of first impression or a reasonably debatable question of law or fact. If an insurer is found to have denied a claim in bad faith, then the insured may also recover costs and attorneys' fees. Va. Code § 38.2-209. Punitive damages are not allowed.

An insured may also recover from his or her liability insurer in a third-party claim for a denial of coverage or for failure to settle within policy limits where there is an excess judgment against the insured and where the failure to settle was the result of the insurer's bad faith. For a denial of coverage, courts apply the same "reasonableness" standard as in a first-party claim. For a claim against an insurer for a bad faith failure to settle, the insured is required to show by clear and convincing evidence that the insurer acted in furtherance of its own interest, with intentional disregard of the financial interest of the insured.

In cases involving motor vehicle insurance, Virginia law provides that where a claim is made by the insured for $3,500 or less (in excess of the deductible), the insured may recover double the amount otherwise due under the policy, together with reasonable attorneys' fees and costs, if the court determines that the denial, refusal or failure to pay was not made in good faith. Va. Code § 8.01-66.1(A). If the claim is made for more than $3,500 (in excess of the deductible), then the insured may recover the amount otherwise due at double the amount of interest from the date the claim was presented, together with reasonable attorneys' fees and costs, if it is determined that the denial, refusal or failure to pay was not made in good faith. Va. Code § 8.01-66.1(D).

**Alcohol:** If a person operates a vehicle while under the influence of alcohol or other intoxicants, then he is negligent. However, in order to establish liability, the plaintiff must show that the intoxication was a proximate cause of the accident.

By statute, a blood alcohol content of .15 or greater creates a presumption of willful and wanton conduct in order to recover for punitive damages in motor vehicle cases. Va. Code § 8.01-44.5.

It is contributory negligence for a passenger to voluntarily ride in a vehicle operated by a driver that the passenger knew or should have known was intoxicated. This conduct also amounts to an assumption of risk.

**Intra Family & Spousal Immunity:** The only intra-family immunity that still survives in Virginia today is that between an unemancipated child and his parents for personal injuries, unless the claim arises out of: 1) an automobile accident; 2) business (master/servant) torts; or 3) willful or malicious torts.

Since the immunity is based solely on preserving intra-family tranquility, exceptions are made where that harmony will not be breached by the suit, such as where there is an indemnity agreement or where the parent is covered by liability insurance. This last exception for insurance is the basis for allowing a child to sue his parents in tort for injuries arising out of an automobile accident.

**Seat Belt Defense:** There is no defense in Virginia for failure to wear a seatbelt, nor can such evidence be used as a failure to mitigate damages. Va. Code § 46.2-1092.

**Labor Law:** The employment relationship in Virginia is "at will." This means the employment relationship can end at any time by either the employee or the employer. However, Virginia law prohibits termination, or other employment decisions, under certain circumstances.

The Virginia Human Rights Act ("VHRA") prohibits discrimination in the employment context on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability. The Human Rights Act applies only to employers of five (5) to fifteen (15) employees.

The Virginians with Disabilities Act ("VDA") prohibits employment discrimination against qualified individuals with disabilities unless the disability prevents the employee from performing the job. The VDA applies to employers who are not covered under its federal counterpart, the Americans with Disabilities Act.

**Rental Coverage:** Rental agreements often provide that the rental company will indemnify and protect the renter/lessee from liability, but it may be possible for the rental company to utilize an escape clause. Where the rental company sells additional liability coverage to the renter through the lease agreement, the uninsured motorist limit must match the liability limit as required by Virginia Code § 38.2-2206. The parties may waive higher uninsured motorist coverage limits in writing as long as the statutory requirements are met.

**Releases:** A release of one tortfeasor from liability does not release any other tortfeasors for the same injury unless its terms so provide. Va. Code § 8.01-35.1. However, any amount recovered against the other tortfeasors shall be reduced by the amount stipulated in the release. A tortfeasor who is released from liability by the claimant is not entitled to contribution from other tortfeasors whose liability has not been extinguished by the release.

A release is not binding in a wrongful death claim unless the terms are approved by a court along with the other terms of the settlement.

**Wrongful Death:** The personal representative of a deceased person may bring an action for wrongful death in the name of the personal representative. Va. Code § 8.01-50. The beneficiaries are prescribed by statute in Va. Code § 8.01-53, and the jury's verdict or the court's judgment apportions the damages among the beneficiaries. Any verdict or judgment shall include, but may not be limited to, damages for: 1) sorrow and mental anguish; 2) loss of income; 3) loss of services; 4) expenses for care and hospitalization; 4) funeral expenses; and 5) punitive damages. They may not recover for pain and suffering of the decedent.

Wrongful death settlements must be court approved. Va. Code § 8.01-55. As in minor settlements, a wrongful death settlement is initiated by a petition to the court where the action is pending or, if no action is pending, then to any circuit court in Virginia. The personal representative has the power to settle the claims and if the beneficiaries do not agree on the distribution, then the court directs the distribution. Unlike in minor settlements, any separate release must also be approved by the court or it is not binding. Wrongful death settlements are a matter of public record and cannot be placed under seal.

**Liens:** Whenever any person sustains personal injuries caused by the alleged negligence of a tortfeasor and receives medical treatment for the injuries, the medical providers shall each have a lien on the injured party's claim against the tortfeasor for the medical services rendered, not to exceed $2,000 for a hospital and $500 for each physician, nurse, therapist or pharmacy. Va. Code § 8.01-66.2.

A similar lien is created in favor of the Commonwealth of Virginia whenever the medical treatment provided to the injured party is paid for pursuant to a state program such as the Virginia Medical Assistance Program or by any hospital or center operated by the Commonwealth. Va. Code § 8.01-66.9. This lien applies not only to the injured party's claim against the tortfeasor, but also to any funds due from the injured party's own insurance coverage or through UM/UIM coverage.

In order for the lien to take effect, the Commonwealth or the medical provider must provide written notice to the injured party or the attorney for the injured party or to the tortfeasor. Va. Code § 8.01-66.5. No notice is required where the attorney for the injured party knew that medical services were either provided or paid for by the Commonwealth.

The attorney of the injured party shall have a lien for professional services for representing the injured party in a claim for damages for personal injuries. Va. Code § 8.01-66.3. This claim is superior to the liens discussed above.

**Payee Notification:** Under Va. Code § 38.2-236, any insurance company that pays $5,000 or more to an attorney or other representative in settlement of a claim must send to the claimant within five business days a notice that such claim was paid. This notice requirement is a narrow exception to the general rule that an insurer shall not communicate with a represented claimant and the statute sets forth the specific language required/permitted in the notice. A copy of the notice must be sent to the claimant's attorney or other representative.

**isclosure of Insurance Policy Limits:** In a motor vehicle personal injury claim, Va. Code § 8.01-417(C) provides a pre-suit procedure for an individual or an attorney to request the disclosure of the limits of liability of any motor vehicle liability or any personal injury liability insurance policy that may be applicable to the claim. The requesting party must provide the insurer with the date of the motor vehicle accident, the name and last known address of the alleged tortfeasor, a copy of the accident

report, if any, and the claim number, if available. The requesting party shall also submit to the insurer the injured person's medical records, medical bills, and wage-loss documentation, if applicable, pertaining to the claimed injury. If the total of all such medical bills and wage losses equals or exceeds $12,500, the insurer shall respond in writing within 30 days of receipt of the request and shall disclose the limits of liability at the time of the accident of all such policies, regardless of whether the insurer contests the applicability of the policy to the injured person's claim.

A similar procedure is set forth in § 8.01-417(D) for wrongful death claims arising from motor vehicle accidents. The requesting party shall submit to the insurer the death certificate of the decedent; the certificate of qualification of the personal representative of the decedent's estate; the names and relationships of the statutory beneficiaries of the decedent; medical bills, if any, supporting a claim for damages under subdivision 3 of § 8.01-52; and, if at the time the request is made a claim for damages under clause (i) of subdivision 2 of § 8.01-52 is anticipated, a description of the source, amount, and payment history of the claimed income loss for each beneficiary. The insurer shall respond in writing within 30 days of receipt of the request with the information about policy limits.

Disclosure of the policy limits under these sections does not constitute an admission that the alleged injury or damage is subject to the policy. Information concerning the insurance policy is not by reason of disclosure pursuant to this subsection admissible as evidence at trial.

In 2019, Virginia codified the law related to spoliation of evidence. Virginia Code 8.01-379.2:1 states as follows:

> A. A party or potential litigant has a duty to preserve evidence that may be relevant to reasonably foreseeable litigation. In determining whether and at what point such a duty to preserve arose, the court shall include in its consideration the totality of the circumstances, including the extent to which the party or potential litigant was on notice that specific and identifiable litigation was likely and that the evidence would be relevant.
>
> B. If evidence that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, or is otherwise disposed of, altered, concealed, destroyed, or not preserved, and it cannot be restored or replaced through additional discovery, the court (i) upon finding prejudice to another party from such loss, disposal, alteration, concealment, or destruction of the evidence, may order measures no greater than necessary to cure the prejudice, or (ii) only upon finding that the party acted recklessly or with the intent to deprive another party of the evidence's use in the litigation, may (a) presume that the evidence was unfavorable to the party, (b) instruct the jury that it may or shall presume that the evidence was unfavorable to the party, or (c) dismiss the action or enter a default judgment.
>
> C. Nothing in this section shall be interpreted as creating an independent cause of action for negligent or intentional spoliation of evidence.

# Washington

## I. INSURANCE

### A. Coverage - Generally

i. Bodily Injury: A vehicle owner must carry limits of at least $25,000 per person/$50,000 per accident for bodily injury. RCW 46.29.090(1).

ii. Property Damage: In Washington, a party may bring an action for relief of property damage for any amount. The amount of damages claimed determines jurisdiction between Washington State courts. Insurance coverage for property damage, at a minimum, must provide "a limit of not less than ten thousand dollars ($10,000.00) because of injury to or destruction of property of others in any one accident." RCW 46.29.090(1).

iii. Personal Injury Protection: No automobile liability insurance policy, or renewal of an existing policy, may be issued unless Personal Injury Protection (PIP) coverage is optionally offered. RCW 48.22.085(1). The insured must reject PIP coverage in writing. RCW 48.22.085(2). Washington law mandates that PIP coverage provide up to: $10,000.00 in medical and hospital benefits; $2,000.00 in funeral expense benefits; $10,000.00 in income continuation benefits, subject to a $200.00 per week limit; and $5,000.00 loss of service benefits, subject to a limit of $200. RCW 48.22.095.

iv. Uninsured/Underinsured Motorist Issues: Washington mandates that all insurance policies must provide coverage for the protection of persons insured from underinsured motor vehicles, hit-and-run motor vehicles, and phantom vehicles for bodily injury, death or property damage. RCW 48.22.030(2). Exemptions exist for policies covering motorcycles and umbrella policies. *Id.* An insured may reject, in writing, such coverage. RCW 48.22.030(4).

The statute of limitations for an UM/UIM claim is based upon the contractual obligations of the insured and insurer. In Washington, a breach of contract claim has a six (6) year statute of limitations. RCW 4.16.040(1).

### B. Coverage – For Hire Operators

Washington State statutes require all "for hire operators" to obtain a permit before operating "for hire vehicles" in Washington. RCW 46.72.020.

The statutes also require the operator to carry a public liability insurance policy. RCW 46.72.050. Such insurance must provide coverage of one hundred thousand dollars ($100,000.00) for any recovery for death or personal injury by one person, and three hundred thousand dollars ($300,000.00) for all persons killed or who received a personal injury by reason of one act of negligence, and twenty-five thousand dollars ($25,000.00) for damage to property of any person. *Id.*, *see also* RCW 46.72.040.

Furthermore, a direct cause of action on behalf of injured persons may be brought against the insurance company of the "for hire operator." RCW 46.72.060. This allows the insurance company to be added as a defendant in a case. *Id.* Additionally, the surety or insurance company may only be liable up to the amount of the surety bond or policy coverage. *Id.*

The definitions of "for hire vehicle" includes all vehicles used for the transportation of passengers for compensation, *except* auto stages*, school buses operating exclusively under a contract to a school district*, ride-sharing vehicles, limousine carriers, *vehicles used by nonprofit transportation providers for elderly or handicapped persons and their attendants*, vehicles used by auto transportation companies, vehicles used to provide courtesy transportation at

no charge to and from parking lots, hotels, and rental offices, and vehicles used by charter party carriers of passengers and excursion service carriers. RCW 46.72.010.

The term "for hire operator" means and includes any person, concern, or entity engaged in the transportation of passengers for compensation in for hire vehicles. *Id.*

## C. Extra-Contractual Liability Claims Against Insurers

i. Good Faith: Under Washington law, insurers must act in good faith, and may not put their own financial interests above that of their insured. RCW 48.01.030.

The insurance commissioner has adopted comprehensive unfair practice regulations as well. *See* WAC 284-30-300, *et. seq*.

Generally, third parties have no right to bring bad faith claims, though such claims are assignable. *Tank v. State Farm*, 105 Wn.2d 381, 393, 715 P.2d 1133 (1986) (holding that it is the province of the insurance commissioner to enforce the WAC provisions, not third-party claimants).

Bad faith claims are based in tort, not contract. *Safeco Insurance v. Butler*, 118 Wn.2d 383, 389 (1992). A showing of harm is an element of a bad faith claim. *Id.* If the insured shows by a preponderance of the evidence that the insurer acted in bad faith there is a rebuttable presumption of harm. *Id.* at 390. The insurer can rebut the presumption by showing, by a preponderance of the evidence, that the acts did not harm or prejudice the insured. *Id.* at 394. Further, if the insured prevails on the bad faith claim, the insurer is estopped from denying coverage. *Id.* Generally, the issue of bad faith is a question of fact. *Id.* at 395.

Violation of a Washington Administrative Code ("WAC") regulation is a *per se* unfair trade practice. *Industrial Indemnity Company v. Kallevig*, 114 Wn.2d 907, 920-921, 792 P.2d 520 (1990). Such a violation satisfies the first two of five elements required for bringing a Consumer Protection Act claim. Under this test, a private citizen must show (1) an unfair or deceptive act or practice, (2) in trade or commerce, (3) that impacts the public interest, (4) which causes injury to the party in his business or property, and (5) which injury is causally linked to the unfair or deceptive act. *Id.*; *see also Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Company*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

ii. Washington Insurance Fair Conduct Act: In 2007, the Washington Insurance Fair Conduct Act ("IFCA") went into effect. *See* RCW 48.30.015. As to its key elements, IFCA creates a new cause of action and prohibits "unreasonable" denial of a claim for coverage or benefits to any "first party claimant." IFCA's new provisions: authorize a civil penalty by the Insurance Commissioner of $250.00 per violation; suit by any insured for an unreasonable denial of coverage or benefits; and in such a suit, allows for the *trebling* of a claimant's actual damages without any cap and requires an award of "actual and statutory litigation costs, including expert witness fees" to a prevailing insured.

The violation of certain WAC provisions, (WAC 284-30-330, captioned "specific unfair claims settlement practices defined"; WAC 284-30-350, captioned "misrepresentation of policy provisions"; WAC 284-30-360, captioned "standards for the insurer to acknowledge pertinent communications"; WAC 284-30-370, captioned "standards for prompt investigation of claims"; and WAC 284-30-380, captioned "settlement standards applicable to all insurers") qualifies as a violation of IFCA. Prior to filing an IFCA claim, a first party claimant must give twenty days written notice to the insurer of the basis for the cause of action as well as to office of the insurance commissioner. RCW 48.30.015(8).

## D. Permissive Use

Washington law requires that owners of automobiles carry insurance and that an owner's policy of insurance:

> Shall insure the person named therein and any *other* person, as insured, using any such vehicle or vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising our of the ownership, maintenance, or use of such vehicle or vehicles. . . .
>
> RCW 46.29.490(2)(b)(emphasis added).

Washington subscribes to the minor deviation rule. *Eshelman v. Grange Ins. Ass'n*, 74 Wn.2d 65, 67-68, 442 P.2d 964 (1968). "Under the minor deviation rule, a material deviation voids the initial permission and precludes coverage under the omnibus clause. A minor deviation leaves the permission unaffected, so that the omnibus clause is operative." *Id.* at 67-68; *New Hampshire Insurance Company v. Myers*, 69 Wn. App. 277, 280, 848 P.2d 221 (1993).

In terms of how far permission can extend, permission can be implied beyond the original scope of permission. For example, the permission given to one person can extend to another individual. "When an insured gives permission to someone to drive an automobile, and that person in turn gives permission to someone else, the insured's permission to the second permittee may be implied if the insured should have anticipated 'in view of the scope and nature of permission granted (even if less than unfettered dominion), and because of the permittee's relationship to another, the permittee will allow that other to use the car.'" *Progressive Casualty Insurance Company v. Cameron*, 45 Wn. App. 272, 277, 724 P.2d 1096 (1986), quoting *Safeco Ins. Co. of Am., Inc. v. Pac. Indem. Co.*, 66 Wn.2d 38, 45, 401 P.2d 205 (1965). However, "permission obtained through fraud is void." *Myers*, 69 Wn. App. at 281.

The element of permissive use may be a factual one, depending on the testimony presented. *Beaughan v. Losvar*, 19 Wn. App. 593, 595, 576 P.2d 451 (1978).

### E. Collateral Source

Washington follows the collateral source rule. *Mazon v. Krafchick*, 158 Wn.2d 440, 144 P.3d 1168 (2006). Under this rule, a tortfeasor may not reduce damages that would otherwise be recoverable to reflect payments received by a plaintiff from a collateral source. *Id.*

Where subrogation interests are allowed, the insured must be made whole before subrogation is allowed. A carrier's right to subrogation is generally governed by *Thiringer v. American Motors Insurance Company*, 91 Wn.2d 215, 588 P.2d 191 (1978), and *Leader National Insurance Company v. Torres*, 113 Wn.2d 366, 779 P.2d 722 (1989). In *Leader National*, the court held that a settlement does not extinguish an insurer's equitable right of subrogation if:

(1) the settling party knows of the rights of subrogation;

(2) the insurer does not consent to the settlement; and

(3) the settlement does not exhaust the settling party's assets.

*Id.* at 373-74.

## II. NEGLIGENCE

### A. Standard of Care

i. Common Carriers: A common carrier is held to the highest degree of care for the safety of its passengers, consistent with the practical operation of its business. *Parilla v. King Cnty.*, 138 Wn. App. 427, 442, 157 P.3d 879 (2007). Strict liability does not apply to a common carrier, and there is no liability without some fault on the part of the carrier. *Id.*

A common carrier's duty to exercise the highest degree of care compatible with the practical operation of its business is not met as a matter of law by the mere observance of the law of the road. *Dennis v. Maher*, 197 Wn. 286, 291, 84 P.2d 1029 (1938). However, ordinary jolts and jerks incident to the mode of the travel are not actionable. *Wiggins v. North Coast Transportation Co.*, 2 Wn.2d 446, 453-54, 98 P.2d 675 (1940).

A bus transportation system is a common carrier that owes this highest degree of care to its passengers. *Sweek v. Municipality of Metropolitan Seattle*, 45 Wn.App. 479, 482, 726 P.2d 37 (1986). The carrier owes only the duty of ordinary care to a prospective passenger who has not attained passenger status. *Id.* Absent any unusual inherent danger or defect in the place of disembarkment, the carrier-passenger relationship ceases when a passenger departs from the bus and steps onto the sidewalk. *Id.* at 484.

This highest degree of care by a carrier also applies to the place for dropping off passengers from the carrier. *Boyd v. City of Edmonds*, 64 Wn.2d 94, 96, 390 P.2d 706 (1964). A carrier must select a safe place for its passengers to alight, and a passenger has the right to assume that such selection was made unless the danger was obvious. *Id.*

A common carrier must exercise special care with respect to a child riding in the carrier's conveyance if the carrier's employees know, or should know, that the child will be injured by certain acts of negligence on its part. *Shay v. Parkhurst*, 38 Wn.2d 341, 350, 229 P.2d 510 (1951).

ii. School Bus Operators: Those who carry children to and from school must also exercise the highest degree of care consistent with the practical operation of the conveyance, and such duty exists to the passengers while they are boarding the bus, while on the bus, and while disembarking the bus. *Yurkovich v. Rose*, 68 Wn. App. 643, 647, 847 P.2d 925 (1993); *Webb v. City of Seattle*, 22 Wn.2d 596, 602, 157 P.2d 312 (1945); *Leech v. School District No. 322 of Thurston County*, 197 Wash. 384, 86, 85 P.2d 666 (1938); *Phillips v. Hardgrove*, 161 Wash. 121, 124, 296 P. 559 (1931). A bus driver's duty to his passengers also extends to the time a student leaves the bus and completes crossing the roadway when that is necessary for the student to reach home. *Yurkovich*, 68 Wn. App. at 648. However, a school district is not necessarily a guarantor of the safety of its passengers. *Id.* at 655.

Standards for school bus drivers are also governed by statutes and administrative code. RCW 46.37.190(2) requires that school buses be equipped with a "stop" signal or sign, as well as signal lamps for the display to the front of two alternating flashing red lights visible for up to 500 feet. Subject to limited exceptions, these signals must be activated by the school bus driver whenever the bus is stopped on the highway for the purpose of receiving or discharging school children.

Additional requirements for school bus drivers are provided in WAC 392-14.020(4), which should be reviewed in detail, but include the following. School bus drivers shall have the primary responsibility for the safety of passengers while they are boarding the bus, while they are on the bus, and while they are disembarking the bus and crossing the roadway. If passengers must cross the road, the driver shall take reasonable action to assure that they cross safely. The driver shall take reasonable action to assure that passengers boarding or disembarking from the bus are within his/her view at all times and they pass in front of the bus and never behind the bus. *Id.*

## B. Minor's Negligence

A child's conduct is measured by the conduct of a reasonably careful child of the same age, intelligence, maturity, training, and experience. *Bauman by Chapman v. Crawford*, 104 Wn.2d 241, 244, 704 P.2d 1181 (1985). However, when a child engages in an inherently dangerous activity, such as powerful mechanized vehicles, the child is held to an adult standard of care. *Robinson v. Lindsay*, 92 Wn.2d 410, 704 P.2d 392

In cases involving contributory negligence, Washington has held that children under the age of six (6) are incapable of such negligence. *Price v. Kitsap County,* 70 Wn. App. 748, 856 P.2d 384 (1993). A 17- or 18- year-old of normal capacity may be treated as an adult in all cases. *Bauman*, 104 Wn.2d at 244. Therefore, the child's special standard of care as it relates to contributory negligence will generally apply only to minors ages 6 to 16 years of age. *Id.*

### C. Comparative Fault

Under the Washington comparative fault statute, plaintiff's damages are reduced by the plaintiff's percentage of fault. *See* RCW 4.22.005. As such, plaintiff's damages are reduced by any contributory fault or negligence chargeable to the plaintiff according to the percentage determined by the trier of fact. *Id.* In determining whether a person was contributorily negligent, the inquiry is whether that person failed to use ordinary care or acted in some way that a reasonably careful person would not have under the existing facts or circumstances. *Huston v. First Church of God*, 46 Wn. App. 740, 732 P.2d 173 (1987).

Additionally, a plaintiff's assumption of risk (either implied unreasonable or implied reasonable assumption of risk) reduces damages under the concept of comparative fault but does not preclude recovery. *Gregoire v. City of Oak Harbor,* 170 Wn.2d 628, 244 P.3d 924 (2010); *see also* RCW 4.22.005 and 4.22.015. However, express and implied primary assumption of risk remain a complete bar to recovery for the risk assumed. *Dorr v. Big Creek Wood Prods., Inc.*, 84 Wn. App. 420, 425, 927 P.2d 1148 (1996).

The contributory fault of one spouse shall not be imputed to the other spouse or the minor child of the spouse to diminish recovery in an action by the other spouse or the minor child of the spouse, or his or her legal representative, to recover damages caused by fault resulting in death or in injury to the person or property, whether separate or community, of the spouse. RCW 4.22.020.

### D. Seatbelt Defense

Although all persons over the age of 16 are required to wear properly-adjusted safety belts, Washington law expressly states that failure to wear a safety belt does not constitute negligence. RCW 46.61.688(3), (4). Further, evidence that a person was not wearing a seatbelt is inadmissible evidence of negligence at trial. RCW 46.61.688(6).

## III. DAMAGES

Washington courts apply the traditional rule of damages in tort cases – a plaintiff is entitled to that sum of money that will place him/her in as good a position as he/she would have been in but for the defendant's tortious act. *Pugel v. Monheimer*, 83 Wn. App. 688, 692, 922 P.2d 1377 (1996). The amount of damages need not be proved with mathematical exactness, but the fact of loss must be established with sufficient certainty to provide a reasonable basis for estimating loss. *Eagle Point Condominium Owners Ass'n v. Coy*, 102 Wn. App. 697, 9 P.3d 898 (2000). However, damages will not be awarded where the evidence of injury is insubstantial or speculative. *Sherrell v. Selfors*, 73 Wn. App. 596, 871 P.2d 168 (1994).

### A. Loss of Consortium

i. Spouses: Washington recognizes loss of consortium as a separate, not derivative, claim under substantive law. *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 772, 733 P.2d 530 (1987). However, a loss of consortium claim may not be brought when the injury to the spouse occurred prior to marriage. *Id.*

ii. Parent-Child: RCW 4.24.010 provides parents a loss of consortium cause of action upon the injury to or death of a "minor" or "dependent" child. Washington law provides one cause of action for both

parents; however, damages may be individually awarded if the parents are separated. *Id.*

In *Philippides v. Bernard*, 151 Wn.2d 376, 88 P.2d 939 (2004), the Washington Supreme Court held that parents must demonstrate financial dependency on an adult child to pursue a claim for loss of consortium. As discussed in further detail below, Washington's legislature recently adopted a new wrongful death statute, which eliminated the requirement for a parent to show financial dependence on a child to prove damages for the death of a child. The prior iteration of Washington's wrongful death statute relied heavily on this notion that a parent must demonstrate financial dependence on an adult child to pursue a claim for damages. It is unclear at this time if the legislature's amendments to the wrongful death statute will impact common law loss of consortium claims in tort claims for personal injuries not resulting in death.

iii. Child-Parent: In Washington, a child may bring an action for loss of parental consortium. *Ueland v. Pengo Hydra-Pull Corp.*, 103 Wn. 2d 131, 691 P.2d 190 (1984). A child beyond the age of majority may bring a claim for loss of consortium; however, whether a child beyond minority suffers damages is a question of fact. *Id.* Further, the Washington Supreme Court has held that a child's claim should be joined with the injured parent's underlying claim. *Id.*

### C. Punitive Damages

Punitive damages are not available in Washington absent express legislative authorization. *Dailey v. North Coast Life Ins. Co.*, 129 Wn.2d 572, 574, 919 P.2d 589 (1996).

### D. Joint and Several Liability

Generally, an at-fault defendant will have severable liability. RCW 4.22.05 and 4.22.070. When more than one tortfeasor is responsible for damages, Washington will treat at-fault tortfeasors jointly and severally: (1) if the at fault parties were acting in concert; or (2) the tortfeasor was an agent of servant of the party; or (3) if the plaintiff was entirely not at-fault. *Id.*

### E. Contribution

Where joint tort liability still exists, it permits the plaintiff to recover the entire judgment amount from any one defendant. The rule of contribution allows any defendant required to pay more than its proportionate share to have a claim against the other jointly-liable parties for the excess. Washington apportions the amount of contribution (if any) among defendants based on comparative fault of each defendant. RCW 4.22.040.

## IV. STATUTES OF LIMITATION

### A. Personal Injury/Property Damage

The statute of limitations for personal injury and property damage is three years. RCW 4.16.080.

The statute of limitations for the intentional torts of libel, slander, assault, assault and battery and false imprisonment is two years. RCW 4.16.100(1).

### B. Contract

Suits arising from a breach of written contract claim are subject to a six (6) year statute of limitation. RCW 4.16.040(1).

Suits arising from a breach of an oral contract claim are subject to a three (3) year statute of limitation. RCW 4.16.070(3).

C. Generally

An insurer shall not continue to negotiate for settlement with an unrepresented claimant until the insurer has given the claimant written notice that the time limit for the statute of limitations may be expiring. WAC 284-30-380(5). Such notice must be given within 30 days to first party claimants, and 60 days to third party claimants. *Id.*

## V. LICENSING REQUIREMENTS

In Washington, licensing requirements are governed under WAC 308-56A- 010 *et seq*., and WAC 308-96A-005 *et seq*. These regulations are voluminous and should be reviewed in greater detail.

## VI. WORKER'S COMPENSATION

A Department of Labor and Industry's lien attaches to any third party recovery. *See* RCW 51.24 *et. seq.* Any settlement of a third-party action by an injured worker resulting in the worker receiving less than the statutory entitlement is void unless made with written approval of the Department of Labor and Industries or a self-insurer. RCW 51.24.090. Accordingly, the Department's or self-insurer's workers compensation lien in any settlement must be considered as part of any settlement. Worker's compensation recoveries must be distributed via the statutory scheme. RCW 51.24.060.

## VII. SETTLEMENTS

Washington's uniform settlement procedure provides that any settlement agreement between the plaintiff and one joint tortfeasor does not discharge the liability of any other joint tortfeasor upon the same claim unless the agreement so provides. RCW 4.22.060(2). As a practical matter, such settlements are unlikely as plaintiffs are fearful that defense counsel will argue the "empty chair" defense at trial.

### A. Minors

In all settlements of claims (filed or not) involving a minor or disabled person, the Court must determine the adequacy of the proposed settlement on behalf of the minor/disabled person. SPR 98.16W. The Court must appoint a Guardian ad Litem to assist the Court's determination. *Id.* at (c)(1).

## VIII. DRIVING UNDER THE INFLUENCE

### A. Legal Limits

A person is guilty of driving under the influence of intoxicating liquor, marijuana, or any drug if the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood; a THC concentration of 5.00 or higher as shown by an analysis of the person's blood made under RCW 46.61.506; or while driving, the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug; or the person is under the combined influence of or affected by intoxicating liquor, marijuana, and any drug. *See* RCW 46.61.502. Additionally, a person under the age of twenty-one (21) years of age is guilty of driving after consuming alcohol if under age 21 and has an alcohol concentration of between 0.02 and 0.08. RCW 46.61.503.

### B. Comparative Fault – Any Passenger in Vehicle with Drunk Driver

"Washington courts have long held that passengers may be contributorily negligent in causing their own injuries by voluntarily riding in a car with a driver they know, or reasonably should know is intoxicated." *Hickly v. Bare*, 135 Wn. App. 676, 145 P.3d 433 (2006). As a result, any passenger, whether intoxicated or not, who chooses to ride in a car with an intoxicated driver may be found to be comparatively negligent. *Id.* at 684. This is so regardless of whether or not the passenger was intoxicated, since defendants are entitled to argue that under the comparative fault scheme found at RCW 4.22, *et seq*., the plaintiff was negligent in failing to use

due care for her own safety. Fact finders must determine the degree to which the plaintiff failed to protect herself, compare that with the defendant's negligence, and the plaintiff's recovery would be reduced accordingly. *Hickly*, 135 Wn. App. at 685, n.4.

### C. Statutory Bar for At-Fault Intoxicated Passengers

Only if a plaintiff was intoxicated at the time of an accident does RCW 5.40.060 (the "intoxication defense") apply. Further, the factfinder (*i.e.*, a jury or the judge) must find that the plaintiff was more than 50% at fault to bar recovery. RCW 5.40.060. RCW 5.40.060(1) will provide a complete bar to recovery if the evidence demonstrates that a plaintiff was: (1) intoxicated at the time of the accident; (2) her intoxication was a proximate cause of her injuries; and, (3) she was more than 50% at fault.

RCW 5.40.060(2) relates to actions brought against drunk drivers.

> In an action for damages for personal injury or wrongful death that is brought against the driver of a motor vehicle who was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and whose condition was a proximate cause of the injury or death, subsection (1) of this section does not create a defense against the action notwithstanding that the person injured or killed was also under the influence so long as such person's condition was not a proximate cause of the occurrence causing the injury or death.

*Id.*

Subsection 2 considers the driver's intoxication and does not provide an intoxicated driver with a defense to liability unless the passenger's intoxication was a proximate cause of the accident. If the passenger's intoxication was a proximate cause of the accident, the defense/bar to liability is triggered if the passenger is more than 50% at fault for her injuries. Subsection 2 does not impact the ability of the drunk driver to argue general comparative fault.

The breach of a duty as provided by statute, ordinance, or administrative rule relating to driving while under the influence of intoxicating liquors or drugs is not considered negligence *per se* but may be considered by the trier of fact as evidence of negligence. RCW 5.40.050.

## IX. LEGAL AGE

In Washington, the age of majority is 18 and the drinking age is 21. *See* RCW 28.26.015 and RCW 66.24.270.

## X. INTERFAMILY AND SPOUSAL IMMUNITY

### A. Husband-Wife Immunity

Washington has abandoned interspousal tort immunity. *In re Marriage of J.T.*, 77 Wn. App. 361, 891 P.2d 729 (1995).

### B. Parent-Child Immunity

Washington generally upholds parental immunity for negligent supervision, while permitting a cause of action by a minor child injured by (i) the negligence of a parent in an auto accident, or (ii) the willful and wanton conduct of a parent. *Jenkins v. Snohomish Cnty. Pub. Utility*, 105 Wn2d 99, 713 P.2d 79 (1986).

## XI. WRONGFUL DEATH

In Washington, all causes of actions for wrongful death and personal injuries shall survive to the personal representative ("PR") of the deceased. RCW 4.20.046(1); RCW 4.20.060. The PR is entitled to recover

economic damages on behalf of the decedent's estate. RCW 4.20.046(2). The PR is only entitled to recover noneconomic damages (*i.e.*, pain and suffering, anxiety, emotional distress, or humiliation) suffered by the deceased on behalf of the beneficiaries identified in RCW 4.20.020. *Id.* Noneconomic damages are recoverable whether or not the death was occasioned by the injury that is the basis of the action.

Under RCW 4.20.020, all actions shall be for the benefit of the spouse, state registered domestic partner, child or children, including stepchildren, of the person whose death shall have been so caused. If there is no spouse, state registered domestic partner, or such child or children, such action may be maintained for the benefit of the parents or siblings of the deceased. Further, recent legislation abolished the requirement that beneficiaries be residents of the United States or financial dependent on the decedent at the time of the decedent's death.

Under RCW 4.20.060, the special survival statute, actions for personal injuries the decedent may have had, while the same may have not resulted in their death, survives to the beneficiaries identified in RCW 4.20.020, *supra*. Similar to the general survival statute under RCW 4.20.046, the special survival statute allows for recovery of economic and noneconomic damages.

### A. Parent-Child Loss of Consortium

Under RCW 4.24.010, which relates to the claims for the wrongful death of a child, parents or legal guardians who regularly contribute to the support of his/her minor child, and parents or legal guardians who had significant involvement in the life of an adult child may maintain an action as a plaintiff for the injury or death of a child so long as the child did not have a spouse, state registered domestic partner, or children. RCW 4.24.010(1) and (3). "Significant involvement" is defined as "demonstrated support of an emotional, psychological, or financial nature within the parent-child relationship, at or reasonably near the time of death, including either giving or receiving emotional, psychological, or financial support to or from the child." Based on this "definition" alone, the question of "significant involvement" would necessarily be a question of fact for a jury. RCW 4.24.010(1).

As to damages, parents can seek damages for the child's health care expenses, loss of the child's services, loss of the child's financial support, and other economic losses, including but not limited to the loss of love and companionship of the child, loss of the child's emotional support, and for injury to or destruction of the parent-child relationship. RCW 4.24.010(2).

### B. Contributory Fault

In an action brought for wrongful death or loss of consortium, the contributory fault of the decedent or injured person shall be imputed to the claimant in that action. RCW 4.22.020.

## XII. JURIES

The Washington Constitution grants all parties the right to a trial by jury on all issues based in law. Art. 1, § 21 WA Const. However, a party must make a demand for a jury, prior to trial. CR 38. A jury of six (6) will be seated, unless the demanding party requests a jury of twelve (12). CR 38(b). In a Washington civil suit, a jury of six (6) requires five (5) jurors for a verdict; a jury of twelve (12) requires ten (10) jurors for a verdict. RCW 4.44.380.

# West Virginia

**UM and UIM (Uninsured Motorist Coverage and Under Insured Motorist Coverage):** All motor vehicle liability insurance policies must include uninsured motorist coverage in the same amounts as the required minimum liability insurance coverage, which is as follows: bodily injury liability coverage of $25,000 per person, $50,000 per accident, and $25,000 property damage liability coverage.[1] However, underinsured motorist coverage is discretionary.

Uninsured and underinsured motorists coverage must be offered for purchase in amounts of up to $100,000 per person, $300,000 per accident, and $50,000 in property damage; however it must not to exceed liability coverage. The offer of optional property damage coverage may exclude the first $300 in property damage resulting from the negligence of an uninsured motorist. The insurer must prove an effective offer (a "commercially reasonable" offer) and a knowing and intelligent waiver by the insured of the optional coverage.[2]

**Offsets:** UM and UIM coverage must be offered for purchase in amounts up to the dollar limits of liability coverage. Nevertheless, there are offsets for payments from third parties such as liability insurers. However, the UIM insurer may not set off payments made by a tortfeasor's liability insurer against the UIM coverage limit.

UIM coverage is excess, not gap, coverage.[3] Therefore, the setoff must be against the amount of damages established.[4]

**Med-Pay, Work Comp, and/or No-Fault:** The West Virginia Code[5] provides, in part, that an automobile liability policy shall provide an option for uninsured/underinsured motorist coverage up to the amount of bodily injury liability coverage "without set-offs against the insured's policy or any other policy…No sums payable as a result of underinsured motorists' coverage shall be reduced by payments made under the insured's policy or any other policy."[6]

West Virginia follows the equitable "made-whole" doctrine.[7] A med-pay insurer may subrogate against any recovery from a tortfeasor if the med-pay policy so provides.[8] It is unlikely that a West Virginia court would enforce policy provisions purporting to entitle the UM or UIM insurer to such offsets if a subrogation claim may be asserted against the UM or UIM recovery.

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[1] W. Va. Code § 17D-4-2.

[2] Syl. pt. 3, Jewell v. Ford, 211 W.Va. 592, 567 S.E.2d 602 (2002), quoting Syl. pt. 1, Bias v. Nationwide Mut. Ins. Co., 179 W.Va. 125, 365 S.E.2d 789 (1987) [superseded by statute as recognized in Ammons v. Transp. Ins. Co., 219 F.Supp.2d 885 (S.D. Ohio 2002) (noting that the West Virginia Supreme Court "has recognized that the portion of Bias that sets forth the information that must be contained in an offer of optional coverage for it to be effective has been superseded by the requirements set forth in § 33-6-31d")].

[3] State ex rel. Allstate Ins. Co. v. Karl, 190 W.Va 176, 437 S.E.2d 749 (1993).

[4] State Auto. Mut. Ins. Co. v. Youler, 183 W.Va. 556, 396 S.E.2d 737 (1990).

[5] W. Va. Code §33-6-31(b)

[6] See, Johnson v. General Motors Corporation, 190 W.Va. 236, 243, 438 S.E.2d 28, 35 (1993).

[7] See, Henry v. Benyo, 203 W.Va. 172, 181, 506 S.E.2d 615, 624 n.10 (1998), quoting Syl. pt. 11, State ex rel. Allstate Ins. Co. v. Karl, 190 W.Va. 176, 437 S.E.2d 749 (1993) ("The [UM/UIM insurer's] right of subrogation under the W.Va.Code, is not available where the policyholder has not been fully compensated for the injuries received and still has the right to recover from other sources. Subrogation is permitted only to the extent necessary to avoid a double recovery by such policyholder.")

[8] Federal Kemper Ins. Co. v. Arnold, 183 W.Va. 31, 393 S.E.2d 699 (1990).

For claims that arose or accrued on or after January 1, 2006, if an injured employee asserts a UIM claim under his employer's policy,[9] the Workers' Compensation Commissioner or self insured employer is entitled to subrogate against that recovery with regard to indemnity and medical benefits paid as of the date of the recovery.[10] For claims that arose or accrued prior to January 1, 2006, the Workers' Compensation Commissioner is only allowed statutory subrogation for medical payments paid as of the date of recovery.[11] For claims that arose or accrued prior to July 10, 2009, the party entitled to subrogation must allow deductions for reasonable attorneys' fees and reasonable costs.[12]

West Virginia is not a "No-Fault" state.

**Stacking:** An insurance contract may incorporate anti-stacking language if the insurer provides a multi-car discount on the premium for at least one of the coverages purchased under the policy.[13] By statute, an insurer issuing two or more policies to the same insured which provides the multi-vehicle discount also may include anti-stacking language in its policy.[14]

The policy's particular anti-stacking language must be examined. The anti-stacking language is enforceable so long as the language does not contravene a West Virginia statute or public policy.[15]

**Indemnity:** "Indemnity clauses serve our goals of encouraging compromise and settlement by reducing settlement discussions to bilateral discussions, by encouraging adequate levels of insurance, and by allowing the parties to a contract to allocate among themselves the burden of defending claims."[16] However, an indemnity agreement covering the sole negligence of the indemnitee will be void if (1) the indemnitee is found by the trier-of-fact to have been completely, exclusively, or one hundred percent negligent in causing the accident; and (2) the contract does not indicate that there was a proper agreement to purchase insurance for the benefit of all concerned.[17]

**Particular UM/UIM issues unique and/or specific to West Virginia:** Any exclusion of coverage for guest passengers in an uninsured motorist policy is void.[18]

Where the insured is involved in a "hit-and-run" accident[19], the West Virginia Code [20] requires that the injured insured establish that the vehicle made "physical contact" with the insured or with a motor vehicle which the insured occupied. Decisions of the West Virginia Supreme Court of Appeals, however, have eroded the physical contact requirement.

In *Walker v. Doe*,[21] the Court held that actual physical contact was not required so long as independent third-party testimony, by detached and neutral individuals, showed that the unidentified vehicle would have struck the insured but for the insured's evasive action.[22] In *Walker v. Doe,* the Supreme Court of Appeals extended

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[9] (which the employee may do unless the tortfeasor driver was a co-employee, Henry v. Benyo, supra.)
[10] W.Va. Code § 23-2A-1(b)(1).
[11] W. Va. Code § 23-2A-1(b)(2).
[12] W. Va. Code § 23-2A-1(c).
[13] Russell v. State Automobile Mutual Ins. Co., 188 W.Va. 81, 422 S.E.2d 803 (1992).
[14] W. Va. Code § 33-6-31(b).
[15] Mitchell v Federal Kemper Ins. Co., 204 W.Va. 543, 514 S.E.2d 393(1998).
[16] Dalton v. Childress Service Corp., 432 S.E.2d 98, 101, 189 W.Va. 428, 431 (1993).
[17] Id.
[18] W. Va. Code §33-6-31(c).
[19] , i.e., the owner and operator of a motor vehicle which causes bodily injury or property damage are unknown
[20] W. Va. Code § 33-6-31(e)(iii).
[21] Walker v. Doe, 210 W.Va. 490, 558 S.E.2d 290 (2001); Dunn v. Doe, 206 W.Va. 684, 527 S.E.2d 795 (1999); and Hamric v. Doe, 201 W.Va. 615, 499 S.E.2d 619 (1997)
[22] See also, Dalton v. Doe, 208 W.Va. 319, 540 S.E.2d 536 (2000).

the holdings in *Hamric* and *Dunn*, ruling that a close and substantial physical nexus exists between an unidentified hit-and-run vehicle and the insured for uninsured motorist coverage under the West Virginia Code,[23] when an insured can establish by independent third-party evidence to the satisfaction of the trial judge and the jury, that but for the immediate evasive action of the insured, direct and physical contact would have occurred between the unknown vehicle and the victim. Testimony by the third party driver who took evasive action does not satisfy the *Hamric/Dunn* requirement for independent evidence.

Under the West Virginia Code,[24] insurers must offer the optional limits of UM coverage and UIM coverage on a form prepared by the Insurance Commissioner. The insurer must provide the form at the time of the insured's initial application. If insured fails to return the form to the insurer within 30 days, it will be presumed that the insured rejected the coverage and that the insured's rejection of the option to purchase the coverage was knowing and intelligent.

**PIP (Personal Injury Protection):** West Virginia auto insurance law does not require the purchase of PIP.

Under West Virginia law, it is generally held that medical payments provisions in automobile liability insurance policies are separate and apart from the liability provisions of the policies. The medical payment provisions in automobile liability policies are of the same kind as personal injury accident policies.[25]

If an insurer does offer and pay PIP and the policy includes a subrogation clause, the insurer may subrogate against the insured's 3rd party recovery. A provision in an insurance policy providing for the subrogation of the insurer to the rights of the insured to the extent that medical payments are advanced to such insured by the insurer is valid and enforceable.[26] As discussed previously, West Virginia follows the "made whole" rule. The "made whole" rule means that "Under general principles of equity, in the absence of statutory law or valid contractual obligations to the contrary, an insured must be fully compensated for injuries or losses sustained (made whole) before the subrogation rights of an insurance carrier arise."[27] Furthermore, the insurer's subrogation interest must be reduced to reflect attorney fees that the insured incurred to collect the subrogation amount.[28]

To preserve its subrogation claim, an insurer or the insured on the insurer's behalf must give notice of the subrogation claim to the liability carrier before the liability carrier settles with the insured. The notice does not have to state the precise amount of the subrogation claim. If appropriate notice is given, then any release obtained will not bar the subrogation claim.[29] West Virginia has followed other jurisdictions which have held that "if the settlement were made with knowledge, actual or constructive, of [insurance carrier's] subrogation right, such settlement and release is a fraud on the insurer and will not affect the insurer's right of subrogation as against the tortfeasor or his insurance carrier."[30]

**Procedure for Substitution of Liability Insurer Settlement Offer:** When an automobile liability insurer indemnifying a tortfeasor offers to pay its full policy limits for bodily injury to a plaintiff, contingent upon the plaintiff's UIM coverage insurer waiving its subrogation rights against the tortfeasor, either the plaintiff or the liability insurer may provide written notice to the UIM insurer. The written notice must be sent by certified mail and it must contain the name and address of the UIM coverage claimant, the name and address of the person in whose name the UIM policy is written, the UIM policy number, the name of the tortfeasor, the name

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[23] § 33-6-31(e)(iii).
[24] § 33-6-31(e)(iii).
[25] Carney v. Erie Insurance Co., Inc., 189 W.Va. 702, 434 S.E.2d 374 (1993).
[26] Travelers Indemnity Co. v. Rader, 152 W.Va. 699, 166 S.E.2d 157 (1969).
[27] Porter v. McPherson, 198 W.Va. 158, 479 S.E.2d 668, 672 (1996).
[28] Federal Kemper Ins. Co. v. Arnold, 183 W.Va. 31, 393 S.E.2d 669 (1990).

[29] Nationwide Mut. Ins. Co. v. Dairyland Ins. Co., 191 W.Va. 243, 445 S.E.2d 184 (1994).
[30] Id., 445 S.E.2d at 187, quoting Transamerica Insurance Co. v. Barnes, 29 Utah 2d 101, 106, 505 P.2d 783, 787 (1972).

of the insurer indemnifying the tortfeasor, and the policy number of the liability coverage.[31] Furthermore, notice must also contain a statement that the insurance company, indemnifying the tortfeasor, has offered to settle for the policy limits if the UIM coverage carrier waives its subrogation rights against the tortfeasor.[32]

In order to preserve its subrogation rights against the tortfeasor, the UIM coverage carrier must, within sixty days of receiving notice of the conditional settlement offer, send written notice to both the claimant and insurer indemnifying the tortfeasor that it does not waive its subrogation rights against the tortfeasor. The notice to the claimant must be accompanied by payment in the amount of the policy limit offered by the insurer indemnifying the tortfeasor in the proposed settlement.[33] If the UIM insurer fails to respond within 60 days, its subrogation rights against the tortfeasor are waived and the claimant may proceed to consummate the settlement.[34] If the UIM insurer gives the required notice and provides payment, then the UIM carrier is and remains subrogated to the rights of the claimant to the extent of any and all sums paid by the UIM insurer to the claimant.[35]

**The Standard of Care For professionals:** In *Capper v. Gates*, the West Virginia Supreme Court of Appeals, citing the Restatement (Second) of Torts,[36] determined that unless a person represents that he or she has greater or less skill or knowledge, a person who takes on the responsibility of providing services in the practice of a profession or trade, is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities. The Court found that a surveyor and land development consultant should be held to the standard of care of a reasonably prudent surveyor and land development consultant. Similarly, a bus driver would be held to the standard of care of a reasonably prudent bus driver. [37]

**Standard of Negligence:** To establish a cause of action for negligence in West Virginia, a plaintiff must prove, by a preponderance of the evidence, that the defendant owed a duty of care to the plaintiff, that the defendant breached that duty of care, and that the defendant's breach was the proximate cause of plaintiff's injuries.[38]

**Negligence Per Se:** Evidence that a defendant violated a statute or regulation does not establish negligence per se in West Virginia. Rather, a violation of a statute or regulation creates a "prima facie presumption" of negligence which may be rebutted by evidence tending to show that the defendant's actions, in violating the statute or regulation, are reasonably expected of person of ordinary prudence, acting under similar circumstances, and who desired to comply with the law.[39]

**Respondeat Superior:** West Virginia follows the universally recognized rule that an employer is liable to a third person for any injury to his person or property which results proximately from the tortious conduct of an employee acting within the scope of his employment.[40] The employee's negligent or tortious act may be imputed to the employer if the act of the employee was done in accordance with the expressed or implied authority of the employer.

A servant is acting within the course of his employment when he is engaged in doing, for his master, either the act consciously and specifically directed by his master or any act which can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act, or a natural, direct and logical result of it. A mere

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[31] W. Va. Code, 33-6-31e (b).
[32] W. Va. Code, 33-6-31e (b).
[33] W. Va. Code, 33-6-31e(c).
[34] Id.
[35] See, Miralles v. Snoderly, 216 W.Va. 91, 602 S.E.2d 534 (2004).
[36] § 299A standard for professionals.
[37] Capper v. Gates, 454 S.E.2d 54, 60,193 W.Va. 9, 15 (1994).
[38] Jack v. Fritts, 193 W.Va. 494, 457 S.E.2d 431 (1995).
[39] Gillingham v. Stephenson, 209 W.Va. 741, 551 S.E.2d 663 (2001).
[40] Griffith v. George Transfer and Rigging, Inc., 157 W.Va. 316, 201 S.E.2d 281 (1973).

deviation or departure from the usual and ordinary course and activities of this employment, even to accomplish some private purpose of the employee's own, does not of itself, as a matter of law, relieve the employer of liability. Whether such departure or deviation is sufficient to relieve the defendant of responsibility for the employee's act is a question of fact to be determined by the jury from the facts and circumstances. "Scope of employment" is a relative term that requires the consideration of the surrounding circumstances, including the character of the employment, the nature of the wrongful deed, the time and place of its commission, and the purpose of the act.[41]

An employer, in an attempt to avoid liability for the actions of one of its employees, may assert that the alleged employee was in fact an independent contractor at the time of the wrongful act. However, the employer bears the burden of establishing that he or she neither controlled nor had the right to control the work that the employee, the wrongdoer, was performing.[42] The general rule is that a person who has contracted with a competent person to do work that is not in itself unlawful or intrinsically dangerous in character, and who exercises no supervision or control over the work contracted for, is not liable for the negligence of such independent contractor or his servants in the performance of the work. [43]

**Negligent Hiring, Training and Retention:** A claim for negligent hiring would derive from the Restatement (Second) of Torts,[44] which provides that an employer is subject to liability for the physical harm sustained by third persons and caused by the employer's failure to exercise reasonable care in employing competent and careful contractors to do work which involves the risk of physical harm unless it is skillfully and carefully done, or to perform any duty which the employer owes to third persons.

The Supreme Court of Appeals of West Virginia has held that an employer has a duty to conduct a comprehensive inquiry into the credentials of an individual, even if that individual is an independent contractor.[45] The Court has cited with approval the ruling of other states that an employer is negligent where it "engages an unqualified or careless contractor or, when on notice of deficient performance, fails to prevent the continuance of such negligence.[46]

**Negligent Infliction of Emotional Distress:** Damages for negligent infliction of emotional distress may be recovered where: (1) the plaintiff suffers physical injury as a result of the defendant's negligent conduct; (2) the plaintiff did not suffer physical injury but, as a result of the defendant's negligence, witnessed the critical injury or death of a person closely related to the plaintiff; or (3) the plaintiff fears contracting disease, where, as a result of defendant's negligence plaintiff actually was exposed to disease, plaintiff's resulting serious emotional distress was reasonably foreseeable, and plaintiff actually suffered serious emotional distress.[47] To recover for negligent infliction of emotional distress, the plaintiff must prove that the harm alleged reasonably could have been expected to befall the ordinarily sensitive person.[48] When the harm reasonably could affect only the hurt feelings of the supersensitive plaintiff -- the "eggshell psyche" -- there is no entitlement to recovery.[49]

**Contributory/Comparative Negligence:** In 2015, West Virginia adopted a form of modified comparative fault, effective beginning May 25, 2015. Under the new law, "any fault chargeable to the plaintiff shall not bar

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[41] Id.
[42] Id.
[43] Stillwell v. City of Wheeling, 210 W.Va. 599, 558 S.E.2d 598 (2001).
[44] Section 411.
[45] Thomson v. McGinnis, 195 W.Va. 465, 465 S.E.2d 922 (1995); see also, Chenoweth v. Settle Engineers, Inc., 151 W.Va. 830,156 S.E.2d 297, (1967) (overruled in part on other grounds by Sanders v. Georgia-Pacific Corp., 159 W.Va. 621, (1976)).
[46] See Thomson, 465 S.E.2d at 928.
[47] Jones v. Sanger, 204 W.Va. 333, 512 S.E.2d 590 (1998). See also Marlin v. Bill Rich Constr., Inc., 198 W.Va. 635, 482 S.E.2d 620 (1996).
[48] Heldreth v. Marrs, 188 W.Va. 481, 425 S.E.2d 157 (1992).
[49] Id. See also Marlin, supra.

recovery by the plaintiff unless the plaintiff's fault is greater than the combined fault of all other persons responsible for the total amount of damages, if any, to be awarded." [50] Therefore, a plaintiff is barred from recovery if found to be more than 50% at fault. Previously, a plaintiff was barred from recovery if found to be 50% or more at fault. Additionally, under the modified comparative fault standard, if the plaintiff's fault is less than the combined fault of all other persons, the plaintiff's recovery must be reduced in proportion to the plaintiff's degree of fault.[51]

**Joint and Several Liability:** When West Virginia adopted modified comparative fault in 2015, it effectively abolished joint and several liability.[52] Prior to West Virginia's adoption of modified comparative fault, one defendant could be held liable for all of the plaintiff's damages, regardless of the amount of fault assigned to that defendant. Under the new law, liability in tort is several, and not joint.[53] Therefore, each defendant is only liable for compensatory damages proportionate to his or her percentage of fault, and a separate judgment is rendered against each defendant for his or her share.[54] To determine the amount to be entered against each defendant, the court multiplies the total amount of compensatory damages by the percentage of each defendant's fault.[55]

There are several exceptions where joint liability is still applicable. Most notably, joint liability may still be imposed on two or more defendants who conspired to commit a tortious act. Additionally, joint and several liability may be imposed when the defendant engages in the following conduct that results in the plaintiff's damages: 1) driving under the influence; 2) criminal conduct; and 3) illegal disposal of hazardous waste.[56]

Additionally, if a plaintiff is not able to collect from a liable defendant through good faith efforts, then the plaintiff may move for reallocation of the uncollectible amount among the other parties found liable.[57] However, the plaintiff must do so within one year after the judgment becomes final. The court may not reallocate to any defendant an uncollectible amount greater than that defendant's percentage of fault multiplied by the uncollectible amount.[58]

When assessing the percentages of fault, the fault of all persons who contributed to the damages should be considered, regardless of whether the person was or could have been named as a party to the lawsuit.[59] The fault of a nonparty must be considered if the plaintiff entered into a settlement agreement with the nonparty, or if no later than 180 days after service a defendant gives notice that a nonparty was wholly or partially at fault.[60] The assessment of percentages of fault for nonparties is only used as a vehicle to determine the fault of the named parties.[61] The burden of proof for establishing comparative fault lies on the person who seeks to establish such fault.[62]

**Assumption of Risk:** The predicate of assumption of risk is that the plaintiff has full knowledge and appreciation of the dangerous condition and voluntarily exposes himself to it.[63] West Virginia has adopted comparative assumption of risk which follows the modified comparative negligence standard set forth above.

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[50] W. Va. Code § 55-7-13a - § 55-7-13d.
[51] W. Va. Code § 55-7-13c(c).
[52] W. Va. Code § 55-7-13a - § 55-7-13d.
[53] W. Va. Code § 55-7-13c(a).
[54] W. Va. Code § 55-7-13c(b).
[55] W. Va. Code § 55-7-13c(b).
[56] W. Va. Code § 55-7-13c(h).
[57] W. Va. Code § 55-7-13c(d).
[58] W. Va. Code § 55-7-13c(d)(1).
[59] W. Va. Code § 55-7-13d(a)(1).
[60] W. Va. Code § 55-7-13d(a)(2).
[61] W. Va. Code § 55-7-13d(a)(5).
[62] W. Va. Code § 55-7-13d(d).
[63] King v. Kayak Mfg. Corp., 182 W.Va. 276, 387 S.E.2d 516 (1989).

A plaintiff is not barred from recovery by the doctrine of assumption of risk unless his degree of fault equals or exceeds the combined fault or negligence of the other parties to the accident. As in the case of comparative contributory negligence, where assumption of risk has been shown, the instructions should only require that the plaintiff's degree of fault be ascertained.[64]

**STATUTE OF LIMITATIONS:**

**Bodily Injury / Property Damage:** An action for negligent damage to person or property must be brought within two years after the right to bring the cause of action has accrued; however, a cause of action must be brought within one year if it would not survive the death of the plaintiff.[65]

**Wrongful Death:** An action for wrongful death must be filed within two years of the decedent's death.[66]

**Product Liability**: In product liability cases, the two year statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence should know, (1) that he has been injured, (2) the identity of the maker of the product, and (3) that the product had a causal relation to his injury.[67]

**Breach of Contract**: A breach of contract action must be brought within ten years of the date on which the act breaching the contract becomes known; however, and the statute of limitations for actions on unwritten contracts is five years.[68]

**Bad Faith Claims:** Claims involving unfair claims settlement practices that arise under the Unfair Trade Practices Act are governed by the one-year statute of limitations set forth in the West Virginia Code.[69]

**BAD FAITH CLAIMS:**

West Virginia courts have recognized a wide variety of situations in which an insurance carrier may be required to pay extra-contractual damages. These claims are generally categorized as "bad faith" claims. If the bad faith claims are proved by the plaintiff, the insurer generally will have to pay extra-contractual damages and sometimes punitive damages.

Historically, West Virginia courts recognized both first and third-party bad faith claims; however, in 2005 the West Virginia legislature limited third-party claims to a statutorily established administrative remedy.[70] The West Virginia Supreme Court held that a private cause of action is derived from the Unfair Trade Practices Act, under the West Virginia Code,[71] as well as from common law.

**Unfair Trade Practices Act:** The West Virginia Unfair Trade Practices Act prohibits insurance trade practices which "constitute unfair methods of competition or unfair or deceptive acts or practices." [72] Sections 4 and 5 define practices that would violate the act, and Section 6 authorizes the insurance commissioner to enforce the act's provisions.[73] If the commissioner determines, after notice and a hearing, that an insurance practice constitutes a violation of the statute, the commissioner may issue a cease and desist order, levy fines, or revoke

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[64] Id.
[65] W. Va. Code 55-2-12 (2007).
[66] W. Va. Code § 55-7-6(d).
[67] W. Va. Code § 55-2-12; Hickman v. Grover, 178 W.Va. 249, 358 S.E.2d 810 (1987).
[68] W. Va. Code § 55-2-6 (2007).
[69] Wilt v. State Automobile Insurance Co., 203 W.Va. 165, 506 S.E.2d 608 (1998), W.Va. Code 55-2-12(c).
[70] W. Va. Code § 33-11-4a.
[71] West Virginia Code §33-11-1 et seq. (1992)
[72] Id. at § 1.
[73] Id., §§§ 4, 5, and 6.

and suspend the license of the company, broker or agent who violated the act.[74] The act does not expressly provide for private causes of action.[75]

The West Virginia Code specifically lists the following as unfair claims settlement practices and mandates that no person shall commit or perform with such frequency as to indicate a general business practice any of the following: (1) misrepresenting pertinent facts or insurance policy provisions relating to coverage at issue; (2) failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies; (3) failing to adopt and implement reasonable standards for prompt investigation of claims arising under insurance policies; (4) refusing to pay claims without conducting a reasonable investigation based upon all available information; (5) failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed; (6) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear; (7) compelling the insured to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds, when the insureds have made claims for amounts reasonably similar to the amounts ultimately recovered; (8) attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising materials accompanying or made part of the application; (9) attempting to settle claims on the basis of an application which was altered without notice to or knowledge or consent of the insured; (10) making claims or payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which the payments are being made; (11) making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration; (12) delaying the investigation or payment of claims by requiring an insured, claimant or the physician of either to submit a preliminary claim report and then requiring subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information; (13) failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy in order to influence settlements under other portions of the insurance policy coverage; (14) failing to promptly provide a reasonable explanation of the basis in the insurance policies in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement; and (15) failing to notify the first-party claimant or provider of services covered under accident and sickness insurance and hospital and medical service corporation insurance policy whether the claimant has been accepted or denied and if denied, the reasons therefore within fifteen calendar days from the filing of the proof of loss.

**Third Party Bad Faith:** As discussed previously, The West Virginia Third-Party Bad Faith Act[76] ("the Act") was enacted on April 9, 2005, effective July 8, 2005.[77] The Act bans lawsuits by third party claimants against insurers of alleged tortfeasors under the Unfair Trade Practices Act (UTPA). Non-policyholders must now file administrative complaints with the insurance commissioner. Such complaints are addressed pursuant to the procedure set forth in the West Virginia Code.[78]

The Act does not eliminate a first-party claimant's cause of action under the UTPA. It also does not preclude a common law cause of action by a policyholder for breach of the implied covenant of good faith and fair dealing arising from the insurance contract.

**MOTOR VEHICLE LIABILITY INSURANCE MINIMUM LIMITS:**

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[74] Id., § 6.
[75] W. Va. Code §33-11-1, et seq. (1992).
[76] W. Va. Code §33-11-4a.
[77] W. Va. Code § 55-7-6.
[78] West Virginia Code of State Rules §§ 114-76-1 et seq.

**Bodily Injury to Others:** Compulsory limits are $20,000 per person and $40,000 per accident.[79] The combined recovery under a liability policy for an injured party's claim and a derivative claim for loss of consortium by the spouse or children of the injured party cannot exceed the per person limit.[80]

**Property Damage to Others:** Compulsory limits are $10,000.[81]

**Uninsured Motorist coverage:** Beginning January 1, 2016, under West Virginia law "financial responsibility" means proof of the ability to respond in damages for liability on account of accidents arising out of the ownership, operation, maintenance, or use of a motor vehicle in the amount of $25,000 because of injury to one person in any one accident, in the amount of $50,000 because of injury to two or more persons in any one accident, and in the amount of $25,000 because of damage to property of others in any one accident.[82] Prior to January 1, 2016, the required amounts were as follows: $20,000 for injury to one person; $40,000 for injury to two or more persons in any one accident; and $10,000 for property damage.

**Permissive Use:** The West Virginia Code[83] provides that every motor vehicle liability insurance policy must have a provision insuring the named insured and any other person using the vehicle with the permission of the named insured against liability for death or bodily injuries caused by negligent use of the vehicle. This provision provides in part:

> No policy or contract of bodily injury liability insurance, or of property damage insurance, covering liability arising from the ownership, maintenance or use of any motor vehicle, may be issued or delivered in this state . . . by any insurer . . . unless it contains a provision insuring the named insured and any other person . . . responsible for the use of or using the motor vehicle with the consent, expressed or implied, of the named insured or his or her spouse against liability for death or bodily injury sustained or loss or damage occasioned within the coverage of the policy or contract as a result of negligence in the operation or use of such vehicle . . . .

Pursuant to the omnibus statute, a person must have express or implied permission of the named insured to operate or move a vehicle before the liability policy coverage is triggered.[84] The purpose of such a clause is "to extend coverage, in proper circumstances, to any person using the insured vehicle, and to afford greater protection to the public generally . . . ."[85]

The burden to prove permission or consent is on the person seeking coverage under the policy.[86] The Supreme Court of Appeals held that implied consent of the owner was not presumed when an unknown individual moved a vehicle from the "zone of danger" of a fire.[87]

The omnibus clause requires that the insurer provide coverage when the insured has granted permission to a driver who then causes injury or property damage. This coverage is not affected by the fact that the driver may have exceeded or differed from the owner's expectations.[88]

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[79] W. Va. Code § 17D-4-2.
[80] Federal Ins. Co. v. Karlet, 189 W. Va. 79, 428 S.E.2d 60 (1993).
[81] W. Va. Code § 17D-4-2.
[82] W. Va. Code § 17D-4-2.
[83] W. Va. Code §33-6-31(a).
[84] Syl. Pt. 2, Collins v. Heaster, 217 W. Va. 652 S.E.2d 165 (2005).
[85] Syl. Pt. 1, State Farm Mut. Auto Ins. Co. v. Allstate Ins. Co., 154 W. Va. 448, 175 S.E.2d 478 (1970).
[86] Syl. Pt. 3, State Farm Auto Ins. Co. v. American Cas. Co., 150 W. Va. 435, 146 S.E.2d 842 (1966).
[87] Syl. Pt. 3, Collins v. Heaster, 217 W. Va. 652 S.E.2d 165 (2005).
[88] Syl. Pt. 4, Universal Underwriters Ins. Co. v. Taylor, 185 W. Va. 606, 408 S.E.2d 358 (1991).

**WORKERS' COMPENSATION SUBROGATION:** The "made whole" rule does not apply.[89] If an injured worker, his or her dependents or his or her personal representative makes a claim against the third party and recovers any sum for the claim, the Workers' Compensation commission or a self-insured employer shall be allowed statutory subrogation with regard to medical benefits paid as of the date of the recovery. The commission or self-insured employer shall permit the deduction from the amount received of a reasonable attorney's fee and a reasonable portion of costs. It is the duty of the injured worker, his or her dependents, his or her personal representative, or his or her attorney to notify the commission and the employer when the claim is filed against the third party.

In the event that an injured worker, his or her dependents, or a personal representative makes a claim against a third party, a statutory subrogation lien upon the monies received exists in favor of the commission or self-insured employer. Any injured worker, his or her dependents, or personal representatives that receive payment in settlement in any manner of a claim against a third party remains subject to the subrogation lien until payment in full of the medical benefits paid as of the date of the recovery has been made.

The right of subrogation described here does *not* attach to any claim arising from a right of action which arose or accrued, in whole or in part, before July 1, 2003. Under the former statute, the commissioner or a self-insured employer was allowed subrogation against a third party recovery with regard to medical benefits paid as of the date of the recovery, but under no circumstances were the payments received by the commissioner or self-insured employer as subrogation to medical benefits expended on behalf of the injured or deceased worker permitted to exceed fifty percent of the amount received from the third party, after payment of any attorney's fees and costs.

Effective January 1, 2006, the workers' compensation commission or a self-insured employer shall be allowed statutory subrogation with regard to medical and indemnity benefits actually paid as of the date of the recovery. The injured worker, his or her dependents, personal representatives, or attorney must give reasonable notice to the commission, private carrier, or self insured employer after a third party claim is filed and before the disbursement of any third party recovery. The statutory subrogation does not apply to uninsured and underinsured motorist coverage or any other insurance coverage purchased by or on behalf of the injured worker. If the injured worker, his or her dependents, personal representatives or attorney fails to protect the subrogation interest, they lose the right to retain attorney fees and costs out of subrogation amount, and the private carrier or self insured employer have a cause of action against the injured worker, his or her dependents, personal representatives or attorney for the full subrogation amount and reasonable fees and costs associated with that cause of action.

**PRIORITY OF MOTOR VEHICLE LIABILITY INSURANCE POLICIES:** Between liability coverage of the driver and the owner of the vehicle involved in an accident, the owner's liability coverage is primary.[90]

**PREMISES LIABILITY:** West Virginia has abolished the common law distinction between a landowner's duty to invitees and licensees, while retaining the distinction and exceptions for trespassers.[91] There is a five point checklist of factors that the trier of fact must consider when determining whether the defendant has met its burden of reasonable care under the circumstances to all non-trespassing entrants. These five factors are as follows: (1) the foreseeability that an injury might occur; (2) the severity of the injury; (3) the time, manner and circumstances under which the injured party entered the premises; (4) the normal or expected use made of the premises; (5) the magnitude of the burden placed upon the defendant to guard against the injury.

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[89] Cart v. General Electric Co., 203 W.Va. 59, 506 S.E.2d 96 (1998).

[90] Allstate Ins. Co. v. State Automobile Mut. Ins. Co., 178 W.Va. 704, 364 S.E.2d 30 (1987).

[91] Mallet v. Pickens, 206 W.Va. 145, 522 S.E.2d 436 (1999).

The *Mallet* decision kept in place the common law rule for the duty owed to a trespasser.[92] The *Huffman* decision set forth the following four factors to determine a landowner's duty to a trespasser: (1) the possessor must know or, from facts within his knowledge should know, that trespassers constantly intrude in the area where the dangerous condition is located; (2) the possessor must be aware that the condition is likely to cause serious bodily injury or death to such trespassers; (3) the condition must be such that the possessor has reason to believe trespassers will not discover it; and (4) in that event, the possessor must have failed to exercise reasonable care to adequately warn the trespassers of the condition.

Although the Attractive Nuisance Doctrine is not recognized in West Virginia, the Supreme Court of Appeals has adopted a similar rule that where a dangerous instrumentality or condition exists at a place frequented by children who suffer injury, the parties responsible for such dangerous condition may be held liable for such injury if they knew, or should have known of the dangerous condition and that children frequented the dangerous premises either for pleasure or out of curiosity.[93]

**DAMAGES:**

**Damages Recoverable in Personal Injury Action:** Damages available in personal injury cases include: past and future pain and suffering; past and future medical expenses; lost wages and impairment of future earning capacity; loss of enjoyment of life; and emotional distress. [94]

**Damages in Wrongful Death Action:** The West Virginia wrongful death action is a statutory creation which compensates survivors for the pecuniary losses sustained as a result of the decedent's death, including the value of the services the victim would have rendered to his family if he had lived. A wrongful death action does not compensate the decedent's estate; it compensates the survivors for damages which they may have sustained as a result of the decedent's death.[95]

In every such action for wrongful death, the jury, or in a case tried without a jury, the court, may award such damages that it believes to be fair and just, and may also direct in what proportions that the damages shall be distributed to the surviving spouse and children, including adopted children, stepchildren, brothers, sisters, parents and any persons who were financially dependent upon the decedent at the time of his or her death or would otherwise be equitably entitled to share in such distribution.[96]

If there are no such survivors, then the damages shall be distributed in accordance with the decedent's will or, if there is no will, in accordance with the laws of intestacy. If the jury renders only a general verdict on damages and does not provide for the distribution thereof, the court shall distribute the damages in accordance with statutory requirements.[97]

The West Virginia Code[98] outlines the factors which may be considered when determining damages in a wrongful death action: (1) sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent; (2) compensation for reasonably expected loss of income of the decedent, services, protection, care and assistance provided by the decedent; (3) expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death; and (4) reasonable funeral expenses.

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[92] Huffman v. Appalachian Power Company, 187 W.Va. 1, 415 S.E.2d 145 (1991).
[93] Hatten v. Mason Realty Co., 148 W.Va. 380, 135 S.E.2d 236 (1964).
[94] Adkins v. Foster, 187 W.Va. 730, 421 S.E.2d 271 (1992).
[95] W. Va. Code § 55-7-6; Davis v. Foley, 193 W.Va. 595, 457 S.E.2d 535 (1995).
[96] W. Va. Code § 55-7-6(b).
[97] W. Va. Code § 55-7-6(b).
[98] Section 55-7-6(c)(1).

If a cause of action for personal injury or damage to real and/or personal property is begun during the lifetime of the injured party, and within the period of time permissible under the applicable statute of limitations, and such injured party dies pending the action it may be revived in favor of the personal representative of such injured party and prosecuted to judgment and execution against the wrongdoer or his personal representative.[99] If the injured party dies before commencing such action, and it is not at the time of his death barred by the applicable statute of limitations, the action may be commenced by the personal representative of the injured party against the wrongdoer or his or her personal representative and prosecuted to judgment and execution against the wrongdoer or his personal representative. Any such action shall be instituted within the same period of time that would have been applicable had the injured party not died.[100]

**Punitive Damages - Standards for Recovery**: Punitive damages may be awarded in cases of intentional torts or gross, reckless or wanton negligence.[101] With respect to an award of punitive damages, there must be a reasonable relationship between such damages and the harm that was likely to occur from defendant's conduct, as well as the harm that actually has occurred.[102] The relevant factors include the reprehensibility of the defendant's conduct, profit from the wrongful conduct, deterrence, the reasonable relationship between punitive damages, compensatory damages, and financial position of the defendant.[103] The cost of litigation alone to the plaintiff is a factor that may justify punitive damages.[104] Of course, any award of punitive damages must also comply with the United States Supreme Court's holding in *B.M.W. of North America v. Gore*, which determined that grossly excessive punitive damages awards violate due process and are therefore unconstitutional.[105]

The United States Supreme Court has held that evidence of the defendant's conduct, relied upon by the plaintiff in arguing for punitive damages, must be specifically connected to the actual harm suffered by the plaintiff.[106] A punitive damages award based in part on a jury's desire to punish a defendant for harming nonparties amounts to a taking of property from the defendant in violation of due process.[107]

**Insurability of Punitive Damages:** Punitive damages imposed for gross, reckless or wanton negligence are insurable. Absent an express exclusion for punitive damages, a policy with language to the effect that the insurer agrees to pay "all sums which the insured shall be legally obligated to pay" covers such punitive damages.[108] This holds true for both uninsured and underinsured motorist insurance.[109]

**Effect of Settlement with a Co-Defendant**: Defendants in a civil action against whom a verdict for compensatory damages is rendered are entitled to have that verdict reduced by the amount of any good faith settlements previously made with the plaintiff by other jointly liable parties.[110] A party in a civil action who has made a good faith settlement with the plaintiff prior to judicial determination of liability is relieved from any liability for contribution.[111] Settlements are presumptively made in good faith and the defendant seeking to establish that a settlement made by the plaintiff and a joint tortfeasor lacks good faith has the burden of doing

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[99] W. Va. Code, § 55-7-8a(b).
[100] W. Va. Code, § 55-7-8a(c).
[101] See Hensley v. Erie Ins. Co., 168 W.Va. 172, 283 S.E.2d 227 (1981).
[102] Alkire v. First National Bank of Parsons, 197 W.Va. 122, 475 S.E.2d 122 (1996).
[103] Id.
[104] Garnes v. Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E.2d 897 (1991).
[105] BMW of N. Amer. v. Gore, 517 U.S. 559, 116 S.Ct. 1589 (1996). See also T.X.O. Production Corp. v. Alliance Resources Corp., 187 W.Va. 457, 419 S.E.2d 870 (1992).
[106] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct 1513 (2003).
[107] Philip Morris USA v. Williams, 127 S.Ct. 1057 (2007).
[108] Hensley v. Erie Ins. Co., 168 W.Va. 172, 283 S.E.2d 227 (1981).
[109] State ex rel. State Auto Ins. Co. v. Risovich, 204 W.Va. 87, 511 S.E.2d 498 (1998).
[110] Burgess v. Porterfield, 196 W.Va. 178, 469 S.E.2d 114 (1996).
[111] Hager v. Marshall, 202 W.Va. 577, 505 S.E.2d 640 (1998) (citing Bd. of Educ. of McDowell County v. Zando, Martin & Milstead, 182 W.Va. 597, 390 S.E.2d 796 (1990)).

so by clear and convincing evidence.[112] Since the primary consideration is whether the settlement arrangement substantially impairs the ability of the remaining defendants to receive a fair trial, the settlement may be rejected as lacking in good faith only upon a showing of corrupt intent by the settling plaintiff and joint tortfeasor, that the settlement involved collusion, dishonesty, fraud or other tortious conduct.[113]

**Employer Liability—"Deliberate Intention" Claims:** The West Virginia Code[114] carves out an exception to the exclusivity of the workers' compensation remedy where an injury is caused by "deliberate intention" of the employer. The statutory claim commonly is termed a "Mandolidis" claim, for the West Virginia Supreme Court decision in which the remedy first was recognized.[115] The West Virginia Code[116] was amended in 2005; the amendments apply to all injuries occurring and all actions filed on or after July 1, 2005.

Perhaps the most significant of the amendments is that the statute now requires plaintiff to prove that the employer had actual knowledge of the existence of the specific unsafe working condition prior to the injury.[117] Under the former statute, plaintiff's burden was to establish that an employer had a "subjective realization" of the unsafe working condition.

In order to succeed in an action for "deliberate intent", a plaintiff must prove all of the following elements (amendments are shown in bold): (1)That an unsafe working condition existed in the work place which presented a degree of risk and strong probability of serious injury or death; (2)That, **prior to the injury**, the employer had **actual knowledge** of the existence of the unsafe working condition; (3)That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer, **as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business,** which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions; (4)That the employer nevertheless **intentionally** exposed the employee to the unsafe working condition, and (5) That the employee exposed suffered serious **compensable** injury or **compensable** death **as defined in section one, article four, chapter twenty-three whether a claim for benefits under this chapter is filed or not** as a direct and proximate result of the specific unsafe working condition.

"Deliberate intent" claims commonly have been filed in all cases involving serious work related injuries. Other "deliberate intent" issues are as follows: (1) punitive damages are not recoverable against the employer in a "deliberate intent" action other than an action in which plaintiff claims and proves that the employer "acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee";[118] (2) comparative negligence may not be a defense for the "deliberate intent" defendant. Often, however, defendants other than the "deliberate intent" defendant will assert such a defense; and (3) the defendant receives a set-off to the extent of workers' compensation benefits paid.

**Minors:** There is a rebuttable presumption that children between ages of seven and fourteen are incapable of negligence. The burden is upon the party attempting to overcome this presumption to prove by preponderance of evidence that a child has the capacity to be contributorily negligent.[119]

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[112] Id.
[113] Boyd v. Goffoli, 216 W.Va. 552, 608 S.E.2d 169 (2004) (citing Smith v. Monongahela Power Co., 189 W.Va. 237, 429 S.E.2d 643 (1993)).
[114] Section 23-4-2.
[115] Mandolidis v. Elkins Industries, Inc., 161 W.Va. 695, 246 S.E.2d 907 (1978).
[116] Section 23-4-2
[117] 23-4-2(d)(2)(ii)(B).
[118] W. Va. Code 23-4-2(d)(2)(i); 23-4-2(d)(2)(iii)(A).
[119] Pino v. Szuch, 185 W.Va. 476, 408 S.E.2d 55 (1991).

Under the "Minor Settlement Proceedings Reform Act" the parent, guardian or next friend of a minor may negotiate a settlement of the minor's claim for damages before or after the filing of an action for damages.[120]

To secure a release of the party or parties allegedly responsible for the injury or loss, the parent, next friend or guardian of the minor shall file a verified petition in the circuit court of the county in which the minor resides or in which venue would lie for an action for damages; however, if a suit is pending, the petition is to be filed and served by the parent, guardian or next friend as a motion in the pending action.[121]

The court will appoint a guardian ad litem to represent the interests of the minor and will conduct a hearing on the petition or motion.[122] If the court grants the requested relief, the party authorized by the court to execute the release shall execute a release of the minor's claim against the persons or entities alleged to be responsible for the injuries or losses and who are identified in the petition or motion to be released from liability, any other persons or entities making payment on behalf of those persons or entities and any subsidiaries or successor persons or entities.[123]

**DEFENSES**:

**General Defenses:** West Virginia defendants have available to them the defenses of superseding cause, comparative negligence, assumption of the risk, and, in limited circumstances, sudden emergency.[124]

**Seatbelts:** West Virginia does not have a seatbelt defense, but evidence regarding seatbelt non-use may be introduced in limited circumstances. The West Virginia Code[125] provides that no one may operate a "passenger vehicle" on a public road unless that person, front seat passengers, and back seat passengers under 18, are restrained by seatbelts. A passenger vehicle is a motor vehicle designed for transporting ten passengers or less, including the driver; the term does not include motorcycles or trailers.[126] A violation of this statute may not be introduced as evidence of negligence, comparative negligence or failure to mitigate. However, the statute does provide that upon defendant's motion, the Court may conduct an in camera hearing to determine whether the plaintiff's failure to wear a seat belt was the proximate cause of his injury. If the Court so finds, it will, by special interrogatory to the jury, determine that: (1) the injured party failed to wear a safety belt and (2) this constituted a failure to mitigate damages. The trier of fact may then reduce recovery for medical expenses by an amount not to exceed five percent. The plaintiff can elect to stipulate to a reduction of five percent for not using a seat belt, and if he does, the Court will not instruct the jury on this issue.[127]

The Supreme Court of Appeals of West Virginia has held that accidents occurring on private roadways are not subject to the West Virginia Code[128]; therefore, in these cases, the option of introducing evidence of plaintiff's failure to wear a seatbelt does not exist, even in the limited circumstances referenced above.[129]

**EVIDENCE AND DISCOVERY:**

**Evidence:** The West Virginia Rules of Evidence substantially reflect the Federal Rules of Evidence, particularly on the principles of relevance and hearsay. The Supreme Court of Appeals of West Virginia has stated that

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[120] W. Va. Code, § 44-10-14(a).
[121] W. Va. Code, § 44-10-14(b).
[122] W. Va. Code, § 44-10-14(d) & (e).
[123] W. Va. Code, § 44-10-14(f).
[124] See; White v. Lock, 175 W.Va. 227, 332 S.E.2d 240 (1985); Addair v. Bryant, 168 W.Va. 306, 284 S.E.2d 374 (1981); Bradley v. Appalachian Pwr. Co., 163 W.Va. 332, 256 S.E.2d 879 (1979).
[125] Section 17C-15-49
[126] W. Va. Code § 17C-15-49.
[127] Miller v. Jeffrey, 213 W.Va. 41, 576 S.E.2d 520 (2002).
[128] Section 17C-15-49.
[129] Id.

ordinarily it is improper to permit evidence of an arrest for or conviction of an offense in a subsequent civil suit for damages arising out of the conduct of the arrested and or convicted person. A party's conviction of such an offense based on a guilty plea, however, may be admissible, as the guilty plea constitutes an admission against interest.[130]

**Discovery:** West Virginia's Rules of Civil Procedure regarding discovery are also fairly standard, allowing for the discovery of statements by any witness, insurance information, and claims files.[131] A body of case law has developed governing discovery in suits involving claims against insurers for bad faith.[132]

**PLACARD LIABILTIY:** In West Virginia, the presence of a corporation's name, placard or logo on a commercial vehicle has been deemed evidence of an employer-employee relationship between the driver of the vehicle and the corporation, regardless of the provisions of an express contract between the two, and regardless of the fact that the vehicle is owned by the driver.[133]

**LIABILITY FOR UNAUTHORIZED PASSENGERS:** Where an employer expressly forbids an employee from permitting unauthorized passengers, and the employee nonetheless allows unauthorized passengers to occupy the vehicle, the employer owes no duty to the passenger other than the duty to protect him from the willful and wanton negligence of the employee.[134]

**LIENS:** Where a money judgment is obtained against a defendant or debtor, a judgment lien against personal property of the defendant/debtor may be perfected by delivering a writ of execution to the sheriff.[135]

West Virginia permits recovery of medical payments made by the injured party's automobile insurer, health insurer, or worker's compensation carrier. The attorney for the injured party is entitled to 1/3 of the medical payments subrogation recovery.[136] Additionally, settlement of a claim with the injured party does not release the medical lien if the subrogee has put the tortfeasor or the tortfeasor's representative on notice of the subrogation lien prior to the settlement.[137]

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[130] Groves v. Compton, 167 W.Va. 873, 280 S.E.2d 708 (1981).

[131] State ex rel. Brison v. Kaufman, 213 W.Va. 624, 584 S.E.2d 480 (2003); see also State ex rel. v. W.V. Fire & Casualty Co. v. Karl, 202 W.Va. 471, 505 S.E.2d 210 (1998).

[132] See, State Farm Insurance Co. v. Stephens, 188 W.Va. 622, 425 S.E.2d 577 (1992) (holding that relevant information need not be produced if discovery request is unduly burdensome, oppressive or needlessly cumulative); State ex rel. Erie Ins. Property & Cas. Co. v. Mazzone, 218 W.Va. 593, 625 S.E.2d 355 (2005) (holding that in order to permit discovery of insurance reserves information, court must determine whether the information is relevant in that it is admissible or is reasonably calculated to lead to the discovery of admissible evidence); State ex rel. Erie Ins. Property & Cas. Co. v. Mazzone, 220 W.Va. 525, 648 S.E.2d 31 (2007) (holding that aggregate reserves information compiled for specific litigation is protected opinion work product).

[133] Griffith v. George Transfer & Rigging, Inc., 157 W.Va. 316, 201 S.E.2d 281 (1973).

[134] Kelly v. Checker White Cab, 131 W.Va. 816, 50 S.E.2d 888 (1948).

[135] W. Va. Code § 38-4-8.

[136] Federal Kemper Ins. Co. v. Arnold, 183 W.Va. 31, 393 S.E.2d 669 (1990).

[137] Provident Life & Accident Ins. Co. v. Bennett, 199 W.Va. 236, 483 S.E.2d 819 (1997); see also Nationwide Mut. Ins. Co. v. Dairyland Ins. Co., 191 W.Va. 243, 445 S.E.2d 184 (1994) (holding that (1) written notification by the insurance carrier as to its subrogation claim for medical payments is legally sufficient even if it does not contain a precise monetary amount for the subrogation claim, and (2) subrogation rights of the insurer are not barred so long as the tortfeasor's insurer was notified of the subrogation claim before it settled with the insured.).

West Virginia does not allow collateral source offsets if the benefits were paid under a contractual arrangement that the plaintiff made independently of the tortfeasor. This includes first-party medical benefits, health insurance benefits and underinsurance benefits.[138]

**Offers of Judgment:** At any time more than ten days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or to the effect specified in the offer, with costs then accrued.[139] If the offer is not accepted and the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.[140]

**Forum Shopping:** Whenever possible, Plaintiffs' counsel files suit in Marshall, Brooke, Ohio or Hancock Counties, as they are particularly pro-plaintiff. Removal to federal court on the basis of diversity of citizenship should be evaluated in all such venues.

**The Driving Under the Influence Standard**: Operating a vehicle with a blood alcohol level of .08 or more is punishable by fine or imprisonment in West Virginia.[141] Drivers of commercial motor vehicles are prohibited from driving with "an alcohol concentration in . . . blood, breath or urine" of .04 or more.[142]

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[138] Johnson by Johnson v. General Motors Corp., 190 W.Va. 236, 438 S.E.2d 28 (1993).
[139] W.Va.R.Civ.P. 68.
[140] Id.
[141] W. Va. Code § 17C-5-2.
[142] W. Va. Code § 17E-1-14.

# Wisconsin

**NO FAULT:** Wisconsin is **not** a "no-fault" state. Rather, Wisconsin follows a modified comparative negligence rule. *See* Wis. Stat. § 895.045.

**NEGLIGENCE:**

**Modified comparative:** A plaintiff who is found to be more at fault than the defendant against whom recovery is sought is barred from recovery. The negligence of the plaintiff is to be measured separately against each of the causally negligent defendants in making this determination. All comparisons are individual, between the plaintiff and a defendant. Wis. Stat. § 895.045.

**Joint and Several Liability**: "The liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that person. A person found to be causally negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed." Wis. Stat. § 895.045.

The court of appeals underscored the import of the statute's language with respect to apportioning negligence and liability between defendants. Only defendants found *51% or more* negligent can be held jointly and severally liable, even where the plaintiff has been completely absolved of negligence. *Thomas v. Bickler*, 2002 WI App. 268, ¶¶ 19-20, 258 Wis. 2d 304, 654 N.W.2d 248.

**Examples**: Assume plaintiff is 10% causally negligent; defendant #1 is 70% causally negligent; and defendant #2 is 20% causally negligent. Plaintiff recovers 90% of his damages, after reduction for his contributory negligence; plaintiff can recover all of those damages from defendant #1 because that defendant's causal negligence exceeds 50%, and #1 has a contribution claim against #2 for 20% of the payment; defendant #2 pays only 20% of plaintiff's damages because its liability was less than 51%.

A jury attributes 30% causal negligence to plaintiff, 60% to defendant #1, and 10% to defendant #2. Defendant #2 pays nothing because its negligence is less than plaintiff's. Plaintiff recovers 70% of his damages, after reducing his contributory negligence, and recovers all from defendant #1 (its own 60% plus 10% attributed to defendant #2) because #1's causal negligence exceeded 50%. Defendant #1 has no contribution right against defendant #2 because defendant #2 is not liable to plaintiff.

A jury assigns 40% causal negligence to plaintiff, 39% to defendant #1 and 21% to defendant #2. Plaintiff recovers nothing because his contributory negligence exceeds the negligence of both defendants #1 and #2.

**CONTRIBUTION:** Contribution between joint tortfeasors is determined in proportion to percentage of causal negligence. *Bielski v. Schulze*, 16 Wis. 2d 1, 6, 114 N.W.2d 105 (1962).

**TIMELY PAYMENT OF CLAIMS:** "Unless otherwise provided by law, an insurer shall promptly pay every insurance claim. A claim shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of the loss." Wis. Stat. § 628.46(1).

"All overdue payments shall bear simple interest at the rate of 7.5% per year." Wis. Stat. § 628.46(1).

Nevertheless, the payment is not overdue until 30 days after the insurer receives the proof of loss required by the policy or some equivalent evidence of the loss. Wis. Stat. § 628.46(2). "[W]hen there is clear liability, a sum certain owed, and written notice of both, the plain language of Wis. Stat. § 628.46, incorporating by reference Wis. Stat. § 646.32(2), imposes 7.5% simple interest on overdue payments to third-party claimants in personal injury claims and actions." *Kontowicz v. American Standard Ins. Co.*, 2006 WI 48, ¶ 55, 290 Wis.2d 302, 714 N.W.2d 105. (Legislature changed the 12% in *Kontowicz* to 7.5% in 2018)

**STATUTE OF LIMITATIONS:**

**Bodily Injury**: Three (3) years from date of accrual of the injury. Wis. Stat. § 893.54.

Intentional torts have a three (3) year statute of limitations as well. Wis. Stat. § 893.57.

Wisconsin has adopted the discovery rule for all tort actions other than those already governed by a legislatively created discovery rule. *Hansen v. A. H. Robins, Inc.*, 113 Wis.2d 550, 560, 335 N.W.2d 578 (1983). The discovery rule provides that a cause of action will not accrue "until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only the fact of the injury but also that the injury was probably caused by the defendant's conduct or product." *Borello v. United States Oil Co.*, 130 Wis.2d 397, 411, 388 N.W.2d 140 (1986).

The reasonable diligence requirement has been interpreted to mean that the plaintiff must exercise "such diligence as the great majority of persons would use in the same or similar circumstances" to discover their injuries. *Spitler v. Dean*, 148 Wis.2d 630, 638, 436 N.W.2d 308 (1989). The *Spitler* court noted that plaintiffs may not close their eyes to means of information reasonably accessible to them and must in good faith apply their attention to those particulars which may be inferred to be within their reach. The "exercise reasonable diligence" requirement is objective. *Estate of Merrill v. Jerrick*, 231 Wis.2d 546, 552, 605 N.W. 2d 645 (1999).

**Property Damage**: Six (6) years. Wis. Stat. § 893.52; Three (3) years for property damage caused by a motor vehicle.

**Minor**: Within two (2) years of reaching age of majority, but no shorter than the otherwise applicable limitation. Wis. Stat. § 893.16.

**COVERAGE:** Motor vehicle liability insurance is now mandatory in the state of Wisconsin as of June 1, 2010. Wis. Stat. § 344.62.

**UM (uninsured motorist):** With the exception of certain commercial liability and umbrella or excess liability policies, every motor vehicle insurance policy is required to have UM coverage.. Wis. Stat. §632.32(4)(a). UM coverage is not required for a commercial liability policy if the coverage it provides for the insured's liability arises out of the maintenance or use of a motor vehicle is limited to coverage for motor vehicles that are not owned motor vehciles, or to an umbrella or excess liability policy. Wis. Stat. § 632.23(4)(d).

The minimum limits are 25/50 for bodily injury, sickness or death by an uninsured motorist (UM). Wis. Stat. § 632.32(4)(a).UM is subrogable. Wis. Stat. § 632.32(4)(c).

While stacking is permitted, 2011 legislation permitted insurance companies to incorporate anti-stacking clauses in policies. Wis. Stat. § 632.32(5)(f) and (g). Stacking will ultimately depend on the facts and the policy in question.

A policy may provide that the limits under the policy for UM coverage for bodily injury or death resulting from any one accident may be reduced by: (a) amounts paid by or on behalf of any person or organization that may be legally responsible for the bodily injury or death for which the payment is made; (b) amounts paid or payable under any worker's compensation law; and (c) Amounts paid or payable under any disability benefits laws.

Uninsured vehicles include an unidentified motor vehicle involved in a hit-and-run accident. Wis. Stat. § 632.32(2)(g)3. A hit-and-run accident requires physical contact. *Hayne v. Progressive Northern Insurance Co.*, 115 Wis. 2d 68, 74, 339 N.W.2d 588 (1983). Even where a hit-and-run accident occurs but there is no contact with the plaintiff's vehicle, the plaintiff may not claim uninsured coverage. *Wegner v. Heritage Mutual Insurance Co.,* 173 Wis. 2d 118, 127, 496 N.W.2d 140 (Ct. App. 1992). *See also DeHart v. Wisconsin Mut. Ins. Co.*, 2007 WI

91, ¶¶ 34-35, 302 Wis. 2d 564, 734 N.W.2d 394 (UM coverage is not mandated by statute for an accident in which an unidentified vehicle made contact with another vehicle, but there was no hit to insured's vehicle).

Therefore, if the plaintiff is involved with a chain reaction hit-and-run accident, the plaintiff will be covered if the contact with his or her vehicle is from a vehicle that has had contact with the unidentified vehicle. *Smith v. General Cas. Ins. Co.,* 2000 WI 127, ¶ 28, 239 Wis. 2d 646, 619 N.W.2d 882 (2000) (for example, C, the unidentified vehicle, strikes B, forcing B to strike A, the insured vehicle). The Wisconsin courts have not required that the insured's vehicle be struck by another vehicle, so long as the insured vehicle is struck by something that was an integral part of the unidentified vehicle. *Theis v. Midwest Security Ins. Co.*, 2000 WI 15, _ 39, 232 Wis. 2d 749, 609 N.W.2d 162; *see also Dehnel v. State Farm Mut. Auto. Ins. Co.,* 231 Wis. 2d 14, 22, 604 N.W.2d 575 (Ct. App. 1999). This would include contact with objects such as a tire, but not a piece of ice dislodged from the UM vehicle.

Uninsured vehicles also include "phantom motor vehicles." Wis. Stat. § 632.32(2)(g)2. However, there is only UM coverage for an accident caused by a phantom vehicle here the following apply: (a) The facts of the accident are corroborated by competent evidence that is provided by someone other than the insured or any other person who makes a claim against the uninsured motorist coverage as a result of the accident. (b) Within 72 hours after the accident, the insured or someone on behalf of the insured reports the accident to a police, peace, or judicial officer or to the department of transportation or, if the accident occurs outside of Wisconsin, the equivalent agency in the state where the accident occurs. (c) Within 30 days after the accident occurs, the insured or someone on behalf of the insured files with the insurer a statement under oath that the insured or a legal representative of the insured has a cause of action arising out of the accident for damages against a person whose identity is not ascertainable and setting forth the facts in support of the statement.

**Medical payments**: Coverage for med pay of at least $1,000 must be offered, but it can be rejected. Wis. Stat. § 632.32(4)(a)-(bc). Med pay is subrogable. Wis. Stat. § 632.32(4)(c).

**UIM (underinsured motorist):** Underinsured motorist (UIM) coverage is optional. However, an insurer is required to provide written notice of the availability of UIM coverage. Wis. Stat. § 632.23(4m)(a). An insured's acceptance or rejection of UIM coverage need not be in writing and absence of premium payments is conclusive proof that the person rejected such coverage. Wis. Stat. § 632.23(4m)(b). If coverage is accepted, the minimum limits are 50/100 for bodily injury or death by a the underinsured motorist (UIM). Wis. Stat. § 632.32(4m)(d)..

A cause of action for UIM coverage is a contract action, and, therefore, the six (6) year statute of limitations (Wis. Stat. § 893.43) applies. This may cause a problem for the insurance company that is faced with a three (3) year statute of limitations if it wants to seek recovery against a tortfeasor on its subrogation claim. A court has ruled that the statute of limitations in that instance ran from the date of the denial of coverage by the liability insurer and not the date of the accident. *Effert v. Heritage Mut. Ins. Co.,* 160 Wis. 2d 520, 528, 466 N.W.2d 660 (Ct. App. 1990).

While stacking is permitted, 2011 legislation permitted insurance companies to incorporate anti-stacking clauses in policies. Wis. Stat. § 632.32(5)(f) and (g). Stacking will ultimately depend on the facts and the policy in question.

A policy may provide that the limits under the policy for UIM coverage for bodily injury or death resulting from any one accident may be reduced by: (a) amounts paid by or on behalf of any person or organization that may be legally responsible for the bodily injury or death for which the payment is made; (b) Amounts paid or payable under any worker's compensation law; and (c) Amounts paid or payable under any disability benefits laws.

**Property Damage**: If the plaintiff has been necessarily deprived of the use of his or her auto as a natural consequence of the collision, then loss of use is the sum that will reasonably compensate the plaintiff for that

loss of use. Considerations of reasonable damages include the reasonable rental value of a comparable auto during the period of time reasonable and necessary for the repair, but such rental may not exceed the amount actually spent for the rental of a temporary replacement. Loss of use for a totaled vehicle is handled the same. Wisconsin Civil Jury Instructions 1800 and 1801. If a plaintiff does not acquire a vehicle for temporary use, he or she is nevertheless entitled to the reasonable value of the loss of use. *Kim v. American Family Mut. Ins. Co.*, 176 Wis.2d 890, 900, 501 N.W.2d 24 (1993).

**Who is covered**: Under Wisconsin law, "coverage provided to the named insured applies in the same manner and under the same provisions to any person using any motor vehicle described in the policy when the use is for purposes and in the manner described in the policy." Wis. Stat. §632.32(3)(a). This applies to all automobile liability policies issued and delivered in the state of Wisconsin. *Danielson v. Gasper*, 2001 WI App 12, ¶9, 240 Wis.2d 633, 623 N.W.2d 182. "Coverage extends to any person legally responsible for the use of the motor vehicle." Wis. Stat. §632.32(3)(b).

This coverage extends to three categories of persons. The first is the named insured, that individual's spouse, and family members (which may include wards and foster children). The second category is that of occupants of an insured vehicle. The final category of insured persons covers individuals whose claims derive from an injury to individuals in the first two categories. For example, a person might bring a wrongful death claim for an individual covered under either the first or second category. *See* Anderson, *Wisconsin Insurance Law*, " 3.2 and 4.2 (4th Ed. 1998).

**Permissive Use:** A policy may limit coverage to use that is with the permission of the named insured, or an adult member of the named insured's household. Wis. Stat. §632.32(5). This language is usually found in the omnibus coverage clause of the automobile liability policy. Harper v. Hartford Acc. & Indem. Co., 14 Wis.2d 500, 111 N.W.2d 480 (1961). The burden of proving such permission exists, rests with party seeking to establish coverage. Derusha v. Iowa Nat. Mut. Ins. Co., 49 Wis.2d 220, 223, 181 N.W.2d 481 (1970). The word permission has been consistently construed broadly to grant coverage to third parties who are injured. Home Ins. Co. v. Phillips, 175 Wis.2d 104, 111, 499 N.W.2d 193 (Ct. App. 1993). Permission may be express or implied. Derusha, 49 Wis.2d at 222-223. Wisconsin statute § 344.33(2) states:

"A motor vehicle policy of liability insurance shall insure the person named therein using any motor vehicle with the express or implied permission of the owner, or shall insure any motor vehicle owned by the named insured and any person using such motor vehicle with the express or implied permission of the named insured, against loss from the liability imposed by law for damages arising out of the maintenance or use of the motor vehicle within the United States of America or the Dominion of Canada, subject to the minimum liability limits with respect to each such motor vehicle."

A person granting permission to use his automobile need not expressly state all limitations, and in absence of any express permission, the scope of permission, as it pertains to coverage under omnibus clause of automobile liability policy, must be determined by circumstances. Harper, 14 Wis.2d at 509-510. Permission may be restricted, as to location or purposes, by the owner of the vehicle. Id. at 508-509. Permission may also be implied, but depends on the state of mind of the permitter. Derusha, 49 Wis.2d at 222. Implied consent is proven through circumstantial evidence. Id. at 223.

**PUNITIVE DAMAGES:** For punitive damages, the plaintiff must show that the "defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." Wis. Stat. § 895.043(3). Absent a specific policy exclusion, insurance coverage for punitive damages is allowed in Wisconsin. *Brown v. Maxey*, 124 Wis. 2d 426, 442-43, 369 N.W.2d 677 (1985).

**WORKER'S COMPENSATION:** Worker's compensation is subrogable in Wisconsin. The insurer who has paid a lawful claim shall have the same right to make a claim or maintain an action in tort against any party for the injury or death and shall have an equal voice in the prosecution of the claim. Wis. Stat. § 102.29(1).

The proceeds of the claim must be divided according to statute: "After deducting the reasonable cost of collection, one-third of the remainder shall in any event be paid to the injured employee or the employee's personal representative or other person entitled to bring action. Out of the balance remaining, the employer, insurance carrier, or if applicable, uninsured employers fund, shall be reimbursed for all payments made by it, or which it may be obligated to make in the future. . . . Any balance remaining shall be paid to the employee or the employee's personal representative or other person entitled to bring action." Wis. Stat. § 102.29(1).

The statute's exclusive remedy provision bars a cause of action for contribution against employer by negligent third party even though employer was substantially more at fault than third party. *Mulder v. Acme-Cleveland Corp.*, 95 Wis. 2d 173, 177, 290 N.W.2d 276 (1980).

The Wisconsin Supreme Court has held that a UM or UIM insurer may not reduce the benefits paid to the plaintiff by the amount the plaintiff recovers from worker's compensation insurance. *See Teschendorf v. State Farm Ins. Companies*, 2006 WI 89, ¶ 63, 293 Wis. 2d 123, 717 N.W. 2d 258 (payment of the worker's compensation death benefit to the Work Injury Supplemental Benefit Fund did not entitle the insurer to a reduction in coverage limits).

**MINORS AND MINOR SETTLEMENTS:** Negligence can be attributable to a minor only if he or she is over the age of seven. Wis. Stat. § 891.44. Minors between ages of seven and eighteen are held to the standard of care of an ordinary minor under like age except where adult activities are involved, such as driving an automobile, where the minor is held to an adult standard. *See Frayer v. Lovell*, 190 Wis. 2d 794, 805-06, 529 N.W.2d 236 (Ct. App. 1995). A settlement of an action with a minor (or mentally incompetent person) may be made by the general guardian, if the guardian is represented by an attorney, or the guardian ad litem with the approval of the court in which the action is pending. Wis. Stat. § 807.10(1).

If an action has not been commenced, the claim can be settled "by the general guardian, if the guardian is represented by an attorney, with the approval of the court appointing the general guardian, or by the guardian ad litem with the approval of the court in which such action or proceeding is pending." Wis. Stat. § 807.10(2).

In the case that a minor is awarded damages through a judgment or a settlement approved by a court, the court may require payment through the clerk of court or require the guardian ad litem to satisfy and discharge the judgment. Wis. Stat. § 807.10(3). If the court requires payment through the clerk of court, at the court's direction the clerk may deposit the payment in a bank or financial institution, direct the payment to the guardian of the minor, or direct the payment to minor himself. *Id.*; see also Wis. Stat. § 54.12.

**BAD FAITH:** In Wisconsin, only the first party may claim bad faith. *Kranzush v. Badger State Mutual Cas. Co.*, 103 Wis. 2d 56, 73, 307 N.W.2d 256 (1981). "[W]here a claim was not *fairly debatable*, refusal to pay would be bad faith." *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 685, 271 N.W. 2d 368 (1978) (emphasis added).

Bad faith in not settling a claim may be shown by any of the proscribed activities in Wis. Admin. Code, INS. 6.11(3)(a), if committed without just cause and with such frequency to indicate a general business practice, such as:

8. Failure to settle a claim under one portion of the policy coverage in order to influence a settlement under another portion of the policy coverage.

9. Except as may be otherwise provided in the policy contract, the failure to offer a settlement under applicable first party coverage on the basis that responsibility for payment should be assumed by other persons or insurers.

10. Compelling insureds or claimants to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them.

11. Failure, where appropriate, to make use of arbitration procedures authorized or permitted under any insurance policy.

12. Adopting or making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

Generally, the failure to promptly within 10 days (sub. (4)) acknowledge claims and maintain open lines of communication with the claimant, quickly and thoroughly conduct claims investigations and settlement negotiations, and to conduct fair and forthright settlement negotiations with the claimant's interests in mind, are also bad faith.

It is important to note, however, that the Wisconsin Supreme Court has rejected the contention that INS. 6.11 contains an implied private right of action. *Kranzush v. Badger State Mutual Casualty Co.*, 103 Wis. 2d 56, 81, 307 N.W.2d 256 (1981).

**WRONGFUL DEATH:** Wrongful death actions are statutory. Wis. Stat. § 895.04.

"An action for wrongful death may be brought by the personal representative of the deceased person or by the person to whom the amount recovered belongs." Wis. Stat. § 895.04(1).

"Judgment for damages for pecuniary injury from wrongful death may be awarded to any person entitled to bring a wrongful death action. Additional damages not to exceed $500,000 per occurrence in the case of a deceased minor, or $350,000 per occurrence in the case of a deceased adult, for loss of society and companionship may be awarded to the spouse, children or parents of the deceased, or to the siblings of the deceased, if the siblings were minors at the time of the death." Wis. Stat. § 895.04(4).

"If the personal representative brings the action, the personal representative may also recover the reasonable cost of medical expenses, funeral expenses, including the reasonable cost of a cemetery lot, grave marker and perpetual care of the lot. If a relative brings the action, the relative may recover such medical expenses, funeral expenses, including the reasonable cost of a cemetery lot, grave marker and perpetual care of the lot, on behalf of himself or herself or of any person who has paid or assumed liability for such expenses." Wis. Stat. § 895.04(5).

**SEATBELT DEFENSE AND HELMET DEFENSE:**

**Seatbelts**: Wisconsin courts recognize the seatbelt defense. Wis. Stat. § 347.48(2m). Calculating the damages apportionment for seatbelt negligence follows this method: first, apportion liability between the parties for the automobile accident itself; next, determine how much, if any, of the total negligence causing injuries is attributable to the nonuse of a seatbelt; finally, reduce the plaintiff's damages accordingly. *Foley v. City of West Allis*, 113 Wis. 2d 475, 490, 335 N.W.2d 824 (1983). With respect to injuries or damages determined to have been caused by a failure to comply with the seatbelt law, such a failure shall not reduce the recovery for those injuries or damages by more than 15%. Wis. Stat. § 347.48(2m)(g).

**Helmets**: The only statute that addresses the use of motorcycle helmets, Wis. Stats. § 347.485, applies only to persons with an instructional permit or persons under 18 years of age. In a recent case, however, the Wisconsin Supreme Court did recognize a defense for a plaintiff's failure to wear a helmet while operating an ATV. *Stehlik v. Rhoads*, 2002 WI 73, ¶ 28, 253 Wis. 2d 477, 645 N.W. 2d 889.

The method for assigning responsibility and calculating damages for helmet negligence differs slightly from that used for seatbelt negligence. In the helmet context, the jury is required first to apportion the negligence between the plaintiff and the defendant(s). This calculation is subject to the comparative negligence rule in Wis. Stat. § 895.045. *Id.* at ¶ 45. Then, the jury must weigh the helmet negligence against the total negligence of the defendant(s). *Id.* This calculation is *not* subject to the comparative negligence rule. *Id.* at ¶ 46.

**Methods of Calculation Compared**: In most circumstances, the calculations will bear the same results. (The exception, of course, is that the apportionment of seatbelt negligence of a plaintiff in seatbelt cases is capped at 15%. Wis. Stat. § 347.48(2m)(g). There is no analogous statute capping negligence determinations for helmet plaintiffs.) The primary objection in the concurring and dissenting opinions was that the method of calculation in helmet cases would confuse juries. *See Id.* at ¶¶ 60-70. (Abrahamson, J., concurring).

**ALCOHOL ISSUE:** If the person has an alcohol concentration of 0.08 or more and was driving or operating a motor vehicle, the person will be subject to penalties and the person's operating privileges will be suspended. Wis. Stat. § 343.30(1p) and (1q), 346.63(1)(b), and 340.01(46m).

If the person has an alcohol concentration above 0.0 and was driving or operating a commercial motor vehicle, a law enforcement officer shall report the results detecting a controlled substance to the department and the person's operating privilege shall be suspended for 6 months. Wis. Stat. § 343.305(7)(b).

**LEGAL DRINKING AGE:** The legal drinking age is 21 years of age. Wis. Stat. § 125.02(8m).

# Wyoming

**Bodily Injury**

WYO. STAT. § 31-10-101 requires that all policies insuring against loss resulting from liability for bodily injury or death arising out of the ownership, maintenance, or use of a motor vehicle shall include coverage with minimum limits of $25,000 because of bodily injury to or death of one person in any one accident, $50,000 because of bodily injury to or death of two or more persons in any one accident, and a minimum of $20,000 in property damage coverage. Uninsured motorist coverage is also required in all policies. The named insured may reject the coverage. Unless the insured requests the coverage in writing, the coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with the policy previously issued to him by the same insurer.

**Property Damage**

Under WYO. STAT. § 31-10-101, there is no additional minimum property damage coverage requirement in Wyoming other than the $20,000 minimum required by WYO. STAT. § 31-9-102(a)(xi).

**Settlements with Minors**

1. A conservatorship is required in order to affect a settlement with a minor valued over five thousand dollars ($5,000.00). *See* WYO. STAT. § 3-3-108. The preference for appointment of a conservator of a minor is set forth in WYO. STAT. § 3-3-105. If the allegations of the petition are proved by a preponderance of the evidence, the Court may appoint a conservator. WYO. STAT. § 3-3-205. The conservator may receive money or property of the ward paid or delivered to him; disperse funds of the ward necessary for the support, maintenance and general welfare of the ward; and with consent of the director of the department of health, invest a reasonable amount of the funds in any investment authorized by Wyoming law. WYO. STAT. § 3-3-503.

2. A conservator has certain powers that it may exercise with or without order of the Court. For a list of these powers see WYO. STAT. §§ 3-3-606 and 607. The duties of the custodian of a minor with respect to the care of custodial property are enumerated at WYO. STAT. § 34-13-125.

3. A Court may order an independent investigation by an attorney other than the attorney for the conservator prior to authorizing a compromise for a claim for damages on account of personal injuries to the ward. The cost of this investigation, including a reasonable attorney fee, shall be taxed as part of the cost of the conservatorship. WYO. STAT. § 3-3-608. The settlement of any claim by or against the ward is subject to Court approval. WYO. STAT. § 3-3-607(a)(ii).

**Personal Injury**

Wyoming is not a PIP state. *Wyoming Insur. Guar. Ass'n v. Allstate Indem. Co.*, 844 P.2d 464, 470 n.4 (Wyo. 1992).

**Medical Payments**

Medical payment coverage is not mandatory in Wyoming.

**Uninsured/Underinsured Motorist Coverage**

1. Statutory requirements-

WYO. STAT. § 31-10-101 requires that all policies insuring against loss resulting from liability for bodily injury or death arising out of the ownership, maintenance, or use of a motor vehicle shall include uninsured motorists coverage with minimum limits of $25,000/$50,000 and a minimum of $20,000 in property damage coverage. The named insured may reject the coverage. Unless the insured requests the coverage in writing, the coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with the policy previously issued to him by the same insurer.

2. The same duty of good faith and fair dealing that is inherent in all contracts and insurance policies is owed to an uninsured motorist. *State Farm Mut. Auto. Ins. Co. v. Shrader*, 882 P.2d 813, 827 (Wyo. 1994). In other words, a claim for bad faith may be made on an uninsured motorist policy. Additionally, the fault of the uninsured motorist and the amount of damages suffered by the insured may be determined in a direct action against the insurer. *Id.* While uninsured motorist coverage is subject to the minimum limits of insurance as provided in WYO. STAT. § 31-9-102(a)(xi), Wyoming law allows for the maximum recovery under more than one policy covering the insured, rather than finding that the maximum to be paid would be the minimum limit of one policy. *Ramsour v. Grange Ins. Ass'n,* 541 P.2d 35, 37-38 (Wyo. 1975).

3. "Other insurance" escape clauses are invalid to the extent that they limit total recovery to less than or equal to actual damage within policy limits. *Id.* at 38.

4. The Wyoming Supreme Court has emphasized the importance and necessity of insurance policy language being unambiguous and saying clearly what the insurance company intended the policy to communicate. Any ambiguity in the policy will be interpreted against the company and in favor of the insured. *Evans v. Farmer's Ins. Exch.*, 34 P.3d 284, 287 (Wyo. 2001).

5. Stacking-

An insured that has a single automobile insurance policy encompassing several vehicles is not permitted to stack or pyramid uninsured motorist and medical payment provisions for recovery of injuries sustained in an accident involving one of the covered vehicles, where the right to aggregate coverages was neither required by ascertainable public policy concerns nor permitted by the insurance policy in its clearly stated terms. *Commercial Union Ins. Co. v. Stamper*, 732 P.2d 534, 539-40 (Wyo. 1987).

However, if insurers wish Wyoming courts to enforce policy provisions which will result in a "windfall to the insurer" by precluding the aggregation of uninsured or underinsured motorist coverage from separate policies for which separate premiums have been paid by the insured and accepted by the insurer(s), they must have done so clearly and unambiguously in terms that a lay-insured of ordinary intelligence could easily comprehend. Otherwise, the policy will be construed in favor of the insured, and a presumption exists that the payment of additional separate premiums was intended to purchase additional "stackable" coverage commensurate with the insured's damages. *Aaron v. State Farm Mut. Auto. Ins. Co.*, 34 P.3d 929, 932-33 (Wyo. 2001). This applies to inter-policy stacking, but does not necessarily extend to intra-policy stacking. *Mena v. Safeco Ins. Co.*, 412 F.3d 1159, 1163 (10th Cir. 2005). How and to what extent the tortfeasor's liability payment will reduce the amount owed under each of the underinsured coverages is likewise determined by the policy language. If the language is not very clear, the benefit of the doubt will undoubtedly go to the insured. *Aaron v. State Farm Mut. Auto. Ins. Co.*, 34 P.3d 929, 933 (Wyo. 2001).

6. Definition of "uninsured motor vehicle"-

The term "uninsured motor vehicle," subject to the terms and conditions of the coverage, includes an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency. WYO. STAT. § 31-10-102. Note that a hit-and-run vehicle or phantom driver does not qualify as an uninsured vehicle unless so specified in the policy.

7. UM Subrogation-

In the event of payment to an insured under the uninsured motorist coverage required by statute and subject to the terms and conditions of the coverage, the insurer making the payments is subrogated to the rights of the insured and is entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of the insured against any person or organization legally responsible for the bodily injury or death for which payment is made. This subrogation interest also extends to proceeds recoverable from the assets of an insolvent insurer. WYO. STAT. § 31-10-104.

8. Under-insured Motorist Coverage

Where a policy for insurance provides for coverage for both uninsured and underinsured claims, the insured may not state a claim for underinsured coverage where the policy limits of the other motorist are the same as those in the automobile policy at issue. In such a case, the insurer has no obligation to provide payment under the policy. *Farmers Ins. Exch. v. Shirley*, 844 P.2d 1099, 1102 (Wyo. 1993). Wyoming does not have a statute that specifically addresses underinsured motorist coverage. Therefore, this issue is determined based on the contract of insurance between the parties.

Based on the *Shirley* case, an underinsured claim may only be stated under the following conditions:

1. The other motorist has insurance and, thus, is not an uninsured motorist; and

2. The other motorist's policy limits are less than that of the insured.

**Negligence**

Wyoming is a comparative fault state where a plaintiff may recover damages if the contributory fault of the plaintiff is not more than 50% of the total fault of all actors. WYO. STAT. § 1-1-109(b). The term "fault" includes negligence, strict products liability, breach of warranty, assumption of risk, and misuse or alteration of a product. WYO. STAT. § 1-1-109(a)(iv). Additionally, the jury may assess the fault of intentional tortfeasors whose fault contributed to the proximate cause of the plaintiff's death or injuries. *Bd. of Cnty. Comm'rs v. Bassett*, 8 P.3d 1079, 1085-86 (Wyo. 2000). The jury assesses the fault of both parties and non-party actors. The amount of damages is thereby reduced in proportion to the percentage of fault attributable to the plaintiff as well as non-party actors. Each defendant is liable only to the extent of that defendant's proportion of the total fault. In other words, this allows an empty chair defense that will reduce plaintiff's recovery against the defendants at trial. Defendants only pay for their own fair share of the total fault since there is no joint and several liability. *Id.*

1. Non-Party Actors –

There must be at least some competent proof that the non-party actors were at fault before they are placed on the verdict form. If this qualification is met, the defendants are entitled to argue the comparative fault of the non-party actor. *Pinnacle Bank v. Villa*, 100 P.3d 1287, 1294 (Wyo. 2004).

2. Immune Actors –

In Wyoming, a jury can consider and compare the fault of the State of Wyoming or any other entity, even though that entity is immune from recovery. *Pinnacle Bank v. Villa*, 100 P.3d 1287, 1293 (Wyo. 2004).

**Statutes of Limitations**

1. Real Property – An action for the recovery for the title or possession of lands can only be brought within ten (10) years after the cause of such action accrues. WYO. STAT. § 1-3-103.

2. Actions other than recovery of real property –

a. Written contracts – ten (10) years.

b. Oral contracts, either express or implied – eight (8) years.

c. Action on a foreign claim, judgment, or contract – five (5) years after the debtor establishes residence in Wyoming.

d. Trespass upon real property, recovery of personal property – four (4) years.

e. Personal injury or injury to the rights of a plaintiff not arising on contract and not otherwise enumerated in Wyoming statutes – four (4) years.

f. For relief on the ground of fraud – four (4) years.

g. Libel, slander, assault, battery, malicious prosecution, false imprisonment – one (1) year.

h. A civil action for sexual assault of a minor may be brought within eight (8) years after the minor's eighteenth (18th) birthday or within three (3) years after discovery, whichever occurs later. WYO. STAT. § 1-3-105.

i. Wrongful death – two (2) years. WYO. STAT. § 1-38-102.

**Note that Wyoming has rejected the argument that the two-year statute of limitations is unconstitutional based on the "open courts" provision of the Wyoming Constitution. Robinson v. Pacificorp, 10 P.3d 1133 (Wyo. 2000). Furthermore, the limitations period is a condition precedent to filing an action and is not tolled by the discovery rule. Id.*

j. Medical malpractice – two (2) years after the date of the alleged act except that an action may be brought not more than two (2) years after discovery of the alleged act if the claimant can establish that the alleged act was not reasonably discoverable within a two (2) year period or the claimant failed to discover the alleged act within the two (2) year period despite the exercise of due diligence. WYO. STAT. § 1-3-107(a).

**Such injuries to the rights of a minor must be brought by his 8th birthday or within two (2) years of the date of the alleged act or the discovery of the alleged act as outlined above. Id.*

**Such injury to the rights of a plaintiff suffering from a legal disability other than minority must be brought within one (1) year of the removal of the disability. Id.*

**If the alleged act, error or omission is discovered during the second (2nd) year of the two (2) year period from the date of the act, error or omission, the period for commencing a lawsuit shall be extended by six (6) months. § 1-3-107(a)(iv).*

3. Federal Statute –

All actions upon the liability created by federal statute, other than a forfeiture or penalty, for which no period of limitations is provided in such statute, shall be commenced within two (2) years after the cause of action has accrued. WYO. STAT. § 1-3-115.

**Punitive Damages**

Punitive damages are insurable in Wyoming. *Sinclair Oil Corp. v. Columbia Cas. Co.*, 682 P.2d 975, 981 (Wyo. 1984). In fact, evidence of insurance is typically admissible on the issue of punitive damages. However, evidence of financial condition including insurance may not be introduced before the jury determines that punitive damages should be awarded. In other words, the jury must first decide to award punitive damages. Then, in a second phase of the trial, the jury may hear evidence on the defendant's financial condition. *Campen v. Stone*, 635 P.2d 1121, 1132 (Wyo. 1981).

**Joint and Several liability**

The Wyoming legislature abrogated joint and several liability in 1986. WYO. STAT. § 1-1-106. There is no longer joint and several liability in tort actions. Additionally, the legislature also repealed Wyoming's contribution statute when adopting comparative fault.

**Workers' Compensation**

1. Exclusive Remedy Provisions –

Workers' Compensation is not available for everybody in Wyoming. The Act only provides tort immunity for employers of persons engaged in "extra hazardous occupations" as defined in WYO. STAT. § 27-14-108, or for those employers who elect coverage under WYO. STAT. § 27-14-108(j). The Act provides the exclusive remedy to employees injured in the course and scope of their employment against covered employers and co-employees, except where a co-employee acts to intentionally harm a fellow worker. WYO. STAT. § 27-14-104. The Wyoming Supreme Court has interpreted this provision to encompass willful and wanton misconduct, a lower standard. *Hannifan v. Am. Nat'l Bank of Cheyenne*, 185 P.3d 679, 683 (Wyo. 2008). Therefore, an intentional act exclusion may not serve to exclude coverage for these types of losses, although this question has not yet been addressed by the Wyoming Supreme Court. Employers not engaged in extra hazardous occupations, or that do not elect to participate, do not receive the same protection from liability.

It is important to note that the Wyoming Worker's Compensation statutes only apply to employers who make payments to the State fund. Wyoming does not permit an employer to purchase independent insurance for worker's compensation coverage. Likewise, an employer may not self-insure against any obligations that may arise under the Act. Nevertheless, many employers purchase private insurance to provide coverage to their non-hazardous employees. Presumably, this coverage incorporates a promise by the employer to provide coverage *as if* the worker's compensation statutes applied to those employees, but, strictly speaking, the Act does not apply to these employees.

2. Electing Coverage –

An employer may elect coverage under the Act by making the payments required by the Act to the state fund. An employer electing coverage may only elect to cover all employees. WYO. STAT. § 27-14-108(j). An employer may withdraw elected coverage if the same has been in force for two (2) years and the employer is current on all payments and contributions required under the Act. *Id.*

3. Employee Reporting Requirements –

As soon as is practical but not later than 72 hours after the general nature of the injury became apparent, an injured employee shall, in writing or by other means approved by the Department of Employment, report the occurrence and general nature of the accident or injury to the employer. In addition, the injured employee shall within ten (10) days after the injury became apparent, file an injury report with the employer and the Division in a manner and containing information prescribed by Division rule and regulation. WYO. STAT. § 27-14-502.

Failure of the injured employee to report the accident or injury to the employer and to file the injury report within ten (10) days after the injury became apparent is a presumption that the claim shall be denied. The presumption may be rebutted if the employee establishes by clear and convincing evidence a lack of prejudice to the employer or Division in investigating the injury and in monitoring medical treatment. WYO. STAT. § 27-14-502(a) – (c); see also *Jensen v. Jensen*, 24 P.3d 1133, 1136-37 (Wyo. 2001).

4. Statute of Limitations –

Payments of benefits involving an injury which is the result of a single brief occurrence shall not be made unless in addition to the proper and timely filing of the injury reports, an application or claim for benefits is filed within one (1) year after the date the injury occurred or for injuries not readily apparent, within one (1) year after discovery of the injury by the employee. WYO. STAT. § 27-14-503 (a).

The right of compensation for an injury which occurs over a substantial period of time is barred unless a claim for benefits is filed within one (1) year after a diagnosis of injury is first communicated to the employee, or within three (3) years from the date of last injurious work place exposure to the condition causing the injury, whichever occurs last. WYO. STAT. § 27-14-503 (b).

The time a particular injury becomes compensable is when a reasonable person under the circumstances would have understood the full extent and nature of the injury and that the injury was related to his or her employment. *Wesaw v. Quality Maintenance*, 19 P.3d 500, 505 (Wyo. 2001).

Wyoming also recognizes the second compensable doctrine, however. Under that doctrine, an employee who has received a compensable injury and received benefits for that injury can, regardless of the passage of time, receive more benefits for that compensable injury when it ripens into a condition requiring additional medical intervention. *Pino v. State ex rel. Workers' Safety and Compensation Division*, 996 P.2d 679, 685 (Wyo. 2000).

5. Actions against third parties –

a. General –

The Act does not prohibit an injured employee from seeking recovery in a legal action against a third party who may be liable for all or part of his injuries. Likewise, the fact that a

third party may be liable for the injuries does not preclude recovery under the Act. WYO. STAT. § 27-14-105. In such a case, the Department is subrogated to the right of recovery against the third party and must be notified of any suit, judgment, compromise, settlement, or release. *Id.* Any recovery by the State shall be reduced pro rata for attorney fees and costs proportional to the employee's liability for fees and costs. *Id.*

b. Comparative Fault and Employer Immunity –

A third party may allege that the injuries to the employee were caused by the fault of the employee or his employer. If supported by the evidence, the jury may assess and apportion fault to the employee and employer, which results in a net award to the employer. Thus, if a jury assesses 50% of the fault in a $500,000 judgment against the employer, the employee's recovery is reduced by $250,000, but the employer faces no liability based on this verdict. WYO. STAT. § 1-1-109.

c. Indemnity agreements –

The Act does not affect any contractual obligations of indemnity between the employer and third party. *Gainsco Ins. Co. v. Amoco Prod. Co.*, 53 P.3d 1051, 1069 (Wyo. 2002). Thus, the employer may be contractually obligated to indemnify a third party for any damages paid to the employee despite the protection of the Act. *Id.* at 1060. As a practical matter, the indemnity provisions must provide that the employer will indemnify the third party for the third party's own negligence for the employer to face any additional liability since the third party will typically not face any exposure due to the negligence of the employer under Wyoming's Comparative Fault Statute.

**Bad Faith**

1. Wyoming recognizes a cause of action in tort for both first-party and third-party bad faith. The tort of bad faith generally springs from the common law concept in Wyoming that every contract imposes on the parties a duty to act in good faith. *State Farm Mut. Auto. Ins. Co. v. Shrader*, 882 P.2d 813, 825 (Wyo. 1994). A breach of the duty of good faith and fair dealing entitles the prevailing party to tort damages caused by the breach, including punitive damages. *Id.* Additionally, a policy holder may recover attorney's fees and interest at 10% per year if it is determined that the insurer refuses to pay the full amount of a loss covered by the policy and that the refusal is unreasonable or without cause. WYO. STAT. § 26-15-124(c).

2. Standing – Only an insured (or his assignee) has standing to bring a bad faith action against an insurer. The Wyoming Supreme Court considered whether a third-party claimant could maintain a bad faith action based on a third-party beneficiary argument in *Herrig v. Herrig*, 844 P.2d 487 (Wyo. 1992). The *Herrig* court held that a third party claimant has no direct cause of action against an insurer for bad faith. "To extend the duty would only compromise the insurer's ability to protect its own interests and those of its insured." *Id.* at 492.

Interestingly, in *Ames v. Sundance State Bank*, the Wyoming Supreme Court stated in dicta that "[a] tort claim of 'bad faith' can be asserted only by a party to a contract or by a third party beneficiary to an enforceable contract." 850 P.2d 607, 611 (Wyo. 1993). The issue of whether or not a third party beneficiary may maintain a bad faith action was not squarely before the court as there was no enforceable judgment on which to premise such a claim. Surprisingly, the *Ames* court cited *Herrig* as well as *McCullough v. Golden Rule Ins. Co.*, 789 P.2d 855 (Wyo. 1990) and *Darlow v. Farmers Ins. Exch.,* 822 P.2d 820 (Wyo. 1991) as support for this proposition. A review of these cases reveals no support for the notion that a third-party beneficiary may bring a direct action against an insurer for

bad faith. In fact, as is demonstrated by the holding in *Herrig*, this case stands for exactly the opposite result.

3. Claims Must be Paid or Rejected in 45 Days.

All claims for benefits under a life, accident, health, property, or casualty insurance policy shall be rejected or accepted and paid by the insurer within 45 days after receipt of the claim and supporting bills. WYO. STAT. § 26-15-124(a), (b). Exceptions to the 45-day rule shall be made for accident and health insurance claims if there is any question as to the validity or amount of the claim and the question is referred to the Wyoming state medical peer review committee for adjudication. *Id.*

4. First Party Bad Faith

The elements of an action for bad faith include the following:

a. An intentional act/decision by an insurance carrier to deny or delay payment of a claim owed to its insured;

b. Absence of a reasonable basis in fact or law to support the decision/act, and

c. Knowledge or reckless disregard by the insurer of an absence of reasonable basis in fact or law to support the decision/act. *See McCullough v. Golden Rule Ins. Co.*, 789 P.2d 855 (Wyo. 1990) (adopting the reasonably debatable standard from *Anderson v. Continental Ins. Co.*, 271 N.W.2d 368 (Wis. 1978)).

5. Oppressive Claims Practices –

Additionally, Wyoming has expanded the tort of bad faith to include an action for bad faith based upon oppressive and intimidating claims practices. *See Hatch v. State Farm Fire & Cas. Co.* (Hatch I), 842 P.2d 1089 (Wyo. 1992). Hatch I involved a fire loss where the insured alleged that the insurer abused the investigation process by l) requiring detailed, cumulative inventory, 2) conducting unsupervised searches of the premises, 3) obstructing the insured's access to his own property, 4) setting unrealistic deadlines, 5) conducting lengthy and repeated interviews, 6) promising and then refusing to share investigative reports, 7) penalizing the insured for obtaining the services of an attorney, 8) demanding confidential and/or privileged information that was irrelevant to the claim. The Hatch I court held that such conduct could be actionable either as intentional infliction of emotional distress or bad faith.

6. Third Party Bad Faith

An insurer can be liable for the amount of an excess verdict if the insurer fails to settle a claim against the insured in good faith. *See Western Cas. and Sur. Co. v. Fowler*, 390 P.2d 602 (Wyo. 1964). The *Fowler* court found that an insurer has a "duty to exercise intelligence, good faith and honest and conscientious fidelity to common interests." *Id.* at 606. This language is very similar to that used in a first-party context in *Anderson v. Continental Ins. Co., supra*; "Bad faith is the absence of honest, intelligent action or consideration based upon the knowledge of the facts and circumstances upon which a decision in respect to liability is predicated." 271 N.W.2d at 377. Bad faith in a third-party context should require proof of conscious and deliberate inaction on the part of the carrier. Mere negligence should not impose liability for bad faith. The tort of bad faith provides a means to recover both compensatory and punitive damages.

The elements of a third-party bad faith action are failure to settle within the policy limit in bad faith, and entry of an excess final judgment against the insured. *Jarvis v. Farmers Ins. Exch.*, 948 P.2d 898, 902 (Wyo. 1997).

NOTE-- One Wyoming Federal District Court has held that a third-party bad faith claim may be predicated on either an excess judgment or a settlement in excess of policy limits. *Wolf v. Reliance Ins. Co., et al*, U.S.D.C. Wyo. Case No. 99-CV-40-B (Order of July 19, 1999). This same Court later granted Reliance summary judgment on the bad faith claim since it never assumed the defense of the insured. As such, the insurer did not assume control over the settlement negotiations and never had an opportunity to settle within policy limits. *Id.* (Order of January 8, 2000).

7. Accrual of Action –

Note that a cause of action will not accrue prior to entry of judgment against the insured or a settlement of the underlying claim in excess of policy limits. *Jarvis v. Farmers Ins. Exch.*, 948 P.2d 898, 902 (Wyo. 1997); *Wolf v. Reliance Ins. Co., supra.*

8. Reservation of Rights –

An insurer may defend under reservation of rights and such reservations will be effective against the later assertion of waiver. *St. Paul Fire & Marine Ins. Co. v. Albany Cnty. Sch. Dist. #1*, 763 P.2d 1255, 1256-57 (Wyo. 1988). The reservation must identify the point of dispute and refer to policy language. *Doctors' Co. v. Ins. Corp. of Am.*, 864 P.2d 1018, 1030 (1993). Furthermore, the insurer may be able to assert additional grounds for exclusion beyond the grounds cited in the reservation of rights, since waiver may not be used to expand coverage. *Security. Ins. Co. v. Wilson*, 800 F.2d 232, 234 (10th Cir. 1986). However, the reservation of rights may have the unintended consequence of permitting the insured to take control of litigation and settle without consent of the insurer, if the insurer is not prejudiced or does not incur the loss of a valid defense. *See INA v. Spangler*, 881 F. Supp. 539 (D. Wyo. 1995). In *Spangler*, the insured settled for an amount within the policy limit; however, permitting entry of judgment in excess of limits might possibly constitute prejudice as a matter of law.

9. Unfair Claims Settlement Practices –

WYO. STAT. § 26-13-124 provides:

(a) A person is considered to be engaging in an unfair method of competition and unfair and deceptive act or practice in the business of insurance if that person commits or performs with such frequency as to indicate a general business practice any of the following unfair claims settlement practices:

(i) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

(ii) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

(iii) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

(iv) Refusing to pay claims without conducting a reasonable investigation based upon all available information;

(v) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

(vi) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

(vii) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;

(viii) Attempting to settle a claim for less than the amount to which a reasonable person would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

(ix) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured;

(x) Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which the payments are being made;

(xi) Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

(xii) Delaying the investigation or payment of claims by requiring an insured, claimant or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(xiii) Failing to promptly settle claims, where liability has become reasonably clear, under one (1) portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;

(xiv) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

(xv) Denying or failing to timely pay disability insurance claims for medically necessary services, procedures or supplies as required by WYO. STAT. § 26-40-201;

(xvi) Failing to comply with the external review procedures required by WYO. STAT. § 26-40-201; or

(xvii) Failing to pay a claim after an external review organization has declared such claim to be a benefit covered under the terms of the insurance policy.

**Alcohol**

A driver is presumed to be operating under the influence if they have a blood alcohol content (BAC) of .08. WYO. STAT. § 31-5-233.

WYO. STAT. § 12-8-301 provides:

1. No person who has legally provided alcoholic liquor or malt beverage to any other person is liable for damages caused by the intoxication of the other person.

2. This section does not affect the liability of the intoxicated person for damages (he or she causes to others).

3. This section does not affect the liability of the licensee or person if the alcoholic liquor or malt beverage was sold or provided in violation of title 12 of the Wyoming statutes. *Greenwalt v. Ram Rest. Corp.*, 71 P.3d 717, 727 (Wyo. 2003).

This statute was adopted in 1986, thereby overruling the decision in *McClellan v. Tottenhoff*, 666 P.2d 408 (Wyo. 1983), which abrogated the common law principle of non-liability holding that cases involving vendors of liquor and injured third parties were to be approached in the same manner as other negligence cases.

**Intra Family & Spousal Immunity**

1. Wyoming has abrogated the common law parental (*Dellapenta v. Dellapenta*, 838 P.2d 1153, 1154 (Wyo. 1992)) and spousal immunity (*Tader v. Tader*, 737 P.2d 1065, 1069 (Wyo. 1987)). Likewise, Wyoming has abolished the common law prohibition against recovery for both parental (*Nulle v. Gillette-Campbell Cnty. Joint Powers Fire Bd.*, 797 P.2d 1171, 1176 (Wyo. 1990)) and spousal (*Weaver v. Mitchell*, 715 P.2d 1361, 1369 (Wyo. 1986)) loss of consortium.

2. Minor children have an independent claim for loss of parental consortium resulting from injuries tortiously inflicted on their parents by a third person. The independent claim of the minor should be joined with the injured parent's claim whenever feasible. *Craft v. Hermes Consolidated, Inc.*, 797 P.2d 559, 560 (Wyo. 1990).

3. Wyoming refuses to recognize a cause of action or to allow for recovery for a parent's loss of consortium, including loss of comfort and companionship of his or her child. *Nulle v. Gillette-Campbell County Joint Powers Fire Bd.,* 797 P.2d 1171, 1175 (Wyo. 1990); *Gates v. Richardson,* 719 P.2d 193, 201 (Wyo. 1996).

**Seat Belt Defense**

Wyoming does not recognize the seat belt defense. Wyoming does have a mandatory seat belt law, WYO. STAT. § 31-5-1402, but does not allow evidence of non-use to be admitted for fault. However, it can be admitted as evidence of crashworthiness. *Gardner by & Through Gardner v. Chrysler Corp.*, 89 F.3d 729, 734 (10th Cir. 1996).

**Rental Coverage**

Wyoming has no statutes specifically relating to rental coverage.

**Releases**

1. Settlement Releases –

   Typically, the terms of a release will be interpreted according to general contract law. The parties can insure such operation by inserting terms in the release stating that the recitals are contractual in nature. Such language renders a subsequent action for breach of the release contractual in nature.

Since Wyoming has abolished joint and several liability as well as contribution, the release of one tortfeasor no longer serves to release other joint tortfeasors. *See Bjork v. Chrysler Corp.*, 702 P.2d 146, 151 (Wyo. 1985). Other joint tortfeasors are only released if it is evident that this was the intent of the parties and that the plaintiff has received "full compensation" for the injuries. *Id.; see also Harris v. Grizzle*, 599 P.2d 580, 585-86 (Wyo. 1979).

2. Release of Satisfied Judgment –

Any pending action or judgment rendered in the district courts that has been settled or satisfied shall be released or dismissed in writing by the written release of the attorney of record or the person in whose favor the judgment was rendered. If neither the attorney nor the judgment creditor can be found in the county, the judgment debtor may pay the amount due upon the judgment to the Clerk of Court. Upon proper showing to the Court that the judgment has been paid in full, the Court shall order the judgment released and satisfied. WYO. STAT. § 1-16-308. Such is typically accomplished by filing a satisfaction of judgment signed by the attorneys of record for both parties.

**Wrongful Death**

A. Background

Wyoming allows actions for wrongful death that must be brought by and in the name of the personal representative of the deceased person. WYO. STAT. §§ 1-38-101 to 102. Wyoming's survival statute, WYO. STAT. § 1-4-101, does not permit survivors to recover for the pain and suffering of the deceased. *Parsons v. Roussalis*, 488 P.2d 1050, 1052 (Wyo. 1971); *Coliseum Motor Co. v. Hester*, 3 P.2d 105, 111 (Wyo. 1931). Rather, survivors are limited to damages recoverable under the wrongful death statute. *Robinson v. Pacificorp*, 10 P.3d 1133, 1150 (Wyo. 2000).

B. Parties Entitled to Sue

The action must be brought by and in the name of the decedent's wrongful death representative for the exclusive benefit of beneficiaries who have sustained damage. The Court or jury may award such damages, pecuniary and exemplary, as shall be deemed fair and just. Every person for whose benefit such action is brought may prove his respective damages, including damages for loss of probable future companionship, society and comfort. WYO. STAT. § 1-38-102. The words "every person" in the statute does not create a new class of persons. The persons for whose benefit a wrongful death action may be brought are all of those persons identified in WYO. STAT. § 2-4-101, which establishes the rules of intestate succession. *Butler v. Halstead*, 770 P.2d 698, 700 (Wyo. 1989). Therefore, any potential claimant in the lineal chain of the decedent is a claimant.

C. Recoverable Damages

1. The beneficiaries may recover an award for the following elements of damage:

   a. loss of probable future companionship, society, and comfort; WYO. STAT.§ 1-38-102(c);

   b. the amount of money that the beneficiaries might have received out of future earnings. *Coliseum Motor Co.*, *supra*;

   c. miscellaneous expenses incurred by the beneficiaries due to the death of the decedent. *Id.*

2. The beneficiaries may not recover damages for:

   a. pain and suffering of the decedent, *Robinson v. Pacificorp, supra*; *Parsons v. Roussalis*, 488 P.2d 1050, 1052 (Wyo. 1971);

   b. mental suffering of survivors, *Coliseum Motor Co.*, *supra*;

   c. the investment of money spent in birth and rearing of children. *Danculovich v. Brown*, 593 P.2d 187, 196 (Wyo. 1979).

3. Punitive damages are proper only in cases where willful and wanton misconduct cause the death. *Id.*

D. Negligent and Intentional Infliction of Emotional Distress

Damages claimed for negligent or intentional infliction of emotional distress are personal to the plaintiffs and do not result from the decedent's death alone. *R.D. v. W.H.*, 875 P.2d 26, 31 (Wyo. 1994). In IIED cases, plaintiff must prove that defendant's conduct was extreme and outrageous and that the defendant intentionally or recklessly caused plaintiff to suffer severe emotional harm. *Id.* In NIED cases, plaintiff must prove that he suffered emotional distress as a result of observing the infliction of a serious bodily injury to or the death of a relative. *Id.* at 31-32. In other words, the "essence of the tort is the shock caused by the perception of an especially horrendous event." *Gates v. Richardson*, 719 P.2d 193, 199 (Wyo. 1986).

E. Limitation Period

A wrongful death action must be commenced within two (2) years after the death of the deceased person. If the decedent's death involved medical malpractice, this limitation shall be tolled as provided in WYO. STAT. § 9-2-1518 upon receipt by the director of the medical review panel of a malpractice claim. WYO. STAT. § 1-38-102(d). Furthermore, the two (2) year limitation period in the Wrongful Death statute is a condition precedent that the discovery rule cannot toll. *Robinson v. Pacificorp*, 10 P.3d 1133, 1135 (Wyo. 2000). The limitation period found in the wrongful death statute is a condition precedent, not a statute of limitations, and the discovery rule does not apply to conditions precedent. *Corkill v. Knowles*, 955 P.2d 438, 442 (Wyo. 1998).

F. Wrongful Death Suits against Estates

WYO. STAT. § 2-7-703(a) requires claims against an estate to be filed with the court clerk within three (3) months after the date of first publication of a notice to creditors. WYO. STAT. § 2-7-712(a) then provides that the personal representative is to allow or reject the claim within thirty (30) days after expiration of the time for filing claims. When a claim is rejected and notice given as required, the holder shall ***bring*** suit in the proper court against the personal representative within thirty (30) days after the date of mailing the notice, otherwise the claim is forever barred. However, the Court has held that the holder of a wrongful death claim may bring his or her civil action and serve the personal representative before the claim has been filed and rejected in the probate estate. *Rodriguez v. Casey*, 50 P.3d 323, 331 (Wyo. 2002).

G. Court Approval of Awards/Settlements to Minors

It is generally recognized in Wyoming that the Court should approve the settlement with a minor in order to ensure that the minor will not attempt assertion of his/her claim upon reaching the age of

majority. Settlements valued over five thousand dollars ($5,000.00) shall form a conservatorship. *See* WYO. STAT. § 3-3-108.

**No Fault**

Wyoming does not have no-fault.

**Liens**

A. Medical Liens

1. The Wyoming Insurance Code provides that whenever a contract by a third-party agency provides for payment to a beneficiary under the contract for medical expenses, the beneficiary shall assign the benefits of the contract to the Wyoming Department of Health or any doctor or hospital rendering the care in an amount equal to the value of the care rendered. Notification sent by registered or certified mail to the third-party agency with a copy to the insured, shall provide authority for the payment directly by the third-party agency to the assignee. The State shall have a lien, in an amount equal to the care rendered, on the proceeds of the contracts for care rendered by any medical provider. If notice is provided by the assignee to the insurer in accordance with the provisions of WYO. STAT. § 42-4-204 (Medicaid recovery), the insurer shall be liable to the assignee for any amount payable to the assignee under the contract. WYO. STAT. § 26-15-136.

B. Welfare Liens

1. Medicaid liens –

The department is subrogated to any right of recovery and indemnification arising from an accident or occurrence resulting in expenditures by the department, which any recipient of medical assistance or any legally liable party has against an insurer for the cost of hospitalization or other health care services. An applicant for benefits is deemed to have made a subrogation assignment and assignment of claim for benefits to the department. WYO. STAT. § 42-4-204. The State Health Department is not required to file a lien statement to obtain reimbursement under the statute that provides for automatic assignment of benefits upon application for Medicaid. *Cargill v. State Dept. of Health*, 967 P.2d 999, 1002-03 (Wyo. 1998).

2. Medicare Liens

See 42 USCS § 1395. Medicare liens are governed by federal law.

C. Workers Compensation Liens - WYO. STAT. § 27-14-105.

1. If an employee who receives compensation for an injury pursuant to the Wyoming Workers Compensation statute recovers from a third-party or a co-employee in any manner including judgment, settlement, or release, the state is entitled to be reimbursed for all payments made, or to be made, to or on behalf of the employee under this Act but not to exceed one third of the total proceeds of the recovery without regard to the types of damages alleged in the third-party action. Any recovery by the state shall be reduced pro rata for attorney fees and costs in the same proportion, as the employee is liable for fees and costs. All money received by the state shall be credited to the worker's compensation account and considered in computing the employer's experience rating. § 27-14-105(a).

The plaintiff must serve the complaint on the Director of the Workers Compensation Division and the Attorney General by certified mail. Service on the Director and Attorney General is a jurisdictional requirement in order to maintain the suit. Likewise, the Director and the Attorney General must be notified in writing by certified mail of any judgment, compromise, settlement or release entered into by an employee.

Before offering settlement to an employee, a third-party or its insurer shall notify the state of the proposed settlement and give the state fifteen (15) days after receipt of such notice in which to object. If notice of the proposed settlement is not provided, the State is entitled to initiate an independent action against the third party or its insurer for all payments made to and any amount reserved for or on behalf of the employee under this Act. If there is a settlement entered into by the parties and claims against a person other than the employer, the Attorney General representing the Director shall be made a party in all such negotiations for settlement, compromise or release.

The Attorney General and the Director may authorize acceptance by the State of less than the State's claim for reimbursement for purposes of facilitating compromise and settlement. The proceeds of any judgment or settlement are encumbered by a continuing lien in favor of the State to the extent of the total amount of the State's claim for reimbursement and for all current and future benefits under this act. The lien shall remain in effect until the State is paid the amount authorized under this section. ***In addition, the person paying the settlement remains liable to the State for the State's claim unless the State through the Attorney General signs the release prior to payment of an agreed settlement.*** § 27-14-105(b).

Any attorney who fails to notify the Director and Attorney General of any settlement or fails to ensure that the State receives its share of the proceeds of any settlement or judgment shall be reported to the grievance committee of the Wyoming State Bar. § 27-14-105(d).

2. At any time before the statute of limitation bars an employee or his estate from commencing a claim for personal injury or wrongful death, and upon an unsolicited written request of the employee or estate, the Workers Compensation Department may commence an action on behalf of the employee or his estate and the state is entitled to an amount equal to all sums awarded as benefits to the employee or his estate and all anticipated future medical costs. Any excess recoveries shall be paid to the injured employee or his estate. § 27-14-105(e). Additionally, the Department or employer shall have an additional six (6) month limitation period beyond the date on which the employee or his estate is barred under the applicable statute of limitations from commencing a claim for personal injury or wrongful death, in which to commence such an action on behalf of the employee or his estate. § 27-14-105(f).

**Permissive Use**

The Wyoming Motor Vehicle Safety Responsibility Act provides that a vehicle owner's policy of liability insurance shall insure the owner and any other person using the covered motor vehicle with the express or implied permission of the insured. The pertinent section of the Act provides:

1. An owner's policy of liability insurance shall: Insure the person named and, except for persons specifically excluded pursuant to WYO. STAT. § 26-35-105, any other person, as insured, using any covered motor vehicle with the express or implied permission of the named insured against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of the motor vehicle…

WYO. STAT. § 31-9-405(b)(ii).

There are no reported cases that address or interpret the meaning of "express or implied permission" as used in this statute. In fact, there are only three cases that address the question of permissive use under an omnibus clause of insurance issued in Wyoming. The cases are *Phoenix Assurance Co. v. Latta*, 373 P.2d 146 (Wyo. 1962)[1]; *Wyoming Farm Bureau Mut. Ins. Co. v. May*, 434 P.2d 507 (Wyo. 1967)[2]; and *Curtis v. State Farm Mut. Auto. Ins. Co.*, 591 F.2d 572 (10th Cir. 1979).[3]

In *Phoenix Assurance Co. v. Latta*, 373 P.2d 146 (Wyo. 1962), the Wyoming Supreme Court stated that when determining whether there is coverage under an insurance policy's omnibus clause, and there is a question as to whether a non-insured driver's use was permitted by the insured, one of three rules is usually applied. *Id.* at 149. The three rules were:

1. The strict or conversion rule where any deviation will defeat liability under the coverage of an omnibus clause;

2. The liberal rule where permission for any purpose will be considered to extend to any and all uses; and

3. The moderate rule, or 'minor deviation' rule, where coverage is recognized when the deviation is minor only, but not when it is a major deviation. *Id.*

While Wyoming appears to have rejected the liberal rule, the Court refused to "catalogue [its] decision under any one of the foregoing rules." *Id.* The results suggest that when faced with the question of whether the use of a motor vehicle by a non-insured was done with the express or implied permission of the named insured, Wyoming courts will make a factual inquiry regarding the use and then most likely apply either the moderate or strict rule. The cases appear to suggest that the moderate rule is being applied by the Court. However, given the lack of explicit guidance on this issue, it remains unsettled law.

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[1] The Court held that an employee driving a company car with permission, also had implied permission to drive the car when he had a non-employee passenger with him, had spent the day driving on company business, and in the evening had an accident while taking the non-employee to dinner.

[2] The Court held that the vehicle's use was not permitted when the owner of a dump truck gave permission to an individual to use the truck with the caveat that only he could drive it. The accident occurred when the permittee's employee was driving the dump truck with the permittee's, but not the owner's explicit permission.

[3] The owners of the vehicle gave permission to their licensed minor children to drive the car, but not to their unlicensed 14-year-old daughter. The 14-year-old daughter took the car and allowed it to be driven by another unlicensed minor who had an accident. The Court held that it was possible that the older children could have given the 14-year-old permission to drive the vehicle, but that permission could not be extended to the non-family member who had the accident.

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