

# **TORT LAW SYNOPSIS**

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## **NUZZO & ROBERTS, L.L.C.**

L A W O F F I C E S

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## 1. COMMON LAW TORT

### A. Negligence

#### 1. General Rule

Negligence is the breach of a duty of care, or a breach of a duty arising from a contract or a statute. The test for negligence is whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that his conduct would bring about harm of the general nature suffered by the plaintiff. Connecticut does not recognize degrees of care, but courts consider circumstances existing at the time of an injury when determining whether a defendant acted reasonably. The violation of a relevant statute is negligence per se if the plaintiff is within the class of persons whom the statute was intended to protect and if the harm was of the type that the statute was intended to prevent.

To recover, a plaintiff must also prove that a defendant's negligent conduct proximately caused his damages. Proximate cause means the defendant's negligence was a substantial factor in producing the plaintiff's damages and that the harm was foreseeable.

#### 2. Premises Liability

##### a. Classifications

Connecticut recognizes the traditional classifications of persons on land: trespassers, licensees and invitees.

The possessor of land owes a duty to an adult trespasser to not intentionally injure him or her. There is generally no duty to warn trespassers of hidden dangers. However, the trespasser may be entitled to due care after his presence is actually known. A possessor of land who knows, or should know, that trespassers constantly intrude upon a limited area of land is liable for a trespasser's bodily injuries if: (1) the possessor created or maintained a condition likely to cause serious bodily injury; (2) the possessor had reason to believe that the trespasser would not discover the condition; and (3) the possessor failed to use reasonable care to warn the trespasser of the condition. Maffucci v. Royal Park Ltd., 243 Conn. 552 (1998). A landowner is liable to child trespassers if he should have anticipated that harm of a general nature of that suffered was likely to result from his conduct. Connecticut has not adopted the attractive nuisance doctrine.

A possessor of land does not have an obligation to keep his premises in a reasonably safe condition to a licensee because a licensee takes the premises as he finds it. However, a possessor owes licensees a duty to warn of hidden dangers about which the possessor knew or should have known. Morin v. Bell Court Condominium Ass'n, Inc., 223 Conn. 323 (1992). Under Connecticut's "firefighter's rule," a firefighter or police officer who enters private property in exercise of his or her duties is treated as a licensee. Therefore, a possessor of land generally owes the firefighter or police officer only the duty not to injure him "willfully or wantonly." Furstein v. Hill, 218 Conn. 610, 615 (1991). However, the "firefighter's rule" applies only to premises liability cases, and only against those in control of the property. Levandoski v. Cone, 267 Conn. 651 (2004).

Invitees are entitled to a higher standard of care. A business customer, for example, is an invitee. A possessor of land has a duty to an invitee to reasonably inspect and maintain the premises to render them reasonably safe. In addition, the possessor of land must warn an invitee of dangers that the invitee could not reasonably be expected to discover. The duty to warn, however, does not arise if an invitee already has actual knowledge of the dangerous condition. Sequenzia v. Guerrieri Masonry, Inc., 113 Conn.App. 448 (2009). As to invitees, a landowner is charged with constructive notice of any defects on the land so long as the defective condition existed for enough time that the possessor, in the exercise of reasonable care, should have detected and remedied the condition. Kurti v. Becker, 54 Conn.App. 335 (1999). Connecticut has abolished the distinction between business and social invitees by statute. C.G.S. §52-557a.

b. Non-Delegable Duty Doctrine

A possessor of land has a non-delegable duty to keep the property over which he has control in a reasonably safe condition. A possessor may contract out the performance of this duty to an independent contractor, but he cannot contract out of his legal responsibility. Although an employer is generally not liable for the acts of an independent contractor, a possessor's liability for the negligent acts of the independent contractor hired to remove snow or otherwise maintain the property is akin to vicarious liability. The contractor does not escape liability. Rather, he owes a direct duty to the plaintiff based on his contract with the possessor. However, apportionment claims by possessors against a contractor are impermissible. Smith v. Town of Greenwich, 278 Conn. 428 (2006). However, the possessor can bring an indemnity claim against the negligent contractor. Additionally, a city has a non-delegable duty to maintain its public highways, so it is the city's obligation to keep a defective road in repair, regardless of whether it contracts the work out. Machado v. City of Hartford, 292 Conn. 364 (2009).

c. Contractor Liability

The general rule in Connecticut is that contractors are not liable for injuries to a subcontractor's employee. Pelletier v. Sordoni/Skanska Construction Co., 264 Conn. 509 (2003). Also, a homeowner is not liable for injuries to an independent contractor caused by the contractor's failure to maintain a safe work environment. Mozeleski v. Thomas, 76 Conn.App. 287 (2003).

However, a plaintiff is not barred from suing a general contractor in negligence simply because he is an employee of a subcontractor. The subcontractor's employee must prove a direct claim of negligence against the general contractor or prove one of the exceptions to the general rule that general contractors are not liable. The exceptions include the following: if the work contracted for is unlawful, may cause a nuisance, is intrinsically dangerous or its nature is calculated to cause injury to others; if the general contractor reserves general control over the subcontractor and its employees, or over the manner of doing work; if in the progress of the work, the general contractor assumes control or interferes with the work; or if the general contractor is under a legal duty to see that the work is properly performed. Pelletier v. Sordoni/Skanska Construction Co., 264 Conn. 509 (2003).

A general contractor's overall responsibility for safety on the work site does not necessarily mean the GC reserves control over the subcontractor and its employees. To prove a GC retained control, a plaintiff must show he controlled the manner in which tasks were performed by the subcontractors' employees. Archambault v. Soneco/Northeastern, Inc. 287 Conn. 20 (2008).

d. Mode of Operation

The mode of operation rule is that a business invitee hurt by a dangerous condition may recover without proof that the business had actual or constructive notice of that condition if the mode of operation creates a foreseeable risk that the condition will regularly occur, and the business failed to take reasonable measures to discover and remove it. Kelly v. Stop and Shop, Inc., 281 Conn. 768 (2007).

e. Landlord and Tenant

Since control, not ownership, is the legal basis for liability, the tenant, not the landlord, is generally liable to persons injured on the rented premises. However, the landlord is liable for injuries within common areas such as hallways or parking lots. The tenant assumes the risk of any obvious defects, but the landlord is responsible for those

defects that are not discoverable upon reasonable inspection. A landlord of a store or other public place is also liable if he should have known of dangerous conditions which the tenant cannot be expected to remedy. The lease must be examined to determine the respective obligations for maintenance, indemnity and insurance.

f. Abutting Landowners

In the absence of a statute or ordinance, a landowner does not have a duty to maintain the public sidewalks and public works abutting his property. Wilson v. City of New Haven, 213 Conn. 277 (1989). Where a local ordinance so provides, an abutting landowner may be liable for injuries caused by a failure to remove ice, snow or other debris from abutting sidewalks. However, although a municipality may require abutting landowners to repair actual physical defects such as depressions or uneven sections, a municipality may not shift liability to an abutting landowner for injuries stemming from such defects. Dreher v. Joseph, 60 Conn.App. 257 (2000). Even though there is no common law duty to maintain abutting sidewalks, a landowner can still be held liable in negligence or public nuisance when his positive act creates a defective condition on a sidewalk. Abramczyk v. Abbey, 64 Conn.App. 442 (2001).

g. Ongoing Storm

In the absence of unusual circumstances, a property owner may await the end of an ice or snow storm and a reasonable time thereafter before removing ice and snow from outside walks, platforms and steps. Kraus v. Newton, 211 Conn. 191 (1989). The Connecticut Supreme Court has reasoned that it would be “inexpedient and impractical” to require a property owner to keep walkways clear of accumulations of ice or snow or to spread sand while a storm continues. However, a plaintiff may still attempt to avoid the application of this rule by claiming the storm had ended or that the plaintiff fell on “old ice.”

3. Children

In Connecticut, a child is liable for his own torts. However, the standard of care for a child is different than that for adults. Connecticut cases indicate that there is an age below which a child cannot be negligent (approximately five years old). Children are judged by the standard of behavior to be expected from a child of like age, intelligence and experience. Clennon v. Hometown Buffet, Inc., 84 Conn.App. 182 (2004).

B. Intentional Torts

1. In General

Connecticut cases follow the Restatement of Torts in defining intent to cause injury. Intent means that one desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it. Intent is not limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated as if he had in fact desired to produce the result. It is not essential that the precise injury which was done be the one intended.

Insane and mentally incapacitated adults can be civilly liable for an intentional tort. The age and mental capacity of children committing intentional torts are considerations. Polmatier v. Russ, 206 Conn. 229 (1988). With children, the focus is on whether they can form the appropriate state of mind necessary to establish the elements of the tort. Walker v. Kelly, 6 Conn. Cir. Ct. 715 (1973).

2. Assault

An assault is an attempt to hurt another with force, with the apparent ability to do so. The person on whom the attempt is made must be placed in apprehension and fear. Restatement (Second) Torts §21; Prosser and Keeton, Torts (5th Ed.) §10 at 44. Connecticut courts have allowed claims for both negligent and intentional assaults.

3. Battery

A battery is a completed assault or any unauthorized invasion of the person of another. There is no requirement that there be actual damages. Petruccelli v. Catapano, 107 Conn. 122 (1927). A battery may also be committed recklessly or wantonly. Lentine v. McAvoy, 105 Conn. 528 (1927).

4. False Imprisonment

False imprisonment is any act which, directly or indirectly, restrains the physical liberty of another for any amount of time when: the restraining is not lawful or privileged; the act is designed to confine the other person; and the other person knows of his confinement and does not consent to it. Berry v. Loiseau, 223 Conn. 786 (1992). False imprisonment may be committed intentionally, recklessly or negligently. Green v. Donroe, 186 Conn. 265 (1982). Compensable damages include attorneys' fees, lost wages, mental

anguish, humiliation, embarrassment, mortification, shame, fear and damage to reputation. Binette v. Sabo, 244 Conn. 23 (1998).

5. Intentional Spoliation of Evidence

Intentional spoliation of evidence is the intentional destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person's recovery in a civil action. In 2006, the Connecticut Supreme Court first recognized an independent cause of action for intentional spoliation of evidence. Rizzuto v. Davidson Ladders, Inc., 280 Conn. 225 (2006). Prior to this case, spoliation was recognized as a rule of evidence which allowed the trier of fact to draw an inference that the destroyed evidence would have been unfavorable to the party that destroyed it.

In order to establish intentional spoliation of evidence, five elements must be proven: (1) the defendant's knowledge of a pending or impending civil action involving the plaintiff; (2) the defendant's destruction of evidence; (3) in bad faith, that is, with intent to deprive the plaintiff of his cause of action; (4) the plaintiff's inability to establish a prima facie case without the spoliated evidence; and (5) damages. Rizzuto v. Davidson Ladders, Inc., 280 Conn. 225, 244-45 (2006).

C. Nuisance

1. In General

To establish a nuisance, four elements must be proven: (1) the condition complained of had a natural tendency to create danger and inflict injury upon person or property; (2) the danger created was a continuing one; (3) the use of the land was unreasonable or unlawful; and (4) the existence of the nuisance was the proximate cause of the plaintiff's injuries and damages. Filisko v. Bridgeport Hydraulic Co., 176 Conn. 33, 35-36 (1978).

2. Absolute v. Negligent Nuisance

Nuisance claims fall into two categories: (1) negligent nuisance; and (2) absolute (intentional) nuisance. Both negligent and absolute nuisance require the four elements above. An absolute nuisance also requires that the creator of the nuisance intended to bring about the conditions which constitute a nuisance, even though the creator may not have intended to create a nuisance. Green v. Ensign-Bickford Co., 25 Conn.App. 479 (1991). The creator of an absolute nuisance is strictly liable for the injury and damages caused by the nuisance. Comparative negligence is not a defense to an absolute nuisance, but may be a defense to negligent nuisance.

3. Public v. Private Nuisance

A private nuisance occurs when one is injured in relation to a right which he enjoys by reason of his ownership of an interest in land. Webel v. Yale Univ., 125 Conn. 515, 525 (1939). A plaintiff claiming private nuisance must show that the defendant's conduct was the proximate cause of an unreasonable interference with the plaintiff's use and enjoyment of his property. Berube v. Nagle, 81 Conn.App. 681 (2004).

A public nuisance is one that injures citizens exercising a public right who happen to come within its influence. Higgins v. Connecticut Light & Power, 129 Conn. 606 (1943). Generally, nuisance claims arising out of accidents in stores are not allowed because they are neither public nor private nuisances.

D. Strict Liability

The common law doctrine of strict liability or "liability without fault" is primarily limited to ultrahazardous activities, such as blasting. A person who uses an intrinsically dangerous means to accomplish a lawful end in such a way as will necessarily or obviously expose the person of another to the danger of probable injury, is strictly liable if such injury results even though he uses all proper care. Whitman Hotel Corp. v. Elliot & Wastrous Engineering Co., 137 Conn. 562, 565 (1951).

Whether an activity is "ultrahazardous" is determined by the following factors: (a) existence of a high degree of risk of harm; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes. Green v. Ensign-Bickford Co., 25 Conn.App. 479 (1991). All of these factors are considered, but not all must be met.

E. Defamation

Defamation is a false, unprivileged publication concerning a person that causes injury to his reputation. To establish defamation, the plaintiff must demonstrate that: (1) the defendant published a defamatory statement; (2) the defamatory statement identified the plaintiff to a third person; (3) the defamatory statement was published to a third person; and (4) the plaintiff's reputation suffered injury as a result of the statement. Cweklinsky v. Mobil Chemical Co., 267 Conn. 210, 217 (2004). The tort of defamation encompasses both the written word (libel) and the spoken word (slander). The publication requirement is met if the statement is read or heard by a person other than the plaintiff.

In Connecticut, damages in actions for libel are governed by C.G.S. §52-237. The plaintiff will recover only actual damages, unless the plaintiff can prove either (1) malice in fact (any improper or unjustifiable motive), or (2) that the plaintiff requested a retraction and the defendant failed to timely retract. If either is proven, the plaintiff may be entitled to punitive damages.

A statement is libel per se or slander per se when it charges certain crimes or improper conduct, or lack of skill or integrity in one's profession or business. Proto v. Bridgeport Herald Corp., 136 Conn. 557 (1950). Essentially, to be actionable per se, a defamatory statement must have an element of personal disgrace to it. When defamatory words are actionable per se, injury to reputation is presumed and need not be pleaded or proved. Terry v. Hubbell, 22 Conn. Supp. 248 (1961).

Truth is an absolute defense to defamation. Additionally, there is no liability for defamation if the statement is protected by an absolute or qualified (conditional) privilege. For example, there is an absolute privilege for statements made during a judicial or quasi-judicial proceeding. This encompasses statements made to administrative agencies and extends to statements made in furtherance of a judicial or quasi-judicial proceeding. Petyan v. Ellis, 200 Conn. 243 (1986). An investigation by a police department's internal affairs division is a quasi-judicial proceeding, thereby affording absolute immunity to a citizen complaint giving rise to the investigation. Craig v. Stafford Construction Inc., 271 Conn. 78 (2004). Qualified privileges exist for opinions that are fair comment on matters of public interest, statements made in good faith in the course of one's official duties, and statements made in good faith under an honest belief that they are true.

If the plaintiff is a public figure, he or she must prove that the defendant acted with actual malice in making the defamatory statement. New York Times v. Sullivan, 376 U.S. 265 (1964); Kelley v. Bonney, 221 Conn. 549 (1992). Actual malice means knowledge that the statement was false or reckless disregard of whether or not it was false.

## **2. NEGLIGENCE STATUTES**

### **A. Negligence Actions**

C.G.S. §52-572h changed the common law rule of joint and several liability such that a defendant is only liable for that portion of damages for which he is responsible. This statute applies only to negligence actions involving personal injury, wrongful death or property damage, not to product liability claims, intentional torts or contract claims.

1. Apportionment

In negligence actions, tortfeasors are responsible only for their proportionate share of the liability. That is, if the damages are determined to be proximately caused by more than one party, then each party is liable to the plaintiff only for the percentage of negligence attributed to him or her. The determination of the percentage of liability is only made between parties to the action and released or settled parties. Thus, defense counsel is obligated to bring in all other potentially liable parties to obtain an apportionment of damages. Otherwise, a defendant who fails to bring in all liable parties may pay a disproportionate share of the damages. For example, assume A and B are sued but tortfeasor C is not. If A is 30% liable, B is 20% liable and C is 50% liable, but C is never brought into the action, then A and B would pay 60% and 40%. If C is brought in, however, then A and B would only pay their fair share, 30% and 20%, respectively.

2. Bringing in Additional Parties

C.G.S. §52-102b provides the method for bringing in additional parties who may be liable for a proportionate share of the plaintiff's damages. Defendants have 120 days from the return date of the original complaint within which to bring in other defendants. The 120 day time limit is mandatory and cannot be extended by motion. However, the Connecticut Supreme Court has held that this time limit can be excused for equitable considerations including waiver and consent of the parties and where the legal basis for apportioning liability arose only after the 120 day limit had already expired. Pedro v. Miller, 281 Conn. 112 (2007).

The plaintiff has 60 days from the return date of the apportionment complaint to assert a direct claim against the new defendant. The plaintiff can assert the direct claim against the new defendant within 60 days even if the statute of limitations has expired. Some superior courts have held that if a plaintiff files a complaint that does not contain a negligence claim, and then later amends his complaint to assert negligence, the defendant has 120 days from the amended complaint to bring in other defendants.

3. When Apportionment is Not Allowed

Apportionment is only available in negligence actions involving personal injury, wrongful death or property damage. However, if a party is immune from liability, such as a plaintiff's employer, which cannot be sued due to the exclusivity provision of the Workers' Compensation Act, then that party cannot be brought in for apportionment. Other immune parties include parents of a minor child, municipalities and the state. In addition, as the Supreme Court implied in Gazo v. City of Stamford, 255 Conn. 245 (2001), a property

owner may not seek apportionment against a snow removal contractor, managing agent or other party hired to work on the property. The reasoning is that the owner's duty to keep the premises reasonably safe for invitees or the public is non-delegable. Thus, most apportionment complaints brought against snow removal contractors and other parties hired to perform work on the property are stricken.

4. Damages

C.G.S. §52-572h defines "economic damages" as past and future medical bills, lost wages and loss of earning capacity. "Non-economic damages" include physical and mental pain and suffering and limitations. The trier of fact determines the amount of economic and non-economic damages, the percentage of fault attributable to each party, including settled and released parties, and the percentage of comparative negligence attributable to the plaintiff.

5. Contributory and Comparative Negligence

A plaintiff's claim is barred if he is greater than 50% negligent. If he is 50% negligent or less, his recovery is reduced by his percentage of negligence.

6. Insolvency

In some cases involving multiple defendants, situations arise where one of the defendants is insolvent, and therefore, the award against that defendant is uncollectible. If one or more of the parties is insolvent (often the case if they are uninsured), C.G.S. §52-572h(g) provides a specific remedy for the plaintiff to recover the uncollectible amount. The solvent parties must pay all economic damages and a part of the uncollectible non-economic damages. Assume that a verdict is \$300,000, of which \$100,000 is economic damages. Defendant A is uninsured with no assets and is 80% negligent. Defendant B is well-insured and 20% negligent. B pays 20% of the entire verdict, or \$60,000 (\$20,000 = economic damages; \$40,000 = non-economic damages). Since A is insolvent, B must make up the remainder of the economic damages, for an additional \$80,000. In addition, B must pay his share (20%) of the remaining \$160,000 of non-economic damages, or an extra \$32,000. Thus, B will pay most of the verdict, for a total of \$172,000.

To take advantage of the statute's reallocation provision, a plaintiff must make a good faith attempt to collect the judgment against each party. This would presumably include garnishing wages and attaching real estate, although the statute does not specify what efforts must be taken. If he is unsuccessful, then he can file a motion within one year of the judgment to seek reallocation from the solvent parties for their proportionate shares.

7. Miscellaneous Provisions

C.G.S. §52-572h expressly abolished the doctrines of “last clear chance” and “assumption of risk”.

B. Collateral Source - Connecticut General Statutes §§52-225a - 52-225c

To prevent plaintiffs from obtaining a “double recovery,” verdicts are reduced by collateral source payments. Payments made by most health care providers such as group health plans or Blue Cross/Blue Shield are collateral sources and get deducted from a verdict. However, the deduction is reduced by all sums paid to procure the health insurance (i.e., premiums) by the plaintiff, his employer or any other source. When premiums are higher than the collateral source payments, there is no deduction from the verdict.

In Jones v. Kramer, 267 Conn. 336 (2004) and Pikulski v. Hospital Health Center, 269 Conn. 1 (2004), the Court held that only payments which correspond to specific items of damages in the verdict may be reduced. Thus, where interrogatories are not posed to the jury allowing it to determine how each aspect of the award is broken down (e.g., medical payments, lost wages, earning capacity), no collateral source deduction is allowed.

Plaintiffs are entitled to a reduction of the med-pay collateral source setoff only for the premiums paid to secure the med-pay portion of the policy, not the entire automobile insurance premiums. Jones v. Riley, 263 Conn. 93 (2003). Additionally, when the plaintiff is awarded less than the economic damages claimed at trial, the defendant’s credit for collateral source benefits is limited to the amount awarded for economic damages.

Workers’ compensation, state public assistance and Medicare/Medicaid payments do not get deducted from the verdict, since those providers have statutory liens on recoveries. It was the accepted rule that payments made by self-funded plans covered by E.R.I.S.A. (a federal statute) must be reimbursed; and, therefore, do not get deducted from a verdict. However, the U.S. Supreme Court in Great-West Life and Annuity v. Knudson, 534 U.S. 204 (2002), held that E.R.I.S.A. plans may not have a right of reimbursement, depending on the language of the plan, particularly when the court approves the settlement, and funds are paid to a special trust set up for the plaintiff. Thus, the language of insurance policies that plaintiffs claim are E.R.I.S.A., should be examined.

The Connecticut Supreme Court held that Social Security disability payments are not deductible as collateral source payments pursuant to C.G.S. §52-225b. Schroeder v. Triangulum Associates, 259 Conn. 325 (2002). Schroeder also implies that disability paid

by private insurance is not deductible as a collateral source payment. Likewise, there are no collateral source deductions for amounts received by a claimant as a settlement.

Those portions of medical bills which are voluntarily forgiven by a medical provider are not collateral sources. Hassett v. New Haven, 91 Conn.App. 245 (2005). However, those portions forgiven pursuant to a contractual agreement between the insurer and the health care provider are likely considered collateral source deductions. Many Superior Courts, relying on Hassett, have held that those portions forgiven pursuant to contract **are** collateral source deductions.

C. Medicare Set Aside Trusts

Medicare has always required that Medicare's interests be considered in settlements of personal injury claims. However, other than in workers' compensation claims, the government never enforced this requirement. Now, reporting of liability claims is required. Accordingly, settlements should contemplate Medicare Set-Aside Trusts (MSAs) if the plaintiff is on Medicare, is elderly, or is receiving or is likely to receive Social Security Disability in the near future. Since insurers and counsel may be liable for the failure to set up MSAs, due consideration must be given in each settlement to creating one.

**3. PRODUCT LIABILITY ACT**

A. Product Liability in General

Connecticut's Product Liability Act, C.G.S. §52-572m *et. seq.* (the "Act") provides the exclusive remedy for claims against product sellers for defective products. A product liability claim may be brought against the product seller for personal injury, death or property damage, caused by the manufacture, design, assembly, installation, testing, warning, marketing or labeling of any product or any component part. C.G.S. §52-572m includes manufacturers, wholesalers, distributors and retailers in its definition of "product seller."

The exclusive remedy provision of the Act does not bar a CUTPA claim for financial injury (See, Section 5D). Gerrity v. R.J. Reynolds Tobacco Co., 263 Conn. 120 (2003). However, this limited exception applies only to claims that are in addition to claims for "personal injury, death or property damage" caused by a defective product, and which separate claims and remedies cannot reasonably be construed as traditionally falling under the Act.

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The Act includes the following theories of liability: strict liability, negligence, breach of warranty, failure to warn and misrepresentation or nondisclosure. All of these theories of liability are subsumed by the Act, and may not be pled in separate counts. Daily v. New Britain Machine Co., 200 Conn. 562 (1986). Thus, a plaintiff in a product liability action should only plead one cause of action: a violation of the Act.

To be successful in a product liability action, a plaintiff must plead and prove the following elements:

1. the defendant was in the business of selling the product;
2. the product was sold in a defective condition, unreasonably dangerous to the consumer or user;
3. the defect caused the injury; and
4. the product was expected to and did reach the consumer without substantial change in condition.

The Act does not set forth the standards for a design defect, but does set forth the factors a jury may consider in determining whether instructions or warnings were required and, if required, whether they were adequate. Whether a product is defective in design turns on the expectations of an ordinary consumer unless it is a complex product. Complex products use a modified consumer expectation test with risk-utility balancing and consideration of many factors to determine whether there is a design defect.

The Connecticut Supreme Court decided that the standard for the admissibility of scientific evidence mirrors the standard set forth by the United States Supreme Court in Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 576 (1993).

The Act does not apply to commercial loss (profits) caused by a defective product as between commercial parties. The Uniform Commercial Code governs recovery for commercial losses in those situations. However, a product claim is the proper remedy to recover costs incurred by a commercial party in repairing or replacing a defective product or in repairing property damage caused by a defective product (as opposed to lost profits, loss of commercial opportunities or damage to business reputation). Sylvan R. Shemitz Designs, Inc. v. Newark Corp., 291 Conn. 224 (2009).

The Act also does not apply to providers of services (as opposed to product sellers) and repairers of products after the sale of the product.

B. Defenses

1. Statute of limitations: A product liability claim must be brought within three years from the discovery of an injury (runs from discovery of actionable harm - see Statute of Limitations, infra, section 6), but no later than ten years from the time the defendant parted with possession or control of the product. The ten-year period does not apply if the useful safe life of the product is longer than ten years and the plaintiff has not received workers' compensation benefits. This period may be tolled if the "wrong" constitutes a continuing course of conduct or a continuing duty to warn. The statute of repose for asbestos-related injuries is 30 years.

2. Misuse of the product.

3. Knowingly using the product in a defective condition.

4. Comparative responsibility: The Product Liability Act has pure comparative responsibility. Damages are reduced based on the responsibility attributed to the claimant. Comparative responsibility will not bar recovery (even if more than 50%), but will diminish a verdict by any percentage of comparative fault assessed against the plaintiff.

5. Product alteration or modification: Applies only to alterations or modifications made by someone not a party to the action and, to be a valid defense, must break the chain of causation.

6. State of the art: It applies to both failure to warn and design defect claims.

7. Contract specifications: Applies to a manufacturer who receives design specifications from a product seller, manufactures the product to those specifications, delivers the product to the seller from whom it received the specifications, and could not have reasonably foreseen that the product would be unreasonably dangerous to the ultimate consumer. Rogers v. Budget Truck Rental, L.L.C., 2008 WL 4926698 (Pittman, J., Oct. 30, 2008) (This was a case of first impression by the Connecticut Superior Court).

8. Preemption: Various federal acts preempt certain state law claims falling within the Act. Many claims based on inadequate warnings and instructions are preempted if a federal act covers the adequacy of warnings or instructions in that area (e.g., Child Safety Protection Act, 15 U.S.C. § 1278 in the area of toys; the Medical Device Amendments of 1976, 21 U.S.C. § 360c in the area of medical devices). Although warnings and instruction claims may be preempted by federal law, plaintiffs are usually still permitted

to pursue a defective product claim. Preemption defenses are waived if not alleged as special defenses. Mullin v. Guidant Corp., 114 Conn.App. 279, 283 (2009). Thus, it is imperative to analyze the availability of preemption defenses early on in defending claims brought under the Act.

9. Unavoidably unsafe product: A manufacturer of an unavoidably unsafe product can avoid strict liability if the product is properly prepared and accompanied by proper directions and warning. Vitanza v. Upjohn Co., 257 Conn. 365 (2001) (Connecticut Supreme Court adopted comment (k) to § 402A of the Restatement of Torts). Typical unavoidably unsafe products are prescription drugs, vaccines, experimental drugs and medical devices.

10. Learned intermediary doctrine: This doctrine, which is an exception to the “proper directions and warning” requirement of the unavoidably safe product defense, provides that adequate warnings to prescribing physicians obviate the need for manufacturers of prescription products to warn ultimate consumers directly. “The doctrine is based on the principle that prescribing physicians act as learned intermediaries between a manufacturer and consumer and, therefore, stand in the best position to evaluate a patient’s needs and assess [the] risks and benefits of a particular course of treatment.” Breen v. Synthes-Stratec, Inc., 108 Conn.App. 105, 111-12 (2008).

### C. Damages

1. Compensatory damages can be recovered for personal injury, wrongful death, and damage to property and the product itself. (This does not include commercial loss between commercial parties - see above.)

2. Attorneys’ fees are only recoverable by the prevailing party if the claim or defense is frivolous.

3. Punitive damages may be awarded under C.G.S. §52-240b if the damages were the result of the product seller’s reckless disregard for safety. If the jury determines that punitive damages should be awarded, the court determines the amount of such damages, not to exceed twice the compensatory damages. Most courts have found that punitive damages are not recoverable in actions for only property damage.

D. Apportionment, Contribution and Indemnification

1. The trier of fact assigns the percentage of responsibility allocated to each party, including the claimant. The claimant's damages are then reduced by his comparative negligence.

2. Judgment is entered against the liable parties based on common law joint and several liability of joint tortfeasors.

3. Contribution claims may be brought in the original action or in a subsequent action.

4. Common law indemnification is not permitted if all potential defendants are parties to the original lawsuit. Kyrtatas v. Stop & Shop, 205 Conn. 694 (1988). However, common law indemnification is allowed when third parties are impleaded. Malerba v. Cessna Aircraft Co., 210 Conn. 189 (1989). Contractual indemnification is still allowed.

5. An employer who intervenes to recover workers' compensation benefits is not a "Party" against which proportional liability may be assigned under the Act. Barry v. Quality Steel Products, Inc., 280 Conn. 1 (2006).

**4. WRONGFUL DEATH STATUTE**

A. Generally

C.G.S. §52-555 creates a statutory right of action for injuries resulting in death. The statute provides the exclusive basis for an action that includes as an element of damages a person's death or its consequences. Lynn v. Haybuster Mfg., 226 Conn. 282 (1993).

B. Limitation on Action

A wrongful death action must be brought within two years from the date of death, but not more than five years from the date of the act or omission complained of.

Pursuant to C.G.S. §52-190a(b), however, a ninety-day extension to the two-year limit applies to actions involving wrongful death caused by a healthcare provider. See, Section 6D.

C. Persons Who May Bring a §52-555 Action

A wrongful death action may only be brought by the administrator or the executor of the deceased's estate, not by his dependents, parents or spouse. Keogh v. City of Bridgeport, 187 Conn. 53 (1982); Isaac v. Mt. Sinai Hosp., 3 Conn.App. 598 (1985).

The right of action belongs to the decedent alone. Sanderson v. Steve Snyder Enterprises, 196 Conn. 134 (1985). A wrongful death plaintiff stands in the shoes of the decedent and can recover only what the decedent could have recovered if his injuries had not proved fatal.

D. Damages

Recovery is measured by the value to the decedent of his life, rather than by monetary loss to his next of kin or estate. Perry v. Allegheny Airlines, 489 F.2d 1349 (2<sup>nd</sup> Cir. 1974). The focus is upon the value of the decedent's life from his viewpoint, not from his family's. Ladd v. Douglas Trucking Co., 203 Conn. 187 (1987).

"Just damages" for wrongful death include: (1) the value of the decedent's lost earning capacity less deductions necessary for living expenses and taking into consideration that a present cash payment will be made; (2) compensation for destruction of capacity to carry on and enjoy life's activities in a way the decedent would have done had he lived; and (3) compensation for conscious pain and suffering. Sanderson v. Steve Snyder Enterprises, 196 Conn. 134 (1985).

The wrongful death cause of action is a continuance of what the decedent could have asserted had he lived. Thus, double and treble damages, which the decedent might have recovered if he survived, are a proper element of damages. Gionfriddo v. Avis Rent A Car System, Inc., 192 Conn. 280 (1984).

**5. OTHER STATUTES**

A. Municipal Liability

Issues concerning the liability of municipalities and their employees are governed by C.G.S. §52-557n. Generally, municipalities are liable for the negligence of their employees while performing ministerial acts (acts which do not require the exercise of discretion), including functions for which the town derives profit. Municipalities are also liable for the creation of nuisances. Municipalities are not liable for acts which constitute fraud or willful misconduct, or acts which require the exercise of judgment or discretion as an official

function of the authority granted by law. However, there are exceptions, the most common of which is the “imminent harm” exception. To satisfy this exception, an individual must show: (i) there was “imminent harm; (ii) the harm was to an “identifiable victim”; and (iii) the public official had “awareness” of the likely injury to the subject victim. Doe v. Petersen, 279 Conn. 607 (2006).

The statute also lists certain acts and conditions for which the municipality is not liable, including the condition of natural land, temporary roads or bridges due to weather, the condition of an unpaved road or footpath leading to a recreation area, the initiation of judicial or administrative proceedings, the issuance or denial of permits or licenses and failure to make inspections.

Municipalities are liable for defects in roads (including sidewalks) only if the defect was the sole proximate cause of the injuries, and the municipality knew or should have known of the specific defect and failed to remedy the defect within a reasonable period of time. C.G.S. §13a-149. Municipalities may also be liable for defects near the roadway if it is in an area where travelers are likely to traverse. The injured party must serve a detailed notice of the occurrence and injury on the town clerk within 90 days of the injury. The defective highway statute is not a negligence statute. Rather, liability arises from the town’s breach of its statutory duty under §13a-149. Lukas v. City of New Haven, 184 Conn. 205 (1987).

To recover under § 13a-149, a plaintiff must prove (1) that the highway was defective as claimed; (2) that the defendant actually knew of the particular defect or that, in the exercise of its supervision of highways in the city, it should have known of that defect; (3) that the defendant, having actual or constructive knowledge of this defect, failed to remedy it having had reasonable time, under all of the circumstances, to do so; and (4) that the defect must have been the sole proximate cause of the injuries and damages claimed, which means the plaintiff must prove the absence of contributory negligence. DeMatteo v. New Haven, 90 Conn.App. 305, 308 (2005), *citing*, Prato v. New Haven, 246 Conn. 638, 642 (1998).

A town must indemnify its employees for negligent acts committed while acting within the scope of their employment and performance of their duties. C.G.S. §7-465. Notice must be given within six months of the injury. C.G.S. §7-101a has a similar indemnity provision, but also requires towns to indemnify employees for claims of willful or malicious acts made in the discharge of their duties. However, if the employee is held liable, the town does not have to pay the judgment, and the employee must reimburse the town for legal fees.

B. Dog Bite Statute

C.G.S. §22-357 imposes strict liability on the owner or keeper of any dog that causes property damage or personal injuries. Keeper means anyone, other than the owner, harboring or possessing the dog. C.G.S. §22-327(6). A person is a harbinger of a dog when he affords lodging, shelter, and refuge to it and undertakes to control its actions. In general, a person cannot be a keeper unless he gives the dog shelter or refuge or exercises some degree of dominion and control over the dog. Falbey v. Zarembski, 221 Conn. 14 (1992). Thus, a landlord is not a keeper merely because he or she allows a tenant to own a dog and to keep it on the rental premises. Buturla v. St. Onge, 9 Conn.App. 495 (1987); See also Auster v. Norwalk United Methodist Church, 94 Conn.App. 617 (2006). A person determined to be a keeper does not have a cause of action under the statute against the owner of the dog, because a keeper is not considered to be within the class of people protected by the statute. Murphy v. Buonato, 241 Conn. 319 (1997).

If the injured person was trespassing, committing a tort or teasing the dog, he or she may not recover under the statute. Children under the age of seven are presumed to lack the mental capacity to appreciate the concepts of trespassing or teasing. Therefore, if the plaintiff is under seven at the time of the injury, the defense does not apply.

An owner or keeper of a dog can also be liable in common law negligence for injuries caused by a dog. Such a claim requires that the plaintiff prove the dog had vicious propensities and that the landlord knew or should have known of such propensities. Connecticut courts are split as to whether a landowner can be held liable under a common law premises liability theory if the landowner does not exercise control over the dog.

C. Dram Shop Act

1. Statutory Liability

C.G.S. §30-102, known as the Dram Shop Act, creates a cause of action for injuries resulting from the sale of liquor to an intoxicated person. The Act imposes strict liability upon the seller, without the necessity of proving negligence. The plaintiff must prove only that the defendant sold alcohol to an already intoxicated person who, in consequence of such intoxication, caused injury to another. Sanders v. Officers' Club of Connecticut, Inc., 196 Conn. 341 (1985). No causal connection between the sale and the injury is required; nor is proof of a particular blood alcohol level. Coble v. Maloney, 34 Conn.App. 655 (1994). Since this is a strict liability statute, contributory negligence is not a valid defense. Belanger v. Village Pub I, 26 Conn.App. 509 (1992). The injured person must give written notice to the seller of the alcohol within 120 days, or in death cases, within 180 days, and

must file suit within a year. The Act provides a cap of \$250,000 per person and in the aggregate. The injured person shall have no cause of action against a seller for the negligent sale of alcohol to someone over twenty-one.

2. Negligent Service

The Connecticut Supreme Court in Craig v. Driscoll, 262 Conn. 312 (2003), held that a plaintiff may assert a cause of action for negligence against a purveyor who negligently provides alcoholic beverages to an already intoxicated patron or a patron known to him to be an alcoholic, for subsequent injuries caused by the intoxicated person. In June of 2003, in response to Craig, the Dram Shop Act was amended to prohibit negligence claims based on service of alcohol to persons over the age of twenty-one. The courts have held that the amendment is not retroactive and therefore does not relieve a seller of liability for injuries incurred prior to the effective date of the act, June 3, 2003.

Connecticut recognizes a common law negligence action for serving alcohol to minors whom the defendant should have known were minors. Ely v. Murphy, 207 Conn. 88 (1988). The social host or other provider of the alcohol is not strictly liable, and the plaintiff must prove negligence. Some superior courts have suggested that a social host may be sued for serving alcohol to any guest.

3. Wanton Conduct

Connecticut recognizes a cause of action for injuries resulting from the wanton and reckless sale or service of alcohol. Kowal v. Hofher, 181 Conn. 355 (1980). The court concluded that one should be required to bear a greater responsibility for consequences from a reckless or wanton act, as opposed to mere negligence.

4. Negligent Supervision

Connecticut courts allow a cause of action for negligent supervision of bar patrons. “These claims usually involve too many patrons in a bar without sufficient staff or bouncers, or unruly behavior which is not addressed after reasonable notice. Negligent supervision claims trigger general liability policies, not dram shop policies.

D. Connecticut Unfair Trade Practices Act (“CUTPA”)

1. Elements of a Claim

The Connecticut Unfair Trade Practices Act (“CUTPA”), codified as C.G.S. §42-110a et seq., is designed to protect consumers from unfair, unscrupulous or oppressive business practices. The cases fall into two primary categories: (1) per se violations of CUTPA, and (2) activities or trade practices which, while not per se violations, are proved to be unfair, deceptive or unscrupulous. “Per se” violations of CUTPA are those acts or practices which automatically constitute a violation. For example, violations of the Home Improvement Act, C.G.S. §20-418 et seq., the Home Solicitation Sales Act, C.G.S. §42-134 et seq., and the Health Club Act, C.G.S. §21a-216, are per se violations of CUTPA.

For unfair, deceptive or unscrupulous practices, courts consider the following factors: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, common law, or otherwise; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, competitors or other businessmen. Fink v. Golenbeck, 238 Conn. 183, 215 (1996). All three criteria do **not** need to be satisfied to support a finding of unfairness.

2. Damages

CUTPA allows the successful claimant to recover actual damages, attorneys’ fees and costs, and punitive damages. Although the common law limits punitive damages to costs and attorneys’ fees, punitive damages under CUTPA are in addition to attorneys’ fees and costs.

E. Recreational Use Statutes

C.G.S. §52-557f-j comprises the Connecticut Recreational Land Use Act. The Act shields a landowner from liability where he makes any part of land available to the public without charge for recreational purposes. Such a landowner owes no duty of care to keep that land safe for the use by others for recreational purposes. Likewise, the landowner does not owe a duty to warn of dangerous conditions on the land.

The Act does not apply to municipalities. Conway v. Wilton, 238 Conn. 653 (1996). There is no shield from liability where the landowner has charged a fee for the use of the land, or where he has willfully or maliciously failed to guard or warn against a dangerous condition, use or structure on the land. C.G.S. § 52-557h.

Landowners are also not liable for injuries sustained by anyone using an all terrain vehicle, motorcycle or motorbike, even if the landowner gives permission for these vehicles to be used on the land, unless a fee is charged or the injury was caused by the willful or malicious conduct of the landowner. C.G.S. § 52-557j.

## **6. STATUTES OF LIMITATION**

### **A. Negligence and Medical Malpractice**

Any action claiming negligence, reckless or wanton conduct, or injuries caused by medical malpractice must be brought within two years from when the injury is sustained or discovered, or should have been discovered. However, no such action may be brought more than three years from the act or omission, regardless of when discovery occurs. C.G.S. §52-584. Thus, if the act or omission was more than three years before suit is brought, the lawsuit is time-barred even if the injury was discovered within two years of the lawsuit. The Connecticut Supreme Court has held that the two year period does not begin to run until the injured person knows, or should have known, the “identity” of the negligent party. Tarnowsky v. Socci, 271 Conn. 284 (2004). However, even if the plaintiff learns of the identity of the tortfeasor more than two years after the injury, the lawsuit must still be filed within three years from the date of the incident, or it will be time-barred.

### **B. Other Torts**

The statute of limitations for most other torts is three years pursuant to C.G.S. §52-577. “The three-year limitation of §52-577 is applicable to all actions founded upon a tort which do not fall within those causes of action carved out of §52-577 and enumerated in §52-584 or another section.” Rosato v. Marcado, 82 Conn.App 396, 407 (2004). This includes torts other than negligence, such as intentional torts, including fraud or misrepresentation, and torts based on statutes, such as the dog bite statute. Krondes v. Norwalk Savings Society, 53 Conn.App. 102, 113 (1999). However, there is a split of authority as to whether the two or three year statute of limitations applies to claims of negligent misrepresentation.

### **C. Contract**

An action on any written contract must be brought within 6 years from the date of breach. C.G.S. § 52-576(a). An action based on an oral contract must be brought within three years from the date of breach. C.G.S. § 52-581(a). However, if one party has performed its obligations under the contract, § 52-576(a) applies and the claim must be brought within six years.

D. Wrongful Death

Any action brought by an executor or an administrator for injuries resulting in death must be brought within two years from the date of death, but no more than five years from the act or omission. C.G.S. § 52-555.

E. Product Liability

A product liability action must be brought within three years from the date when the injury is first sustained or discovered or should have been discovered. C.G.S. §52-577a. However, no such action may be brought later than ten years from when the seller last parted with possession or control of the product, if the plaintiff received workers' compensation. The ten-year limitation does not apply if the plaintiff did not receive workers' compensation. The ten-year limitation may be extended pursuant to a written, express warranty.

A product seller may implead any third party who may be liable for all or part of the claimant's claim within one year of the date on which the original complaint was returned to court.

F. Highway Defect

A plaintiff has two years from the injury to sue, but must give the municipality detailed notice within 90 days of the incident. C.G.S. §13a-149.

G. Indemnity

An action for indemnification must be brought within three years from the date of settlement or judgment of the underlying action. C.G.S. §52-598a.

H. Apportionment

An apportionment complaint must be brought within 120 days of the return date of the underlying action. The plaintiff then has 60 days to assert direct claims against an apportionment defendant. C.G.S. §52-102b.

I. Miscellaneous

In computing the time limits described above, the time during which the defendant is outside the state is excluded from the computation, except the time shall not exceed seven

years. C.G.S. §52-590. If any action timely brought fails due to an accident or procedural defect (insufficient service or return, dismissal for lack of jurisdiction, death of a party, or any matter of form resulting in a nonsuit), the plaintiff may bring a new action within one year after the determination of the original action. C.G.S. §52-592(a).

Tort actions by minors are not tolled to the age of majority, unless the claim is one involving sexual assault. C.G.S. §52-577d.

No right of action is lost due to lapse of time if the writ, summons and complaint are personally delivered to the marshal before the statute of limitations expires and the state marshal serves process within thirty days of receipt of the writ, summons and complaint. C.G.S. §52-593a. However, the marshal must indicate on the return the date process was received. Some courts have permitted marshals to submit affidavits attesting to when process was received.

## **7. MISCELLANEOUS LIABILITY ISSUES**

### **A. Loss of Consortium**

#### **1. Loss of Spousal Consortium**

Connecticut recognizes a claim by a spouse for loss of consortium. Hopson v. St. Mary's Hospital, 176 Conn. 485 (1979). In general, a loss of consortium claim is a claim made by the spouse for loss of affection, society, companionship and/or sexual relations as a result of the other spouse's injury. The loss of consortium claim is allowed in cases of negligence, product liability and wrongful death. Lynn v. Haybuster Mfg., 226 Conn. 282 (1993).

The loss of consortium claim, although a separate cause of action, is not truly independent. Rather, it is derivative and inextricably attached to the claim of the injured spouse. Consequently, the spouse's claim is reduced proportionately or eliminated based on the injured party's negligence. Furthermore, a consortium claim does not trigger a separate per person limit of liability. The couple must be married at the time of the accident for the spouse to recover. Gurliacci v. Mayer, 218 Conn. 531 (1991).

The Connecticut Appellate Court held that a loss of consortium claim may be deemed an action for "personal injury" under Conn. Gen. Stat. §14-295, which permits the trier of fact to award double and/or treble damages in the event of reckless conduct while operating a motor vehicle. Bebry v. Zanauskas, 81 Conn.App. 586 (2004). Accordingly,

the trier of fact may award double and/or treble damages on a loss of consortium claim where the defendant violates §14-295.

2. Loss of Parental Consortium

Connecticut does not recognize a cause of action for loss of consortium between a parent and minor child. Mendillo v. Board of Education of the Town of East Haddam, 246 Conn. 456 (1998). However, many superior courts have distinguished Mendillo and have allowed claims when the parent has died or has been seriously injured.

B. Emotional Distress

1. Victim Emotional Distress

Connecticut recognizes both intentional and negligent infliction of emotional distress. Claims for emotional distress and mental anguish do not require impact between the offending instrumentality and the victim, or a physical injury. Orlo v. Connecticut Co., 128 Conn. 231 (1941). The plaintiff can rely exclusively on subjective complaints. Recovery is available in a variety of situations including “near misses” where the plaintiff was in the zone of danger. Claims will also arise from some offensive or tortious conduct, such as assault or defamation.

The standard for negligent infliction of emotional distress is that the defendant should have realized his conduct involved an unreasonable risk of causing emotional distress and that distress might result in illness or bodily injury. Montinieri v. Southern New England Tel. Co., 175 Conn. 337 (1978). Additionally, in employment cases, the actions giving rise to the claim must occur during the employee’s termination. Perodeau v. Hartford, 259 Conn. 729, 757-58 (2002).

Intentional infliction of emotional distress requires allegations and proof that: 1) the defendant intended to cause the plaintiff emotional distress or knew or should have known that its conduct would cause the plaintiff emotional distress; 2) the defendant’s actions were extreme and outrageous; 3) the defendant’s conduct caused the plaintiff distress; and 4) the plaintiff sustained severe emotional distress. DeLaurentis v. New Haven, 220 Conn. 225 (1991). For the defendant to be liable for intentional infliction of emotional distress, the conduct must exceed all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind.

2. Bystander Emotional Distress

Bystander emotional distress is a claim premised upon witnessing an injury to another person. The Connecticut Supreme Court recognized such claims, with limitations. Clohessy v. Bachelor, 237 Conn. 31 (1996). The Court rejected claims of bystander emotional distress in medical malpractice actions. Maloney v. Conroy, 208 Conn. 392 (1988). However, a minority of Superior Court decisions hold that Clohessy implicitly overruled Maloney, permitting a bystander to medical malpractice to recover for emotional distress so long as the four Clohessy requirements are met. See Desjardins v. William Backus Hospital, 2003 WL 21061114 (April 25, 2003, Hurley, J.T.R.).

The Clohessy Court established four criteria for a claim of bystander emotional distress: 1) a close relationship, such as parent or sibling, between the victim and plaintiff; 2) emotional injury caused by the contemporaneous observation of the injury or arriving on the scene soon after the accident and before significant change in the victim's location; 3) the victim must be seriously injured or die because of the accident; and 4) the plaintiff's emotional injury must be serious and beyond what would be expected from a disinterested observer.

In Myers v. City of Hartford, 84 Conn.App. 395 (2004), the plaintiff dog owner brought claims against the city and animal control officer for intentional and negligent infliction of emotional distress, after the owner's dog was taken and euthanized. The Court noted that there is a no cause of action for infliction of emotional distress arising out of injury to property such as a pet. At least one superior court, however, has distinguished Myers and recognized a negligent infliction of bystander emotional distress claim by a plaintiff who saw his pet getting injured Vaneck v. Drew, 2009 WL 1333918 (April 20, 2009, Rubinow, J.).

C. Frivolous Claims

If any claim or defense is made without probable cause, the party asserting the claim may be liable for double damages. C.G.S. §52-568. If the claim or defense is made with malice, that party may liable for treble damages. Prior to bringing a claim under §52-568, the initial action must be resolved in favor of the party making the claim.

D. Punitive Damages

1. Common Law

The general common law rule in Connecticut is that punitive damages are not allowed. Markey v. Santangelo, 195 Conn. 76 (1985). However, where the tort is willful, wanton or malicious, the injured party may recover exemplary or punitive damages in addition to compensatory damages. Punitive damages are limited to the cost of the litigation, including reasonable attorneys' fees.

2. Statutory

By statute, Connecticut allows for the imposition of punitive damages in certain cases.

a. Motor Vehicles

C.G.S. §14-295 allows the trier of fact to award double or treble damages if the defendant deliberately or with reckless disregard violated certain enumerated motor vehicle statutes and the violation was a substantial factor in causing the plaintiff's injuries.

b. Product Liability

See, Section 3.

c. Unfair Insurance or Trade Practices

See, Section 5D.

3. Coverage of Punitive Damages

Punitive damages may only be awarded for conduct which is willful, wanton, or an intentional or reckless disregard for the rights of others. Since punitive damages are penal in nature, they are traditionally deemed not recoverable from an insurer. Tedesco v. Maryland Cas. Co., 127 Conn. 533 (1941). However, in Avis Rent a Car v. Liberty Mutual Ins. Co., 203 Conn. 667 (1987), the lessor's insurer was held liable for treble damages awarded to the plaintiff under the reckless driving statute. Avis was held vicariously liable for the award under a statute which imposes liability upon the lessor of an automobile for the operator's negligence (C.G.S. §14-154a), and Liberty Mutual had to pay for Avis's liability. Yet, since Avis did not address an insurer's liability for punitive damages assessed against the actual tortfeasor, Tedesco may still be good law.

Common law punitive damages are not available in uninsured/underinsured motorist claims. Bodner v. United Services Automobile Assn., 222 Conn. 480 (1992). The court reasoned that to allow recovery of punitive damages in the UM context would place the insured in a better position than if the tortfeasor had been insured, while the insurer, who has no relationship with the tortfeasor, would be unable to allocate even a portion of the risk of punitive damages to the tortfeasor. Similarly, the court held in Caulfield v. Amica Mutual Ins. Co., 31 Conn.App. 781 (1993) that statutory multiple damages are not recoverable under the uninsured motorist provision of an insurance policy.

E. Vicarious Liability

Vicarious liability is when the law imposes liability upon one party for the torts of another. LaBonte v. Fed. Mutual Ins. Co., 159 Conn. 252 (1970).

1. Agency

A principal (such as an employer) is generally liable for acts of his agent made within the scope of his employment. Ordinarily the principal is not liable for punitive damages arising from the agent's wanton or willful act, unless he authorized or ratified the act.

A principal is generally not liable for the wrongful acts of an independent contractor. One is an independent contractor if he, not the principal, controls the means and methods of doing the work. If the principal controls the work, then the agent is an employee. However, there are exceptions to this rule. If the work performed is inherently dangerous or if the principal has a non-delegable duty, the principal is vicariously liable for the negligence of the independent contractor. A principal may also be directly liable for negligent hiring or negligent retention of an independent contractor. (See also Section 2C.)

2. Family Car Doctrine

The Family Car Doctrine is codified as C.G.S. §52-182. This doctrine creates a rebuttable presumption that a motor vehicle or motorboat is being operated as a family car or boat within the scope of a general authority from the owner if there is proof that the car or boat was operated by the husband, wife, father, mother, son or daughter of the owner. The result of the presumption is that the owner is held liable for the negligence of the operator. A rebuttable presumption is a legal presumption which holds good until evidence contrary to it is introduced. The purpose of the presumption was not to create substantive rights, but merely to govern procedure and aid a plaintiff in his proof where the operator and owner are of a certain designated relationship. Hunt v. Richter, 163 Conn. 84 (1972).

3. Owner of Vehicle

Under C.G.S. §52-183, there is a rebuttable presumption that the operator of a motor vehicle, if other than the owner, is the agent of the owner and is operating it in the course of his agency or employment.

In Engram v. Kraft, 83 Conn.App. 782 (2004), the plaintiff was in a car accident with a vehicle operated by another and owned by defendant Kraft. The defendant won summary judgment on agency by submitting an affidavit stating he gave no permission for the car to be driven. On appeal, the plaintiff argued that defendant's contention was an issue of credibility, which was a question of fact. The Court agreed and reversed, noting: "[i]t is the function and exclusive province of the jury to pass on the credibility of witnesses." The Court emphasized that the strong presumption of agency under §52-183 would have no meaning if a defendant could rebut it every time he asserted no consent was given. Thus, it is difficult to win a summary judgment under §52-183, especially where defendant's evidence is merely a denial of permission.

At common law, a principal cannot be held vicariously liable for the actions of its agents. Similarly, the owner of a motor vehicle cannot be held vicariously liable for punitive damages if liability is imposed under §52-183. Matthiessen v. Vanech, 266 Conn. 822 (2003).

4. Lessor of Vehicle

C.G.S. §14-154a made lessors liable to the same extent as drivers, unless the lease was for at least a year with cars insured for \$100,000/\$300,000 and with certain trucks insured for \$2,000,000. However, a federal statute enacted in 2005 shields leasing companies and rental companies from vicarious liability for injuries caused by lessees and renters. 49 U.S.C. § 30106. This statute preempts state laws such as this one which impose vicarious liability on leasing and rental companies. Connecticut courts have recognized this preemption. Moncrease v. Chase Manhattan Auto Finance Corp., 98 Conn.App. 665 (Conn.App., 2006). Therefore, claims against lessors for injuries caused by its lessees are no longer permissible, unless the lessor was negligent.

5. Children

a. Negligence

Connecticut follows the general rule that parents cannot be held financially responsible for any injuries suffered by a third party as a result of acts of negligence on the

part of their minor children. Kaminski v. Fairfield, 216 Conn. 29 (1990). However, there are three exceptions to this rule:

- i. The child is the agent of the parent or driving a family car;
- ii. The parent makes available to the child a dangerous instrumentality which the child is not capable of handling;
- iii. The parent condones or authorizes repeated acts of vandalism or impropriety by the child.

b. Intentional Torts

By statute, parents may be held vicariously liable up to \$5,000 of damages caused by the intentional misconduct of their child, if the child is an “unemancipated minor” and would have been liable for the damage or injury if he or she had been an adult. C.G.S. §52-572. It is unclear as to whether this would be covered under the parents’ homeowners’ coverage. It would depend on whether the court focused on the underlying act (the intentional tort by the minor) or the position of the person seeking coverage (the innocent parent).

F. Interest

Interest of 10% per year, from twenty days after the date of judgment or ninety days after the date of verdict, is allowed in personal injury claims. C.G.S. §37-3b.

C.G.S. §52-192a allows the plaintiff to file an offer of compromise setting a specific figure for which he will settle. If the defendant does not accept the offer of compromise and a judgment is rendered for at least that amount, the court adds 8% interest to the whole judgment. The interest is computed from the date the complaint was filed if the offer was filed within 18 months of the complaint. If the offer was filed more than 18 months after the complaint, the interest is computed from the date of the offer of compromise. The Court may also award reasonable attorney’s fees in an amount not to exceed three hundred and fifty dollars. (See also Section 8E.)

G. Immunities

1. Charitable Immunity

The common law defense of charitable immunity has been abolished by C.G.S. §52-557d. However, all unpaid directors, officers and trustees of non-profit organizations are immune from civil liability from any act or omission in the exercise of decision making responsibilities, if acting in good faith and within that person's official functions, so long as the damage or injury was not caused by the reckless, willful or wanton misconduct of that person. C.G.S. §52-557m.

2. Interspousal/Interfamily Immunity

Under the common law, spouses may bring tort actions against each other. Dzenutis v. Dzenutis, 200 Conn. 290 (1986). Even though most insurance policies cover husband and wife, when one sues the other arising out of an automobile accident, the defendant is insured under the policy.

Under the common law, unemancipated children may not sue parents in tort. However, in actions for negligence in the operation of motor vehicles, immunity between parent and child has been abolished. C.G.S. §52-572c. Such immunity also does not apply where a child is injured in the course of his parent's business activities. An action against a non-custodial parent for injuries suffered by a minor child during a scheduled visit to that parent's home is barred by the doctrine of parental immunity. Asciutto v. Farricielli, 244 Conn. 692 (1998). Such immunity also does not apply where a child is the victim of parental sexual abuse, sexual assault, or sexual exploitation.

3. Governmental Immunity

See, Section 5A.

H. Indemnity

Indemnity is a 100% reimbursement of damages, attorneys' fees and costs paid by a party. Indemnity is generally sought by third-party action. Contractual indemnity requires a breach of a contractual obligation. This can be an obligation to indemnify or any other contractual obligation which exposes that party to a claim (for example, a tenant's duty to maintain the premises).

Tort indemnity is permitted when the party from whom indemnity is sought was “actively” negligent and the party seeking indemnity was “passively” negligent. The classic example is when a property owner hires a contractor to perform work, and a pedestrian is injured on the construction site. The owner is liable to the pedestrian, but may be indemnified by the contractor.

The elements of tort indemnity are: 1) the other party was in control of the situation to the exclusion of the party seeking indemnity; 2) the other party’s negligence caused the injuries, not the party seeking indemnity; and 3) the party seeking indemnity had no reason to know that the other party was negligent and could reasonably rely on the other party to not be negligent. Kaplan v. Merberg Wrecking Corp., 152 Conn. 405 (1965).

I. Sudden Emergency Doctrine

When, during a sudden emergency situation not created by the defendant’s negligence, the defendant chooses a course of action which could have been or was chosen by a reasonable person under similar circumstances, he will not be found negligent for an error in judgment. Therefore, if the defendant was faced with two alternative courses of conduct, he will not be found negligent for his choice as long as he acted in the manner of a reasonable person under the same circumstances. Miller v. Porter, 156 Conn. 466 (1968). For example, an operator of a motor vehicle may not be liable in negligence for loss of control of the vehicle, if caused by unforeseeable fainting or loss of consciousness. Karen v. Giuliano, 26 Conn. Supp. 44 (1965).

J. Seat Belt and Helmet Laws

In Connecticut, all vehicle operators, front seat passengers and children between the ages of seven and sixteen must wear seat belts while traveling on state roads; also, if the operator is under eighteen years of age, all of the passengers and the operator must wear a seat belt. C.G.S. §14-100a. Failure to wear a seat belt is not considered contributory negligence and evidence of such is not admissible in any civil trial.

All children under fifteen must wear a helmet while operating a bicycle on any highway. Failure to wear a helmet is not considered contributory negligence and evidence of such is not admissible at trial. C.G.S. §14-286d(b). Furthermore, persons under eighteen must wear helmets while a passenger on a motorcycle. C.G.S. §14-289g.

K. Negligent Entrustment

Connecticut recognizes a cause of action for negligent entrustment when: (a) the owner of an automobile entrusts the automobile to one that he knew or should have known was incompetent to operate it; (b) the owner knew or should have reasonably anticipated that others could be injured because of that person's incompetence; and (c) such incompetence results in injury. Greeley v. Cunningham, 116 Conn. 515, 520 (1933). Liability for negligent entrustment is not limited to vehicle owners. Liability for negligent entrustment attaches whenever the entruster has sufficient control over the vehicle. Jordan v. Sabourin, 1996 WL 694628 (Nov. 22, 1996, J. Hurley). For example, a non-owner designated driver can be held liable for negligently entrusting the owner's vehicle to someone else.

L. Assumption of the Risk

Assumption of the risk has been statutorily abolished as a defense in all negligence actions. C.G.S. §52-572h(1). However, all factors relevant to assumption of the risk may be used in evaluating the plaintiff's comparative negligence.

**8. PROCEDURAL ISSUES**

A. Service

A plaintiff must serve process on defendants within the applicable statute of limitations. A return date is set, usually a few weeks after service. Service must be made at least twelve days before the return date, and the complaint must be returned to court so that a file can be opened in the court at least six days before the return date. The defendant must file an appearance within two days after the return date or risk being defaulted. An appearance is simply the document stating that the law firm is representing the defendant. Return dates are always on a Tuesday.

Even if a default is granted on the same date it is filed, the plaintiff must wait 15 days to request a hearing in damages, which is necessary to obtain a judgment. Prior to the entry of a judgment, the filing of an appearance will automatically open (or undo) the default.

B. Venue

Cases are generally brought in the superior court. The superior court is broken down into 13 judicial districts. If either the plaintiff or defendant resides in the judicial district,

suit may be brought there. In addition, there are even more geographical areas which have jurisdiction over small claims cases, housing matters and misdemeanor crimes.

C. Extensions of Time

It is common practice for claim representatives to be granted extensions of time after a complaint is brought in order to continue to negotiate the case prior to hiring counsel. Beware, defendants have 120 days after the return date to apportion in other negligent parties (See also, Section 2). This is a critical deadline, and cannot be extended. Once the 120 days passes, the opportunity to point to other liable parties is lost.

D. Pleadings

After the plaintiff files a complaint, subsequent pleadings must be filed in this order:

1. Defendant's motion to dismiss for lack of personal jurisdiction or improper service must be filed within 30 days from the filing of the appearance;
2. Defendant's request to revise;
3. Defendant's motion to strike;
4. Defendant's answer and special defenses;
5. Plaintiff's request to revise defendant's answer;
6. Plaintiff's motion to strike answer or special defenses;
7. Plaintiff's reply to defendant's special defenses.

Pleadings must generally be advanced within 15 days from the preceding pleading. Filing a pleading waives a party's right to file a preceding pleading. If a plaintiff or defendant fails to advance the pleadings within the allotted time period, the court may enter a nonsuit or default, respectively. However, if judgment has not entered on the default, filing an answer will automatically open the default.

E. Offers of Compromise

In actions accruing *before* October 1, 2005, a plaintiff may file an offer of judgment, which, if accepted, results in an actual judgment being entered against the defendant. The defendant has sixty days to accept the plaintiff's offer of judgment. If the defendant declines to accept the offer of judgment and the plaintiff recovers an amount equal or greater than the offer of judgment, the court will add 12 percent annual interest from the date the offer was filed. If the offer was filed not later than 18 months from the filing of the

complaint, the interest will be computed from the date the complaint was filed. The court can add up to \$350 in reasonable attorneys' fees.

However, for any actions accruing *on or after* October 1, 2005, a plaintiff may file an offer of compromise, which, if accepted, has the same effect as a settlement. A plaintiff may file an offer of compromise not earlier than 180 days after service of the complaint and not later than 30 days before jury selection. A defendant has 30 days to file a written acceptance of the plaintiff's offer of compromise. If the defendant declines to accept the offer of compromise and the plaintiff recovers an amount equal to or greater than the offer of compromise, then the plaintiff is entitled to 8% interest on the entire verdict from the date the offer of compromise was filed. If, however, the offer of compromise was filed within 18 months of the filing of the complaint, then interest is calculated from the date the complaint was filed. Again, the court can add up to \$350 in reasonable attorney's fees.

A defendant may also file an offer of compromise not later than 30 days before jury selection. The plaintiff has 60 days within which to accept the offer. If the plaintiff does not accept the offer and recovers an amount less than the offer of compromise, the plaintiff is not entitled to costs accruing after the offer of compromise was filed and must pay the defendant's costs accruing after the plaintiff received notice of the offer of compromise. These costs include reasonable attorney's fees in an amount not to exceed \$350.

#### F. Trials

Depending on the court, trials are generally scheduled within one to two and a half years of pleadings being closed. It can take several months to a year to close the pleadings if there are requests to revise ambiguous or unnecessary sections of the complaint, or motions to strike legally insufficient claims. Some courts attempt to schedule trials within one year from the return date.

#### G. Complex Court

There are ten complex litigation docket judges sitting in Connecticut, which typically hear commercial cases, medical malpractice cases or any other high exposure, multiple party, complicated cases. Unlike other courts, one judge hears all motions and schedules the trial long in advance. To get to complex court, one of the parties must file an application with the Chief Administrative Judge.

H. Experts

The parties must agree on a scheduling order to disclose experts within 120 days of the return date. After an expert is disclosed, the party must automatically produce the expert's file within 30 days of the disclosure.

I. Arbitration

A judge may order mandatory, nonbinding arbitration in cases where the demand is less than \$50,000. However, if any party is dissatisfied with the award, he can appeal it by filing a demand for a trial de novo. When an appeal is filed, the award has no effect and the case goes back on the jury trial list. Courts are moving away from mandatory arbitrations, because most awards are appealed. Parties often enter into arbitration agreements outside the court system, usually with binding, "high/low" parameters.

**9. COMPULSORY INSURANCE**

Connecticut's financial responsibility and compulsory minimum insurance laws appear in C.G.S. §38a-371 and in the Insurance Commissioner's regulations. Connecticut is a compulsory insurance state, and the minimum insurance coverage is \$20,000 per person, \$40,000 per accident for bodily injury liability and \$10,000 for property damage. In addition, under C.G.S. §38a-339, each insurer must offer comprehensive insurance with full glass protection without a deductible as an option to the insured. Uninsured and underinsured motorist coverage is also mandatory under C.G.S. §38a-336.

The minimum uninsured/underinsured motorist coverage is \$20,000/\$40,000. The uninsured/underinsured motorist limits apply to bodily injury only. There is no uninsured motorist property damage coverage. The insurer must offer coverage with limits that are twice the limits of the bodily injury coverage on the policy and must also offer conversion coverage (See, Section 10). The insured's selection of coverage applies to all subsequent renewals, policies and endorsements, unless changed in writing by any named insured.

Under C.G.S. §38a-371(c), the financial responsibility requirements may be satisfied by self-insurance. The self-insurer must indicate to the Commissioner that it can perform all the obligations that would be imposed upon an insurance company, including handling claims and providing all mandatory coverage, including uninsured motorist coverage.

With respect to motor vehicles, coverage afforded under liability sections applies to the named insured and all resident relatives of his household, unless specifically excluded by the insurance endorsement as provided in C.G.S. §38a-335(d). In addition, residual

liability insurance compels an insurer to pay on behalf of the owner or other persons insured sums which the insured is obligated to pay as damages arising out of the ownership, maintenance or use of a private passenger motor vehicle if the injury occurs within the United States or Canada. C.G.S. §38a-370.

## **10. WORKERS' COMPENSATION**

### **A. Generally**

An employee who sustains an injury or occupational disease that arises out of and in the course of employment is entitled to benefits pursuant to the Connecticut Workers' Compensation Act, C.G.S. §31-275 et seq. "Personal Injury" or "Injury" includes accidental injury, repetitive trauma or repetitive acts incident to the employment. C.G.S. §31-275(16). An "occupational disease" includes any disease peculiar to the employee's occupation and due to causes beyond the ordinary hazards of employment, and also includes any disease due to or attributable to exposure to or contact with a radioactive material by an employee within the course of employment. C.G.S. §31-275(15).

To be within the course of employment, the injury must occur (a) within the period of employment; (b) at a place the employee may reasonably be; and (c) while the employee is reasonably fulfilling the duties of the employment or doing something incidental thereto. McNamara v. Hamden, 176 Conn. 547 (1979).

### **B. Notice Requirements**

An employee who sustains an injury in the course of employment must immediately report the injury to the employer or a representative of the employer. C.G.S. §31-294b. The Workers' Compensation Commission will send a "Form 30C" (Notice of Claim) to every claimant within five days of the Commission's receipt of an Employer's First Report of Injury. In addition, the employee must give written notice of the claim for compensation to the employer within one year from the date of accident or within three years from the first manifestation of a symptom of the occupational disease. C.G.S. §31-294c(a). However, mere suspicion that a disease is work related does not cause the limitation period to run. Bremmer v. Eidlitz, 118 Conn. 666 (1934); Prisco v. North & Judd, 1190 CRD-8-91-3 (June 30, 1992). The statute of limitations commences when the claimant knew or should have known of the correlation of the occupational disease to his employment. Ricigliano v. Ideal Forging Corp., 280 Conn. 273 (2006).

In the case of a repetitive trauma injury, the written notice must be filed within one year of the last date of exposure to the repetitive trauma (often the last date of employment),

not the date the claimant became aware the repetitive trauma injury was work related. Discuillo v. Stone & Webster, 242 Conn. 570 (1997).

Whenever the employer or carrier wants to contest its liability to pay compensation, it shall file with the commissioner a “Form 43,” “Notice to Compensation Commissioner and Employee of Intention to Contest Liability to Pay Compensation,” C.G.S. §31-294c(b), on or before the twenty-eighth day after the employer has received the written notice of claim. However, if the employer pays benefits before the twenty-eighth day after receipt of the written notice of claim, the employer can contest the claim up to one year after receipt of the written notice of claim. The failure to file a Form 43 to contest liability, or commence payment of benefits “without prejudice,” within twenty-eight days of the employer’s receipt of a Form 30C will prevent the employer from contesting indemnity and medical benefits. Harpaz v. Laidlaw Transit, Inc., 286 Conn. 102 (2008). The employer is also precluded from cross-examining witnesses, filing briefs or presenting their own experts at a Formal Hearing on the issue of causation. Donahue v. Veriditem, Inc., 291 Conn. 537 (2009). The claimant still has the burden of proving the claim with competent evidence, and the trial commissioner may cross-examine the claimant.

C. Hearings

If an employer and employee fail to reach an agreement concerning compensation, either party may notify the Commissioner and request an “Informal Hearing.” C.G.S. §31-297. The informal hearing provides a forum for the parties to present their arguments before a Workers’ Compensation Commissioner. Although the Commissioner may make recommendations at the informal hearing, he has little authority to make formal decisions at that time.

If no agreement has been reached within sixty days after the date the notice of claim for compensation was received by the Commissioner, a formal hearing shall be scheduled on the claim and held within thirty days after the end of the 60-day period. C.G.S. §31-297. As a practical matter, the formal hearing is rarely held this soon after the claim is filed.

The formal hearing is the Workers’ Compensation equivalent of a trial. The Commissioner’s findings and awards at a formal hearing may be appealed directly to the Workers’ Compensation Review Board, and then to the Connecticut Appellate Court. C.G.S. §31-301.

D. Benefits

If an injury for which compensation is paid results in the total incapacity to work, the injured employee shall be paid a weekly compensation rate equal to 75% of his average net weekly earnings for the 52 weeks prior to the injury. C.G.S. §§31-307, 31-310. The compensation rate is also subject to minimums and maximums set forth in C.G.S. §31-309 and cost-of-living adjustments for temporary total disability benefits pursuant to C.G.S. §31-307a. (The date of injury and term of temporary total disability will affect the claimant's entitlement to cost-of-living adjustments.)

If an injury for which compensation is provided results in a partial incapacity to work, the injured employee shall be paid a weekly compensation rate equal to 75% of the difference between the total incapacity rate as set forth in C.G.S. §31-307, and the net amount he is able to earn after the injury. C.G.S. §31-308(a). However, when the treating physician certifies the employee is unable to perform his usual work, but is able to perform other work, the employee is ready and willing to perform other work in the same locality, and no other work is available, the employee shall receive his full weekly compensation rate as limited by C.G.S. §31-308(a). This is known as "light duty." An injured employee may also be entitled to permanent partial disability payments. These benefits are calculated based on the percentage of disability established by the treating physician, the schedules found in C.G.S. §31-308(b), and additional regulations created by the Workers' Compensation Commission. For example, a 10% disability to the back translates to 37.4 weeks of benefits.

In the discretion of the Commissioner, the employee, after he has received all benefits he is due pursuant to C.G.S. §31-308, may receive wage differential benefits. C.G.S. §31-308a. These benefits are awarded to the employee if he will likely continue to earn a salary lower than if he had not been injured. For injuries occurring after July 1, 1993, the Commissioner cannot award C.G.S. §31-308a benefits in excess of the permanent partial disability benefits found in C.G.S. §31-308(b).

Pursuant to C.G.S. §31-308(c), the Commissioner may award, no sooner than one year after the injury, up to 208 weeks of benefits for any permanent significant disfigurement of, or permanent significant scar on (A) the face, head or neck, or (B) any other area of the body which handicaps the employee in obtaining or continuing to work.

Public Act 06-84 repealed the Social Security offset against temporary total disability benefits that was found in Connecticut General Statutes §31-307(e). The repeal of the statute went into effect on May 30, 2006. Thus, the offset is only available for the dates of injury from July 1, 1993 (the date the statute originally took effect) through May 30,

2006. Please note that some parties may argue that the repeal of Connecticut General Statutes §31-307(e) should be applied retroactively and there is no offset available for any date of injury.

E. Apportionment

C.G.S. §31-299b permits an employer or the employer's insurance carrier to seek an apportionment of liability when the claimant suffers from an occupational disease or repetitive trauma injury. Pursuant to C.G.S. §31-299b, the carrier is entitled to reimbursement of the portion of the benefits it paid to and on behalf of the claimant for which a prior employer or carrier is liable. C.G.S. §31-299b also requires the last employer or carrier at which an injurious exposure occurred to pay all benefits associated with the claim and then seek apportionment from prior employers.

C.G.S. §31-349 precludes common-law apportionment when there are two separate and distinct injuries to the same body part. Therefore, if the last employer is partially responsible for the new disability and the need for medical treatment, the last employer must pay all of the benefits, except for the permanent partial disability from the first injury. Hatt v. Burlington Coat Factory, 263 Conn. 279 (2003).

Pursuant to Public Act 05-199, after July 1, 2006, the Second Injury Fund's share in apportionment cases where there are uninsured employers must be reallocated among the other carriers on a pro-rata basis.

F. Compensation Lien - Right to Reimbursement

An employee who has a right to benefits under the Workers' Compensation Act may not pursue an action against his employer for damages for personal injuries. C.G.S. §31-284. However, if the employee has a cause of action against someone other than the employer, he may sue that third person. C.G.S. §31-293.

Any employer also may sue a third person to obtain reimbursement for the benefits the employer has or may have to pay to the employee. C.G.S. §31-284(a); Skitromo v. Meriden Yellow Cab Co., 204 Conn. 485 (1987). If the employee brings an action against the third person, he shall notify the employer in writing of the employer's right to be joined as a party plaintiff to obtain reimbursement of its workers' compensation lien and that the employer **must** join the action as a party plaintiff within thirty days after such notification. C.G.S. §31-293(a); Worsham v. Griefenberger, 242 Conn. 432 (1997). If the employer fails to do so, the right of action is terminated. However, if no 30-day notice is given, the employer may sue on his own (if he is within the statute of limitations) or join the lawsuit at

any time. Nichols v. The Lighthouse Restaurant, 246 Conn. 156 (1998). The employer may also protect its rights by sending lien letters pursuant to C.G.S. §31-293(a) prior to any settlement or judgment of the third-party action.

G. Second Injury Fund

For injuries on or after July 1, 1995, the Second Injury Fund may be liable for compensation payments in two situations:

1. If an injured employee worked for more than one employer at the time of the injury, the employee's compensation rate is calculated using earnings from both employers. The Second Injury Fund will reimburse the insurer or self insured employer for the concurrent employment's apportioned share of the compensation rate, pursuant to C.G.S. §31-310.
2. If the employer does not have workers' compensation insurance, or the employer is insolvent or unable to pay, the Second Injury Fund is responsible to pay benefits to and on behalf of the claimant after a finding by the workers' compensation commissioner.

**11. UNINSURED/UNDERINSURED MOTORIST COVERAGE**

Uninsured motorist ("UM") coverage in Connecticut is first-party coverage for protection against bodily injury damages caused by an uninsured or underinsured motorist (for this analysis and generally in Connecticut the term "uninsured" includes "underinsured," except where noted). UM coverage in Connecticut does not cover property damage. Each automobile policy must provide such coverage as set forth in C.G.S. §38a-336, and self-insurers have to provide UM coverage as well. UM coverage is personal rather than merely vehicle oriented. In other words, a person is covered under a policy by being a named insured or a household member (resident relative) of a named insured or by occupying an insured vehicle.

When we approach a UM claim, we must determine under what policies the claimant is an insured for the claimed loss, the amount of coverage provided under each policy, under what policies the claimant may collect damages for the loss, whether any exclusions apply, the priority of the policies and what reductions or setoffs apply.

The Connecticut legislature dramatically changed UM coverage as part of a comprehensive automobile tort statute, Public Act 93-297. The act was passed in 1993, effective January 1, 1994. Among other things, the Act eliminated all stacking of UM

coverage. The Act also provides which coverage is primary and when there can be coverage under more than one policy.

A. Who is Insured

The typical personal auto policy covers the named insured, any resident of the named insured's household related to the named insured by blood, marriage or adoption or anyone occupying a vehicle insured under the policy. (For who is insured on a corporate policy, see number 4 below.) The burden of demonstrating that an individual is eligible for uninsured motorist benefits is on the claimant. Williams v. State Farm Automobile Ins. Co., 229 Conn. 359 (1994).

Some insurers have been successful in limiting coverage by limiting the definition of who is insured under the policy. In Middlesex Ins. Co. v. Quinn, 225 Conn. 257 (1993), the Connecticut Supreme Court upheld a limitation of the definition of resident relative to a resident relative who did not own a vehicle. Thus, a resident relative who would otherwise be an insured was not insured because he owned a car. The rule is that anyone who would be an insured under a policy for liability coverage must be an insured for UM coverage. In order to take advantage of the Quinn limitation, the policy must have the limited definition.

As a general rule, UM coverage is "person-oriented" and "follows" the individual wherever he or she goes. Harvey v. Travelers Indemnity Co., 188 Conn. 245 (1982). In other words, UM coverage attaches to the insured person, not the insured vehicle. However, in the specific context of specialty automobile liability policies on antique automobiles, the Connecticut Supreme Court held that provisions of a policy which limit UM coverage to accidents involving the occupancy and use of the antique automobile did not violate public policy and were enforceable. Gormbard v. Zurich Insurance Company, 279 Conn. 808 (2006).

Pursuant to C.G.S. §38a-336(d), if the claimant is occupying a vehicle he owns at the time of the loss, the UM coverage on the policy covering that vehicle is the only UM coverage available to him, regardless of whether he is defined as an insured under another policy. The statute refers to an "owned" vehicle. It is unclear as to whether a long-term lease constitutes ownership under this statute, so as to limit a claimant lessee's access to other household policies.

1. Occupancy of a Covered Automobile

Whether or not a claimant (who would not otherwise be an insured as a named insured or resident relative) was occupying an insured vehicle is an issue that depends upon

the specific policy language in each situation. Most policies define “occupying” as meaning in, upon, getting in, on, out or off of the covered vehicle. It is fairly well settled that mere intent to enter the vehicle is not sufficient to trigger coverage under a typical uninsured motorist policy. Testone v. Allstate Ins. Co., 165 Conn. 126 (1973). However, a determination of occupancy in a particular case requires an examination of the language of the policy, as well as the unique factual circumstances surrounding the claim, such as whether the claimant was in contact with the vehicle, whether the vehicle door was open, etc.

2. Pedestrians

C.G.S. §38a-336 is silent as to pedestrians. However, UM coverage is personal. Therefore, a person who meets the definition of an insured is covered regardless of whether or not the insured is operating or occupying a vehicle. For example, a named insured or resident relative would be a covered person when hit as a pedestrian. However, the statute does not cover policy priorities for this situation.

3. Listed Drivers

Uninsured motorist coverage is limited to those individuals who fit with a policy’s definition of an “insured.” In most instances, a policy’s declarations page will contain a list of “drivers” as well as list of “insureds.” For purposes of uninsured motorist coverage, the list of named insureds and the definition of “insured” determines who is covered under the policy. As long as the definition of an “insured” is clear and unambiguous in a policy, a “listed driver” will not be entitled to uninsured motorist coverage unless he otherwise fits within the definition of an “insured” under that policy. Kitmirides v. Middlesex Mutual Assurance Co. 260 Conn. 336 (2002). In other words, two unrelated people may live together and share a car. If only one is a named insured on the policy insuring the car, the other co-habitant will not be a covered person for UM coverage on that policy when not an occupant of the car.

4. Corporate or Government UM Policies

An individual may be an insured under a corporation’s policy if the policy language is ambiguous as to household member coverage. Ceci v. National Indemnity Co., 225 Conn. 165 (1993). In addition, a shareholder of a closely held corporation may be an insured for uninsured motorist purposes on a policy insuring the corporation if the policy includes language that creates confusion similar to that in Ceci. Hansen v. Ohio Casualty Ins. Co., 239 Conn. 537 (1996). The Court has also held that a state trooper was covered under the State’s UM policy, when not in his police cruiser, because the policy language

was ambiguous as to who was insured. Agosto v. Aetna Casualty and Surety Co., 239 Conn. 549 (1996). In both Hansen and Agosto, the Connecticut Supreme Court reasoned that the language of the policies was confusing. The policies stated that “you,” the named insured, were covered for UM coverage, when the named insured was a corporation or the State. Obviously neither a corporation nor the state could make a UM claim for injuries. Therefore, the Court held that such language could trigger a reasonable expectation that an individual affiliated with the corporation or entity would be covered under the policy.

An unresolved issue is whether a resident relative of an employee or official would be covered in these circumstances. Although there are no Appellate decisions on this issue, the Connecticut Superior Court has held that family-oriented language contained in a business auto policy may create an ambiguity as to whether employees **and their families** were covered under that policy. Scotfield v. AIU Ins. Co., 31 C.L.R. 618 (2002).

B. What is an Uninsured or Underinsured Motor Vehicle?

“Uninsured motor vehicle” has been defined by the courts as a vehicle which has no policy or bond of insurance, one which has less than the minimum statutory limits, one which has insurance but the insurer is insolvent, or a vehicle which cannot be identified, such as a hit-and-run (or “force-and-run”). Simonette v. Great American Ins. Co., 165 Conn. 466 (1973); Nationwide Ins. Co. v. Gode, 187 Conn. 386 (1982).

An “underinsured motor vehicle” is defined in C.G.S. §38a-336(e) as a motor vehicle the total applicable liability coverage limits of which are less than the applicable UM coverage limits of the policy against which the claim is made. Thus, to determine whether a vehicle is underinsured, we compare the aggregate liability coverage on an at-fault vehicle with the applicable limits of each separate policy against which the claimant is making a UM claim to determine if the at-fault vehicle is underinsured as to that policy. Doyle v. Metropolitan Property & Cas. Ins. Co., 252 Conn. 79 (1999).

There is no contact requirement for a hit-and-run accident, and there are no special corroboration requirements for such accidents. Streitweiser v. Middlesex Mut. Assur. Co., 219 Conn. 371 (1991); Keystone Ins. Co. v. Rafale, 225 Conn. 223 (1993). In other words, in a “force-and-run” claim, it is enough proof for the claimant to testify that an unidentified vehicle ran him off the road if that testimony is accepted by the trier of fact. However, the claimant cannot create an unknown vehicle uninsured motorist claim by letting an identifiable vehicle leave the scene of an accident and then later claiming he cannot identify the vehicle. Sylvestre v. USAA Cas. Ins. Co., 240 Conn. 544 (1997).

C. Stacking

C.G.S. §38a-336(d), as amended in 1994, abolished all policy stacking, or aggregation of limits. If the claimant is occupying an owned vehicle, only the UM coverage on the policy covering that vehicle applies. However, if the claimant is occupying a non-owned vehicle, then that vehicle's policy applies as well as the policy on the claimant's own vehicle and any household vehicles' policies under which the claimant is an insured. However, these policies are not stacked. The most the claimant may recover is the highest per-person policy limit of any one policy providing coverage. It is unclear how motorcycles play into this analysis because the term "vehicle" is not defined in the statute. However, it is probable that this would apply to motorcycles as well.

D. Exclusions

Only those exclusions explicitly provided for by the UM statute C.G.S. §38a-336(a) or the applicable Regulations of Connecticut State Agencies (§38a-334-6, formerly §38-175-6) are valid. The exclusion must appear in the policy for the insurer to take advantage of it. The most common exclusions are for an insured driving or a passenger in an uninsured vehicle owned by the insured or household member, a vehicle owned by a self-insured or a government or agency or where a claim has been settled with an uninsured motorist without the UM insurer's consent.

As to consent clauses, they are valid in principle, but it is unclear as to their practical effect. Public Act 97-58 (codified in C.G.S. §38a-336b) eliminated subrogation in underinsured motorist cases against the underinsured tortfeasor. This applies regardless of the tortfeasor's wealth. Coupled with the first-party contractual duties of the insurer and the definition of an underinsured motor vehicle in Connecticut, it seems to render the consent requirement effectively moot in situations in which the insured is offered a per-person policy limit settlement from the liability insurer. In other words, a vehicle is underinsured because the limits of liability insurance are less than the limits of uninsured motorist coverage. The uninsured motorist section of the policy under which the claimant is claiming coverage says it will pay to the claimant the amount he is legally entitled to collect from the uninsured or underinsured motorist, after all liability bonds or policies applicable to the loss have been exhausted. Therefore, the insurer has this obligation regardless of the wealth of the tortfeasor. Failure to acknowledge this as a valid underinsured claim is probably a breach of the insurance contract and bad faith, particularly since the insurer is losing no subrogation rights. The consent clause still makes sense when the claimant is proposing to settle with an uninsured tortfeasor or is proposing to take less than the full policy limits in a multiple claimant accident. In the former situation, the insurer would be

losing subrogation rights and in the latter, the insurer may be prejudiced by an inequitable split of the liability policy proceeds.

In Lowery v. Valley Forge Ins. Co., 224 Conn. 152 (1992), the court held that the exclusion for a vehicle owned by the named insured was valid, and it meant that in a one-car accident, the fault vehicle was by definition not an uninsured or underinsured motor vehicle because it was owned by the named insured on the policy and the policy included the exclusion. Therefore, it would not be an underinsured vehicle. In Lowery, the exclusion prevented the passenger from collecting from the liability policy and making a UM claim against the same policy. This decision was based on the language of the policy and the exclusion permitted in the Regulations. (This does not prevent the passenger in a multi-car joint-fault accident from collecting liability monies from the policy of the car in which he is a passenger for the driver's fault, and collecting from the UM portion of the policy for the fault of the other tortfeasor, who is uninsured or underinsured. However, in that situation, the UM insurer is entitled to a setoff from UM coverage for money paid for a liability settlement from its policy per the Regulations.)

Since the enactment of C.G.S. §38a-336(f) in 1994, a claimant is permitted to make both a workers' compensation claim and a claim against his employer's UM coverage. This applies to self-insured employers as well as those with policies. Conzo v. Aetna Ins. Co., 243 Conn. 677 (1998). However, an employee is only permitted to make a claim against his employer's UM coverage if he was occupying a vehicle covered under the employer's policy at the time of the accident. Otherwise, the exclusivity provisions of Connecticut's Workers' Compensation Act will bar the employee from collecting UM benefits under the employer's policy. Gomes v. Massachusetts Bay Ins. Co., 87 Conn.App. 416 (2005)

E. Policy Priorities

C.G.S. §38a-336(d) sets forth the priorities of applicable policies (relevant only when the claimant is in a non-owned vehicle). The policy on the vehicle which the claimant occupies is primary; any policies under which the claimant is a named insured are secondary, and any other applicable policies (household policies) are excess. Policies on the same level prorate. (Of course, there is no stacking. The total coverage is the highest of any one policy's limits.)

In situations where C.G.S. §38a-336(d) does not establish priority of coverage, the language of the "other insurance" clauses of the competing policies must be interpreted to determine priority of payment in multi-policy UM claims. Aetna Casualty & Surety Co. v. CNA Ins. Co., 221 Conn. 779 (1992). If those clauses can be reconciled, they are given effect. If not, the coverages will generally be prorated. This effectively puts to rest a

formerly viable theory that the policy “closest to the risk” should be primary and mandates a case-by-case analysis of the other insurance clauses. The insurer may be able to take advantage of the existence of other UM coverage when the other insurer is not a party to the case. An example would be when a claimant makes a claim under one policy and the insurer uncovers the existence of another policy that should prorate with it, but under which the claimant has not made a claim. In that situation, the insurer may only be liable for its prorated share. However, if the policy is ambiguous as to what position it is taking, such as a standard clause applied to a pedestrian who is not occupying any vehicle, the claimant can recover his entire damages from any policy under which he is an insured. O’Brien v. USF&G, 235 Conn. 837 (1996).

F. Reductions and Setoffs

Reductions and setoffs generally must be in the policy for the insurer to be entitled to them. The UM carrier is entitled to a setoff from the gross damages and coverage available for basic reparations or medical payments it has paid (100%), to the extent that they have not been reimbursed out of a liability settlement. Amounts paid under the liability coverage of the policy for the same accident may also reduce UM coverage. Nichols v. Salem Subway Restaurant, 98 Conn.App. 837 (2006). There is also a setoff from damages and coverage for workers’ compensation or similar disability payments paid or payable (to the extent that the funds have not been paid back out of a liability settlement). This includes payments actually received, those already awarded and those reasonably likely to be awarded (such as a workers’ compensation specific award not yet awarded for an agreed upon disability rating). Rydingsword v. Liberty Mutual Ins. Co., 224 Conn. 8 (1992). In addition, the insurer is entitled to a setoff from damages but not from available coverage for all collateral source payments such as private health insurance payments, not part of an ERISA plan. Smith v. Safeco Ins. Co., 225 Conn. 566 (1993). By statute, the insurer is prohibited from reducing uninsured or underinsured coverage or benefits by any amounts paid to a claimant as Social Security disability benefits. C.G.S. § 38a-336(b). The Connecticut Superior Court has recently held that this same prohibition applies to private insurance disability benefits paid to a claimant. Sepe v. Bethke, 36 Conn. L. Rptr. No. 17, 633 (April 26, 2004).

In underinsured motorist claims, in addition to the basic reparations, workers’ compensation and collateral source setoffs, the UM insurers are entitled to a setoff for all monies paid by or on behalf of any person responsible. This includes those monies actually received by the claimant from any motor vehicle owner or operator (the tortfeasor’s personal assets) or his insurer, even if an arbitration panel determines that the operator was not legally responsible for the accident. Buell v. American Universal Ins. Co., 224 Conn. 766 (1993). The reduction also includes all sums paid directly by the tortfeasor above his

liability policy limits; Lumberman's Mut. Cas. Co. v. Huntley, 223 Conn. 22 (1992), as well as the amount received in settlement of a claimant's legal malpractice claim arising from the lawyer's failure to timely file suit against one of the at-fault parties. Hartford Cas. Ins. Co. v. Farrish-Leduc, 275 Conn. 748 (2005). It does not include payments by non-motor vehicle tortfeasors or their insurers, such as dram shop owners or parking lot owners. American Universal Ins. Co. v. DelGreco, 205 Conn. 178 (1987). Depending on the policy language, the setoff usually does not include any sums paid for property damage out of a single limit policy or paid to other claimants. It usually only includes monies paid to that claimant. Stephan v. Pennsylvania Gen. Ins. Co., 224 Conn. 758 (1993). However, if the language expressly takes a setoff for all sums paid by or on behalf of anyone responsible, it may apply to sums paid to other people or property damage from a single limit policy. Allstate Ins. Co. v. Lenda, 34 Conn.App. 444 (1994). This case has been applied narrowly only when the policy language tracks the language in the Allstate policy. Moreover, this setoff may only apply to reduce limits, rather than act as a setoff against damages. The sum of the various rules is that the insurer will be entitled to a reduction for all sums actually paid to that claimant from any motor vehicle source, and in some instances may also be entitled to a reduction of available limits for monies paid to other claimants or for property damage.

In the 1994 changes, an additional setoff for other UM coverage was added. Because there is no stacking, when the claimant is in a non-owned vehicle and is insured on more than one policy, the companies providing excess coverage have a setoff from limits and gross damages from primary UM coverage. In other words, where a claimant is occupying a non-owned car with \$20,000 of UM coverage and is a named insured on a policy providing \$100,000 of UM coverage, the second insurer's exposure will be only \$80,000, the amount by which its coverage exceeds primary coverage limits. This is because the claimant's maximum recovery is the highest limit, or \$100,000.

C.G.S. §38a-336a mandates that the insurer offer underinsured motorist conversion coverage. Conversion coverage is "add-on" coverage, meaning that it is not reduced by any setoffs for monies paid by the tortfeasor or any third parties. It merely pays up to its policy limits after exhaustion of liability coverage. For conversion coverage, the definition of an underinsured motor vehicle is changed to a vehicle "with respect to which the sum of all payments received by or on behalf of the tortfeasor are less than the fair, just and reasonable damages of the covered person." In other words, because conversion coverage recognizes no setoffs, it applies as an add-on even if its limits are less than or equal to the liability policy limits.

Although the insurer must offer conversion coverage, there is no provision for the effect of the insurer's failure to offer the coverage. This is an area of concern, as more

claimants are alleging that they were not offered conversion coverage and are claiming that the result should be that they are given that coverage by default.

G. Other Considerations

1. Statute of Limitations

Unless otherwise recited in the policy, the six-year contract statute of limitations applies to UM claims. Wynn v. Metropolitan, 30 Conn.App. 803 (1993). Pursuant to C.G.S. §38a-336(g), an insurer may limit the time within which to assert a UM claim by suit or demand for arbitration to no less than three years from the date of the accident. However, for underinsured claims, the claimant can preserve his rights beyond the limitations period by notifying the insurer in writing before the expiration of the three-year period and by commencing an action within 180 days of exhaustion of the liability coverage. Where the policy is silent as to the limitations period, for underinsured claims the six-year statute of limitations runs from the date of exhaustion of underlying coverage. Prudential v. Perez-Henderson, 49 Conn.App. 653 (1998).

2. Exhaustion of Liability Coverage

Liability coverage on a tortfeasor's vehicle must be completely exhausted. However, where there are multiple tortfeasors, the claimant need only exhaust all the liability coverage for any one at-fault vehicle to proceed to a UM claim as to that vehicle's apportioned percentage of responsibility. General Accident v. Wheeler, 221 Conn. 206 (1992). If an at-fault vehicle has more than one applicable policy, such as when the driver is not the owner and he owns another insured vehicle, all policies that apply to that at-fault vehicle must be exhausted before the claimant can turn to UM coverage. Ciarelli v. Commercial Union Ins. Cos., 234 Conn. 807 (1995). Note however, that if the claimant has received from any one or a combination of tortfeasors an amount equal to or exceeding the UM limits of the policy, then the UM claim is barred. Savoie v. Prudential Property and Casualty Ins. Co., 84 Conn.App. 594 (2004).

Exhaustion must be by actual payment of the entire policy limits. Exhaustion occurs on the date that the plaintiff's counsel receives a check for the policy limits. Scalise v. American Employers Ins. Co., 67 Conn.App. 753 (2002).

Although complete exhaustion is a prerequisite to recovery of UM benefits, a claimant need not exhaust the tortfeasor's policy before commencing a UM claim against an insurer. McGlinchey v. Aetna Casualty & Surety Co., 224 Conn. 133 (1992).

3. Affidavits or Statements From an Owner or Operator of an Uninsured or Underinsured Motor Vehicle

C.G.S. §38a-336c states that for accidents after October 1, 2006, no insurer may require its insured as a condition for payment of UIM benefits to provide affidavits or written statements from the owner or operator of the uninsured or underinsured vehicle stating the individual did not maintain liability coverage or that there are no additional insurance policies.

Yet, C.G.S. §38a-336c also provides that the insured “shall make reasonable efforts to establish what liability coverage there is for the owner and operator an alleged uninsured or underinsured vehicle.” Additionally, the statute states that “[n]othing in this section shall relieve any person seeking to secure any coverage under an automobile insurance policy of any duty or obligation imposed by contract or law.”

In other words, while the insurer is prohibited from conditioning eligibility for UIM benefits on such an affidavit or statement, the insured must still prove the at-fault vehicle is uninsured or underinsured.

4. Punitive or Treble Damages

Common law punitive damages for willful or wanton behavior are not available to an uninsured motorist claimant. Bodner v. USAA, 222 Conn. 480 (1992). Nor may a claimant receive statutory double or treble damages under UM coverage. Caulfield v. Amica Mutual Ins. Co., 31 Conn.App. 781 (1993). The courts found that it would be unfair to penalize the UM carrier for the egregious behavior of a stranger to the insurance policy (the tortfeasor) because the carrier could not assess and insure such a risk.

5. Selection of Lower Limits

Insurers must offer UM coverage double the liability coverage. The statute does not state a penalty for failing to offer double coverage. (Some plaintiffs have claimed that as a result of not being offered double their liability limits, they should be given those limits by default.) An insured must still select in writing lower UM coverage for it to be valid, but C.G.S. §38a-336(a)(2) was amended to require the signature of “any named insured” rather than all named insureds. However, the selection form now must include the premium cost for all coverage options and must set forth in large type a specific statement regarding the decision to purchase less UM coverage, as well as satisfy other specific requirements. C.G.S. §38a-336(a)(2). Failure to comply with the requirements will cause the UM coverage to equal the liability coverage. This is another area of growing concern as more

claimants deny that they were properly apprised of their rights to higher coverage, and insurers are called upon to produce signed election forms and prove what accompanying documentation they sent to the insured.

For commercial policies, strict compliance with the statutory requirements for selecting lower UM limits is not necessarily required. In Kinsey v. Pacific Employers Company, 277 Conn. 398 (2006), the Connecticut Supreme Court held that the requirement of twelve-point type did not apply to informed consent forms that the corporate insureds sign to reduce UM coverage limits.

#### 6. Arbitration Versus Direct Action

Arbitration is not mandated by statute, but when a policy provides for arbitration, all coverage issues must be decided by the arbitration panel in the first instance. Arbitration panels consist of three attorneys: one chosen by the claimant, one by the respondent and the third “neutral” by the other two arbitrators. Where the amount of damages in dispute is \$40,000 or less, one arbitrator decides the case. Other than a statement under oath of the claimant and an IME, discovery is generally not available in arbitration matters. An arbitration award may be appealed to the superior court. Coverage issues receive a complete retrial at the court level, but damage and liability issues are generally not reviewable. The advantages to arbitration are that it is quicker and less expensive to resolve the case. However, awards tend to be higher than the average jury verdict.

Because of the tendency of arbitration awards to be generous, most policies now provide for direct action against the carrier to collect uninsured motorist benefits or they provide that both parties must agree to arbitrate. The direct actions are brought in the superior court in the nature of a combination contract and tort case, and the amount to which the claimant is entitled is generally determined by a jury. The advantage of this procedure is that the insurer can conduct standard civil action discovery. The major disadvantage is that the defendant is the insurer itself, and juries are not reluctant to award significant verdicts against an insurance company. Verdicts in direct action cases tend to be higher than in regular tort cases. In direct actions, one advantage to insurers is that the jury generally cannot know the policy limits or the amount the plaintiff may have received from underlying liability insurance. After the verdict, the court applies setoffs and conforms the verdict to the coverage limits. Fahey v. Safeco, 49 Conn.App. 306 (1998).

#### 7. The Effect of Self-Insurance

If a tortfeasor or responsible party is self-insured, the claimant cannot exhaust self-insurance to get to underinsured motorist coverage. Regulations permit the UM coverage to

be inapplicable to situations in which the at-fault party is self-insured, and self-insurance is unlimited and therefore cannot be exhausted. In Orkney v. Hanover Ins. Co., 248 Conn. 195 (1999), the claimant made a claim against the lessee and lessor of a vehicle. The claimant exhausted the \$20,000 provided to the lessee, but the lessor was self-insured. The claimant attempted to make an underinsured claim, but the Court held that there could be no underinsured motorist claim because the self-insured lessee's unlimited liability coverage could not be exhausted.

If the claimant is making a UM claim against a self-insured, the self-insured need only provide minimum coverage limits. This is true regardless of whether the self-insurer signals its intention to limit coverage by writing to the Insurance Commissioner. Boynton v. City of New Haven, 68 Conn.App. 815 (2001). Thus, even though the liability of the self-insured entity is unlimited, the UM coverage need only be the statutory minimum, or \$20,000 per person, \$40,000 per accident.

Furthermore, a self-insured municipal employer may not reduce the limits of its uninsured motorist coverage by the amount of compensation benefits paid or payable to a claimant without creating a writing giving a notice of its intention to invoke the reduction. Piersa v. Phoenix Insurance Co., 273 Conn. 519 (2005).

#### 8. Offer of Compromise Interest

An uninsured/underinsured motorist carrier will be obligated to pay offer of compromise interest even in excess of the policy limits. This interest is in addition to any uninsured/underinsured motorist benefits paid to the insured. Accetullo v. Worcester Insurance Co., 256 Conn. 667 (2001).

For uninsured/underinsured motorist claims, offer of compromise interest is not calculated on the jury verdict, but rather, the amount of the trial court's judgment after all of the appropriate set-offs and reductions have been made. Stiffler v. Continental Insurance Co., 288 Conn. 38 (2008).

**12. SMALL CLAIMS**

The limit for claims brought in Small Claims Court is \$5,000. The process is informal and often the plaintiff is pro se. A defendant may transfer a small claims case to the regular court by filing a motion to transfer with a counterclaim greater than \$5,000 or an affidavit stating that a good defense exists. However, if the case is transferred and the plaintiff wins, the plaintiff may recover costs and attorney's fees, which may exceed the actual damages award. All judgments in small claims court are final and not subject to appeals.

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# NUZZO & ROBERTS, L.L.C.

L A W O F F I C E S

## Firm Profile

Nuzzo & Roberts, L.L.C., an insurance defense law firm, handles trials and appeals in all federal and state courts in Connecticut. For almost thirty years, we have remained committed to working closely with our clients to provide cost-effective, proactive and practical service. The firm is dedicated to continuing this high level of service as we face a changing insurance world.

At Nuzzo & Roberts we pride ourselves on providing high quality yet efficient service to our clients. Our attorneys in every practice area focus on the core issues of each case and work closely with our clients to resolve matters effectively. We value excellent communication, early diagnosis, active versus reactive decision making and a driving desire to bring matters to a successful conclusion.

We understand that the insurance world is changing, and not only comply with the letter of our client's guidelines, but the spirit of those guidelines by developing strategies with our clients to resolve cases successfully and expediently.

### *Our Attorneys and Staff*

The firm's attorneys are highly trained, effective advocates for our clients. We encourage our attorneys to become active members in local, state and national bar associations and other professional organizations. Nuzzo & Roberts attorneys serve as mediators and arbitrators, are frequent writers and speakers on all issues of tort litigation and hold a statewide reputation as excellent trial attorneys.

Nuzzo & Roberts also employs over thirty staff members, including thirteen highly skilled paralegals. The use of seasoned paralegals enables the firm to provide particularly cost-effective service to our clients. In addition, a competent and attentive staff ensures that our clients receive prompt, accurate and personalized attention.

### *Our Practice Areas*

#### **Bad Faith/ Coverage**

Nuzzo & Roberts' clients benefit from our extensive knowledge of coverage issues and our reputations as tough negotiators and litigators. The Bad Faith/Coverage Group provides

direct representation to insurers in matters of coverage, coverage litigation and bad faith. The firm's coverage attorneys have vast experience analyzing all types of claims and lawsuits and providing clear and concise coverage analysis of all issues that apply to each claim to assist insurers in properly reserving rights, preserving coverage issues and, when appropriate, denying claims based on coverage. The group also represents insurers in declaratory judgment actions in both state and federal court involving issues of insurance coverage. Additionally, Nuzzo & Roberts represents insurers in complaints before the insurance commission and in bad faith claims, providing advice, support, experience and our highly effective litigation skills.

### **Construction Litigation**

The Construction Litigation Group represents general contractors, subcontractors, project managers, developers, design professionals, architects, engineers and property owners in various disputes arising out of negligence, design and construction defects, product defects, breach of contract, breach of warranty, unfair trade practices, insurance coverage issues and indemnity claims. The group represents clients in all Connecticut state and federal courts, tribal court and arbitrations. Our clients range from large construction firms to small businesses. We pride ourselves in providing clients in the construction industry with knowledgeable representation in complex and technical matters.

### **Employment Litigation**

The Employment Litigation Group primarily represents management, either the business entity itself or managers and supervisors who have been sued individually, in employment-related matters. The group has handled all types of employment litigation, including representation before the Equal Employment Opportunity Commission and the State of Connecticut Commission on Human Rights and Opportunities, as well as representation in federal and state courts. We handle a variety of employment litigation, including employment discrimination (including sexual and racial harassment complaints, disability discrimination, equal pay claims and sexual orientation claims), wrongful discharge, breach of employment contracts, employment-related torts (including defamation and misrepresentation), and violations of federal and related state laws (including the Family Medical Leave Act, the Fair Labor Standards Act and Occupational Safety statutes).

### **Motor Vehicle Tort**

The Motor Vehicle Tort Group is made up of highly skilled and able attorneys that can handle any matter, whether simple or complex. We handle all types of motor vehicle cases, from simple soft-tissue claims to catastrophic losses, including wrongful death claims. The trial attorneys in our group have tried over 80 cases since the late 1990s alone, and have handled numerous arbitrations and mediations.

We have a particular expertise in uninsured and underinsured motorist law, and have argued over ten appeals in that area of law alone. We are often called upon to try cases on the eve of trial and are able to respond to the challenge. When necessary, we work with accident reconstructionists, high quality investigators and members of the medical community who routinely testify in Connecticut.

### **Premises Liability**

The Premises Liability Group has vast experience in premises liability and homeowner's liability matters. Cases can range from slip and falls and dog bites to inadequate security and nuisance claims. We have litigated virtually every kind of defect from snow and ice to raised sidewalks, handicap ramps, fire escapes, curbs and stairways. We are familiar with applicable building codes and work with experts in the fields of forensic engineering, human factors, accident reconstruction and security. We also focus on shifting liability to third-parties through apportionment and indemnity claims, and aggressively seek the defense and indemnity from other insurers particularly in landlord tenant matters.

### **Product Liability**

Nuzzo & Roberts' Product Liability Group has successfully represented product manufacturers, designers, distributors and retailers of a wide variety of consumer, industrial, automotive, recreational and health related products. We pride ourselves on gathering the facts immediately and familiarizing ourselves with the steps that go into the manufacture, assembly and installation of each product. When appropriate, we aggressively seek voluntary withdrawals when our client's products were either not involved or played no role. We also work to shift liability to third parties and seek defense and indemnity through vendor's endorsements. The group has worked with a variety of experts in different product fields in order to effectively defend our client's interests.

### **Professional Liability**

Nuzzo & Roberts is one of the leading Connecticut firms in the area of Professional Liability. We are sensitive to both protecting our client's reputations and finances, as well as the negative personal impact related to being charged with malpractice. We pride ourselves in seeking early creative solutions and avoid protracted litigation, though our attorneys are experienced in trials as well as Alternative Dispute Resolution. We also utilize risk management to both avoid potential claims, as well as minimize future claims.

The Professional Liability Group represents professionals in a number of different industries, including:

- Legal
- Healthcare (hospitals, doctors, nursing homes, nurses and nursing agencies, home health aides and agencies, psychiatrists, psychologists, therapists, naturopathic doctors and chiropractors)
- Directors and Officers
- Insurance (agents, brokers, third party administrators, claims professionals, adjusters and investigators)
- Real Estate
- Accounting

### **Toxic Tort**

The Toxic Tort Group has represented manufacturers, premises owners and contractors in a variety of toxic tort and environmental litigation. We have handled cases ranging from mold litigation, gas leaks, oils spills and exposure to hazardous substances, such as asbestos and other chemicals and substances.

### **Workers' Compensation**

The Workers' Compensation Group works with workers' compensation insurers, third party administrators and self-insured employers in the representation of employers in workers' compensation claims at informal hearings, pre-formal hearings and formal hearings. The group also handles intervening complaints in third party litigation, as well as appeals to the Compensation Review Board and the Connecticut Appellate Court. The group also counsels employers on risk management issues, including taking actions to reduce risk of worker injury.

The firm's attorneys try cases in all civil courts in the State of Connecticut. In addition to jury trials, our attorneys are involved in mediation, arbitration, courtside trials and

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## NUZZO & ROBERTS, L.L.C.

administrative proceedings. Nuzzo & Roberts' attorneys have also argued numerous cases in the Appellate and Supreme Courts of Connecticut, including precedent setting cases in the field of uninsured motorist law.

### *Newsletters*

Nuzzo & Roberts publishes monthly and quarterly newsletters with analysis of recent superior and appellate court case law relevant to the interests of our clients. The newsletters include case details as well as editorial comment, and keep our clients abreast of important changes and developments in Connecticut law.

### *Our Commitment*

Nuzzo & Roberts is committed to fulfilling our mission of working in concert with our clients to make a difference in the outcome of the case by delivering timely, highly skilled legal services while minimizing cost and exposure. We take pride in our firm's attorneys, paralegals and staff and work to continually provide the best service possible to our clients.

### *About Our Attorneys*

#### **ANTHONY NUZZO, JR.**

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Born New Haven, Connecticut; admitted to Bar, 1968, Connecticut and District of Columbia; 1969, U.S. District Court, District of Columbia and U.S. Court of Appeals, District of Columbia; 1971, U.S. District Court, District of Connecticut. Appointed Public Defender for District of Columbia, 1968-1970. Education: University of Connecticut (B.A., 1965; J.D., 1968). Member: Cheshire Board of Education, 1981-1985; American Arbitration Association Advisory Board; New Haven County, Connecticut and American Bar Associations; Association of Trial Lawyers of America; Connecticut Trial Lawyers Association. Positions held: President, Connecticut Defense Lawyers Association, 1994; President, New Haven County Bar Association, 1998-1999. NHCBA Seminar: "Avoid Legal Malpractice Claims by Doing the Obvious."

#### **RICHARD A. ROBERTS**

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Born Astoria, New York; admitted to Bar, 1984, Connecticut and New York; 1985, U.S. District Court and District of Connecticut; 2008 U.S. Supreme Court. Education: State University of New York at Binghamton (B.A., 1979); State University of New York at Buffalo School of Law (J.D., 1983); Member, Moot Court Board. President, New Haven County Bar Association, 2009-2010; Vice President, Connecticut Defense Lawyers

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**NUZZO & ROBERTS, L.L.C.**

Association, 2009-2010; Member, Connecticut Trial Lawyers Association; District Representative to ABA Young Lawyers Division, 1991-1993; Speaker: "Advanced Personal Injury;" "Personal Injury Settlements;" "Premises Liability: The Defense Perspective;" "Preparing and Trying the Automobile Accident Case;" "Evaluating Personal Injury Cases". Lecturer in Legal Studies, Quinnipiac College. Arbitrator and mediator, Connecticut Superior Courts.

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**DAVID J. WEIL**, born Manhasset, New York; admitted to Bar, 1988, Connecticut; 1989, U.S. District Court, District of Connecticut. Education: Franklin and Marshall College (B.A., 1982); George Washington University Law School (J.D., 1988); Member, Moot Court Board. Member: Vice Chair of the Workers' Compensation Section of the Connecticut Bar Association, 2009 - 2010; Connecticut Bar Association (Workers' Compensation Executive Committee).

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Born New Haven, Connecticut; admitted to Bar, 1994, Connecticut; 1995, U.S. District Court, District of Connecticut. Education: Bowdoin College (B.A., 1991); University of Connecticut School of Law (J.D., with honors, 1994); Notes and Comments Editor, *Connecticut Law Review*, Connecticut Moot Court Board.

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Born New Haven, Connecticut; admitted to Bar, 1996, Connecticut; 2000, U.S. District Court, District of Connecticut. Education: Boston University (B.A., *cum laude*, 1993); New England School of Law (J.D., 1996); Articles Editor, *Environmental Law Forum*, 1995-1996. Member: New Haven County, Connecticut and American Bar Associations; Defense Research Institute; Connecticut Defense Lawyers Board of Directors 2008-2010; Friends of New Haven Legal Assistance Board of Directors 2008-2010.

**NICOLE DABEKIS CHOMIAK**

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Born Chelmsford, Massachusetts; admitted to Bar 1997, Connecticut; 1997, Massachusetts; 1998, U.S. District Court, District of Connecticut; 2006, Second Circuit Court of Appeals. Education: Providence College (B.S., 1994); Quinnipiac College School of Law (J.D., *cum laude*, 1997); Editor, *Quinnipiac Probate Law Journal*; Academic Excellence Award. Member: New Haven County and Connecticut Bar Associations.

**JANE M. CARLOZZI**

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Born New Britain, Connecticut; admitted to Bar, 1998, Connecticut and U.S. District Court, District of Connecticut. Education: Wesleyan University (B.A., 1978); University of Hartford (M.B.A., 1987); University of Connecticut (J.D., with high honors, 1998). Member: Connecticut Bar Association.

**MICHELE C. CAMEROTA**

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Born New Britain, Connecticut; admitted to Bar, 1998, Connecticut; 1999, U.S. District Court, District of Connecticut. Education: Central Connecticut State University (B.A., 1993); University of Connecticut School of Law (J.D., 1998). Phi Sigma Alpha. Member: Connecticut Bar Association, Connecticut Defense Lawyers Association.

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Born Waterbury, Connecticut; admitted to Bar, 1999, Connecticut; 2003, U.S. District Court, District of Connecticut. Education: Bryant College (B.S., 1994); Quinnipiac College School of Law (J.D., 1999); Lead Articles Editor, *Quinnipiac Probate Law Journal*; Distinguished Academic Achievement Award Recipient. Member: New Haven County and Connecticut Bar Associations.

**AMBER J. HINES**

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Born Middletown, Connecticut; admitted to Bar, 1999, Connecticut; 2004, U.S. District Court, District of Connecticut. Education: College of New Rochelle (B.A., *summa cum laude*, 1994); Quinnipiac University School of Law (J.D., *cum laude*, 1999); Editor, *Quinnipiac Probate Law Journal*, 1997. Member: Connecticut Bar Association.

**NADINE M. PARE**

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Born Providence, Rhode Island; admitted to Bar, 2000, Connecticut. Education: University of Connecticut (B.A., *cum laude*, 1996); Member, Pi Sigma Alpha National Political Science Honor Society and Golden Key National Honor Society; Quinnipiac College School of Law (J.D., *cum laude*, 2000); Lead Articles Editor, *Quinnipiac Law Review*, Member, Phi Delta Phi International Legal Fraternity, Mock Trial Society; Academic Achievement Award. Member: New Haven County and Connecticut Bar Associations.

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Born Cleveland, Ohio; admitted to Bar, 1996, Connecticut; 1997, U.S. District Court, District of Connecticut. Education: Sacred Heart University (B.S. Political Science, 1991) Widener University School of Law in Harrisburg, PA (J.D. 1996). Officer of the Moot Court Honor Society and was inducted into the Order of the Barristers, Moot Court Honor Society, upon graduation. Member: New Haven County and Connecticut Bar Associations.

**KEVIN C. HINES**

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Born New Britain, Connecticut; admitted to Bar, 2002, Connecticut and Massachusetts; 2003 U.S. District Court, District of Connecticut. Education: University of New Haven (B.S. Summa cum laude, 1997); Western New England College School of Law (J.D. cum laude, 2001); Honor Committee member. New Britain Bar Association Past President. Member: Connecticut Bar Association, Connecticut Defense Lawyers Association and Defense Research Institute.

**JASON K. MATTHEWS**

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Born Teaneck, New Jersey; admitted to Bar, 2002, Connecticut. Education: Tufts University (B.A., 1999); University of Connecticut School of Law (J.D., 2002). Member: Connecticut Bar Association.

**JAMES R. FIORE**

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Born Enfield, Connecticut; admitted to Bar, 2002, Connecticut. Education: Stonehill College (B.A., 1999); Syracuse University College of Law (J.D., *cum laude*, 2002); Member, *Syracuse Law Review*, Justinian Honorary Society, Honorary Moot Court Society. Member: New Haven County and Connecticut Bar Associations.

**TODD J. RICHARDSON**

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Born Meriden, Connecticut; admitted to Bar 2003, Massachusetts; 2004, Connecticut; 2005, U.S. District Court, District of Connecticut. Education: Eastern Connecticut State University (B.A., 1998); University of Connecticut School of Law (J.D., 2003); Lead Articles Editor, *Connecticut Insurance Law Journal*; Member, Connecticut Unemployment Action Committee. Member: New Haven County (president of young lawyers' division), Connecticut (director of professional ethics section), and American Bar Associations.

**PATRICIA M. GIRARD**

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Born Albany, New York; admitted to Bar 2003, Connecticut; New York, 2004. Education: University of Connecticut (B.A. Psychology, 1999); University of Connecticut School of Law (J.D., 2003). Member: Connecticut Bar Association and New York State Bar Association.

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Born Louisville, Kentucky; admitted to bar 2004, Connecticut; 2006, U.S. District Court, District of Connecticut. Education: Fairfield University (B.A., 2001); University of Connecticut School of Law (J.D., 2004); Symposium Editor Connecticut Public Interest Law Journal. Member: New Haven County Bar (Young Lawyers Liaison to the Public Service Committee) and Connecticut Bar Association.

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Born Neptune, New Jersey; admitted to Bar 2006, Connecticut; 2006, New York; 2007, New Jersey; 2007, U.S. District Court, District of Connecticut. Education: Rutgers University (B.A., 2000); Seton Hall University, School of Law (J.D., *cum laude*, 2006). Member: Connecticut Bar Association and New Haven Bar Association.

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Born East Longmeadow, Massachusetts; admitted to Bar 2006, Connecticut. Education: Fairfield University (B.A. Politics, 2001); Villanova University School of Law (J.D., 2005); Member: New Haven County Bar, New Haven County Bar Young Lawyers, and Connecticut Bar Association.

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Born Rockville Centre, New York; admitted to Bar 2007, Connecticut; 2008, New York. Education: State University of New York at Geneseo (B.A., 2003); University of Connecticut School of Law (J.D., 2007). Member: Connecticut Bar Association, New Haven County Bar Association, The American Inns of Court: Oliver Ellsworth Chapter.

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Born Brooklyn, New York; admitted to Bar 2007, Connecticut; 2007, U.S. District Court, District of Connecticut. Education: Long Island University / C.W. Post Campus (B.A., 2001); Western New England College School of Law (J.D. cum laude, 2006). Member: *Western New England Law Review*, Connecticut Bar Association, New Haven County Bar Association, and American Bar Association.

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Born New Haven, Connecticut; admitted to Bar 2009, Connecticut; 2010, New York. Education: Villanova University (B.A., *cum laude*, 2005); University of Connecticut School of Law (J.D., with honors, 2009); Book review editor of the Connecticut Journal of International Law and member of Moot Court Board. Member: Connecticut Bar Association and New Haven County Bar Association.