

NEW HAMPSHIRE

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1. Identify the venue/areas in your State that are considered dangerous or liberal.

New Hampshire is a small state, with only ten counties. There are no counties in New Hampshire that are considered “dangerous” where substantial verdicts are routine/expected. That said, the counties along the southern tier (Hillsborough County North and South, Rockingham County) are considered to be potentially “liberal.” Other counties where there have been substantial verdicts include Merrimack County in the central part of the state, Grafton County, home to the Dartmouth Hitchcock Medical Center which hosts numerous medical malpractice cases, and Strafford County, home to the University of New Hampshire, which tends to have “liberal” jurors.

2. Identify any significant trucking verdicts in your State during 2017-2018, both favorable and unfavorable from the trucking company’s perspective.

There were no significant trucking verdicts or rulings in New Hampshire last year.

3. Are accident animations and/or computer-generated evidence admissible in your State?

Yes, subject to normal rules governing the qualification of expert witnesses. *See, e.g., McLaughlin v. Fisher Engineering*, 150 N.H. 195 (2003).

4. Identify any significant decision or trends in your State in the past two (2) years regarding (a) retention and spoliation of in-cab videos and (b) admissibility of in-cab videos.

There have been no significant decisions or trends in New Hampshire over the past two years on retention and spoliation of in-cab videos and admissibility of in-cab videos.

The Superior Court Rules were recently updated to comment on the duty to preserve potentially relevant ESI. New Hampshire Superior Court Rule 25 provides that “[t]he parties have a duty to preserve all potentially relevant ESI once the party is aware that the information may be relevant to a potential claim. Counsel for the parties have a duty to notify their clients to place a ‘litigation hold’ on all potentially relevant ESI.” N.H. Super. Ct. R. 25(b).

We are not aware of any cases to date which raise the issue of spoliation in the context of in-cab video evidence.

5. What is your State's applicable law and/or regulation regarding the retention of telematics data, including but not limited to, any identification of the time frames and/or scope for retention of telematics data and any requirement that third party vendors be placed on notice of spoliation/retention letters.

Although there is no New Hampshire Supreme Court decision on this matter, RSA 357-G:1 controls event data recording devices in motor vehicles. Per RSA 357-G:1, III, "[a] manufacturer of a new motor vehicle sold or leased in this state, which is equipped with one or more event data recorders, including 'sensing and diagnostic modules', shall disclose that fact in the owner's manual for the vehicle." This data is the property of the vehicle owner and may not be downloaded or otherwise retrieved by a person other than the owner of the motor vehicle at the time of the event, except under one of the following circumstances:

- a) The owner of the motor vehicle or the owner's agent or legal representative consents to the retrieval of information.
- b) In response to an order of a court.
- c) The data is retrieved by a motor vehicle dealer, or by an automotive technician for the purpose of diagnosing, servicing, or repairing the motor vehicle.
- d) The data is retrieved for the purpose of determining the need for or facilitating emergency medical response in the event of a motor vehicle crash.

RSA 357-G:1, IV.

6. Is a positive post-accident toxicology result admissible in a civil action?

Although the New Hampshire Supreme Court has not explicitly addressed this question, there is no prohibition, either in statute or case law, preventing the admission of positive post-accident toxicology results in civil actions. See generally *Weaver v. Stewart*, 169 N.H. 420 (2016) (affirming summary judgment on behalf of defendant regarding other issues in a civil case brought against town, police officer, and towing company for releasing vehicle to intoxicated individual and making no ruling or addressing potential issue of admissibility of toxicology report offered by Plaintiff).

7. Is post-accident investigation discoverable by adverse counsel?

There are no specific statutes protecting post-accident investigations from discovery in the context of motor vehicle crashes. Whether a specific post-accident investigation is discoverable in New Hampshire will likely depend upon whether the Court determines that the investigation is protected work product. Even if the Court determines that the investigation is work product, this would not automatically protect it from discovery if "relevant facts are unobtainable by other means, or are obtainable only under such conditions of hardship as would

tend unfairly to prejudice the party seeking discovery.” *Johnston by Johnston v. Lynch*, 133 N.H. 79, 96 (1990) (quotations and citations omitted).

8. Describe any laws in your State which regulate automated driving systems (autonomous vehicles) or platooning.

New Hampshire has yet to enact any laws that regulate automated driving systems or platooning.

9. Describe any laws or Court decisions in your State which would preclude a commercial driver from using a hands-free device to have a conversation over a cell phone.

RSA 265:79-c governs the use of mobile electronic devices while driving. The statute requires that “[n]o person, while driving a moving motor vehicle upon a way or temporarily halted in traffic for a traffic control device or other momentary delay, shall use any hand-held mobile electronic device capable of providing voice or data communication, including but not limited to: reading, composing, viewing, or posting any electronic message; or initiating, receiving, or conducting a conversation; or initiating a command or request to access the Internet; or inputting information into a global positioning system or navigation device; or manually typing data into any other portable electronic device. An operator of a motor vehicle who holds a cellular telephone or other electronic device capable of voice communication in the immediate proximity of his or her ear while such vehicle is in motion is presumed to be engaging in a call within the meaning of this section.” RSA 265:79-c, I(a). Bluetooth-enabled or other hands-free electronic devices are permitted. The statute defines “hands-free electronic device” as “a mobile electronic device that has an internal feature or function, or that is equipped with an attachment or addition, whether or not permanently part of such mobile electronic device, by which a user engages in conversation without the use of either hand; provided, however, this definition shall not preclude the use of either hand merely to activate, deactivate, or initiate a function of the telephone.”

10. Identify any Court decisions in your State precluding Golden Rule and/or Reptile style arguments by Plaintiffs’ counsel.

Although there are no specific rules addressing the reptile theory, if New Hampshire had to address the issue, it would likely forbid such arguments. New Hampshire case law indicates that “jurors must ultimately base their judgment on the evidence presented and the natural inferences therefrom [and] [t]hus, there must be limits to pleas of pure passion and there must be restraints against blatant appeals to bias and prejudice.” *Id.*, 140 N.H. 403, 406 (1995) (quoting *Draper v. Airco, Inc.*, 580 F.2d 91, 95 (3d Cir.1978)); see also, e.g., *LeBlanc v. Am. Honda Motor Co., Inc.*, 141 N.H. 579, 582, 688 A.2d 556, 560 (1997) (“A mistrial or a new trial may be warranted where counsel attempts to appeal to the sympathies, passions, and prejudices of jurors grounded in race or nationality, by reference to the opposing party’s religious beliefs or lack thereof, or by reference to a party’s social or economic condition or status.”).

Likewise, New Hampshire Rules of Evidence 401, 403, and 404 are in accord with their federal counterparts. These rules, collectively, acknowledge the principal that evidence that is

unfairly prejudicial and only marginally relevant can impact “directly upon the fairness of the trial and the integrity of the system.” N.H. R. Evid. 403, Reporter’s Notes. This was the common law view in this state before the rules were adopted. See, e.g., *Solmica of New England, Inv. v. Verreault*, 115 N.H. 4, 7 (1975).

11. Compare and contrast the advantage and disadvantages of Federal Court versus State Court in your State.

The primary advantage of being in Federal Court versus State Court is the “predictability” of the proceedings which are dictated by the Federal Rules and the enforcement thereof by the judges and magistrate at the United States District Court in New Hampshire. The Federal Court also has significantly better technology/equipment and staff assistance than is available in the State Courts. The primary disadvantages are that the judges and magistrate in the Federal Court tend to be more restrictive in allowing the lawyers to manage their cases in terms of granting continuances and discovery deadline extensions. In general, verdicts in the Federal Court tend to be larger than verdicts in the State Court system.

12. How does your State handle the admissibility of traffic citations (guilty plea, please of no contest, etc.) in subsequent civil litigation?

In New Hampshire, only guilty pleas to minor traffic citations are admissible in a subsequent civil proceeding as an admission against interest. See *Public Service Co. v. Chancey*, 94 N.H. 259 (1947) (finding that “[u]nless the record showed a plea of guilty, under our decisions [the citation] would not have been admissible to establish the truth of facts alleged in the complaint”).

Evidence of a guilty plea is admissible in a subsequent civil suit as an admission against interest, but a plea of no contest is not. See *Public Service Co. v. Chancey*, 94 N.H. 259 (1947).

13. Describe the laws in your State which regulate whether medical bills stemming from an accident are recoupable. In other words, can a plaintiff seek to recover the amount charged by the medical provider or the amount paid to the medical provider? Is there a basis for post-verdict reductions or offsets?

There is a split currently existing among the trial courts of New Hampshire. Some trial judges allow only the amount of the medical bill actually paid, while some find the so-called “negotiated rate” between the insurance carrier and the provider to be inadmissible pursuant to the collateral source rule. There is no governing Supreme Court precedent on this issue.

There is no basis for post-verdict reductions or offsets of medical expenses proven by the evidence.

14. Describe any statutory caps in your State dealing with damage awards.

In general, there are no statutory damage caps in New Hampshire. In certain loss of consortium cases, damage caps are in place. See RSA 556:12.

