DELAWARE

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1. Provide an update on current black box technology and simulations in your State and the legal issues surrounding these advancements.

Delaware courts have permitted the admission of electronic vehicular data from Event Data Recorders ("EDRs"), also known as "black box technology," for use in criminal cases. *State v. Byard*, 2018 WL 2077324, at *4 (Del. Super. Ct. May 1, 2018), as corrected (May 3, 2018) (recognizing the black box issue as one of first impression in Delaware). In *State v. Byard*, the court admitted EDR data and allowed a state police officer's expert testimony regarding EDR data, applying *Daubert*. *Id*. (see Section V. *infra*.)

2. Besides black box data, what other sources of technological evidence can be used in evaluating accidents and describe the legal issues in your State involving the use of such evidence.

Delaware courts have admitted video evidence from the interior of a public bus as relevant for the purposes of evaluating the circumstances preceding a traffic accident. *See Clark v. State*, 894 A.2d 406 (Del. 2006) (finding that the probative value of digital video of traffic accident involving bus driven by claimant was not substantially outweighed by danger of unfair prejudice, confusion or waste of time in worker's compensation proceedings). Otherwise, the case law on this topic involves traditional accident reconstruction methodologies, including estimations of vehicle acceleration rates and speeds, reaction times, and distance measurements. *See*, *e.g.*, *Taylor v. Green Acres Farm, Inc.*, 2018 WL 2128663, at *2 (Del. Super. Ct. May 7, 2018), *aff'd*, 198 A.3d 176 (Del. 2018).

3. Describe the legal issues in your State involving the handling of post-accident claims with an emphasis on preservation / spoliation of evidence, claims documents, dealing with law enforcement early and social media?

a. What is the rule regarding spoliation of evidence in your state?

Delaware recognizes "where a litigant intentionally suppresses or destroys pertinent evidence, an inference arises that such evidence would be unfavorable to his case." *Lucas v. Christiana Skating Center, Ltd.*, 722 A.2d 1247, 1248 (Del. Super. 1998) (*citing Collins v. Throckmorton*, 425 A.2d 146, 150 (Del. 1980)). The most severe remedy for the destruction of evidence is the imposition of a default Judgment. *See Sundor Elec., Inc. v. E.J.T. Constr.*, 337 A.2d 651, 652 (Del. 1975); *Positran Mfg., Inc. v. Diebold, Inc.*, 2003 WL 21104954, at *2 (D. Del. May 15, 2003). To impose a default Judgment, the spoliator must have acted "willful[ly] or in bad faith and intended to prevent the other side from examining the evidence." *Positran*, 2003 WL 21104954, at *2 (citations omitted).

An adverse inference instruction may also be available where a litigant *recklessly* causes the loss of pertinent evidence. *Sears, Roebuck and Co. v. Midcap,* 893 A.2d 542, 552 (Del. 2006) ("An adverse inference instruction is appropriate where a litigant *intentionally or recklessly* destroys evidence, when it knows that the item in question is relevant to a legal dispute or it was otherwise under a legal duty to preserve the item."); *see also Foreman v. Two Farms, Inc.*, 2018 WL 4846341, at *3 (Del. Super. Ct. Oct. 4, 2018) (granting adverse inference after finding that defendant recklessly lost video surveillance of slip and fall accident).

A guilty party may be prosecuted for tampering with physical evidence, a Class G felony. 11 *Del. C.* § 1269(2); *see also Clay v. State*, 164 A.3d 907, 914-15 (Del. 2017) (explaining when a person is guilty of tampering with physical evidence under 11 *Del. C.* § 1269). The responsible party may be subject to a jury instruction that the missing evidence would have been unfavorable to his or her case. *Lucas v. Christiana Skating Center, Ltd.*, 722 A.2d 1247, 1249 (Del. Super. 1998). Delaware courts have refused to recognize an independent tort of spoliation. *Id.* at 1250.

b. Is there a duty to preserve evidence absent a specific demand?

Yes. If a party has reason to anticipate litigation, it has an affirmative duty to preserve evidence.

"A party in litigation or who has reason to anticipate litigation has an affirmative duty to preserve evidence that might be relevant to the issues in the lawsuit." Often, this duty attaches even before litigation has been commenced "when a party should have known that the evidence may be relevant to future litigation." A party does not, however, have a duty to "preserve every shred of paper, every e-mail or electronic document," but instead must "preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request."

TR Inv'rs, LLC v. Genger, 2009 WL 4696062, at *17 (Del. Ch. Dec. 9, 2009), *aff'd* 26 A.3d 180 (Del. 2011) (footnotes omitted).

c. What is the rule of spoliation of evidence specifically relating to electronic data?

See 1.a. & 1.b. above. *See also Beard Research, Inc. v. Kates*, 981 A.2d 1175 (Del. Ch. 2009) (Court drew adverse inference against defendant for recklessly destroying and losing laptop's hard drive after he was on notice that electronically stored information on the hard drive could be relevant).

d. What has been your experience with its application to onboard equipment like DriveCam?

Not much exists in Delaware about DriveCam, Go Pro, etc. However, Delaware courts will likely take an interest in the data on these devices as they become more common. DriveCam can be analogized to data on video, and precedent on spoliation of evidence likely would apply to such video evidence.

e. Does your state allow direct actions against responsible parties for spoliation?

No. Delaware does not recognize a separate cause of action for negligent or intentional spoliation of evidence. *Segura v. M Cubed Techs., Inc.*, 2019 WL 1504048, at *2 (Del. Super. Ct. Apr. 4, 2019); see also *Lucas v. Christiana Skating Center, Ltd.*, 722 A.2d 1247 (Del. 1998). Delaware does permit an adverse inference for the spoliation. *Id*. (finding that the responsible party may be subject to a jury instruction that the missing evidence would have been unfavorable to his or her case).

f. Is there any limitation on upstream liability for spoliation?

No Delaware cases have squarely addressed this issue.

4. Describe the legal considerations in your State when defending an action involving truck drivers who may be considered Independent Contractors, Borrowed Servants or Additional Insureds?

Under Delaware law, a person can be both an independent contractor and an agent of a corporation such that vicariously liability will apply to corporation. *Fisher v. Townsends, Inc*., 695 A.2d 53, 61 (Del. 1997) (holding that a principal can be vicariously liable if the tortfeasor is an "agent-independent contractor."). To determine whether an independent contractor is an agent for vicarious liability purposes, the courts ask whether the owner or contractee's control or direction dominates the manner or means of the work performed. *Id*. If so, the non-agent status of the independent contractor can be destroyed and the independent contractor becomes an agent capable of rendering the principal vicariously liable for the acts of the independent contractor. *Id*. The Delaware Supreme Court held that "[t]his determination is almost entirely one of fact." *Id*.; *see also Randazzo v. Cochran*, 2018 WL 1037455, at *3 (Del. Super. Ct. Feb. 22, 2018); *Janess v. Ramirez*, 2017 WL 2709744, at *3 (Del. Super. Ct. June 22, 2017).

5. What is the legal standard in your state for allowing expert testimony on mild traumatic brain injury (mTBI) claims and in what instances have you had success striking experts or claims?

In general, Delaware courts use the following *Daubert* factors to determine the admissibility of scientific or technical expert testimony: "(1) the witness is qualified as an expert by knowledge, skill, experience, training or education; (2) the evidence is relevant; (3) the expert's opinion is based upon information reasonably relied upon by experts in the particular field; (4) the expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and (5) the expert testimony will not create unfair prejudice or confuse or mislead the jury." *See Tolson v. State*, 900 A.2d 639, 645 (Del. 2006); *Eskin v. Carden*, 842 A.2d 1222, 1227 (Del. 2004); *Culler v. Bayhealth Med. Ctr., Inc*., 2018 WL 1935972, at *2 (Del. Super. Ct. Apr. 16, 2018).

However, when considering medical evidence involving mTBI claims, Delaware courts have held that a "soundly performed differential diagnosis alone satisfies the *Daubert* requirements for reliability in the context of clinical medicine." *Culler v. Bayhealth Med. Ctr., Inc.*, 2018 WL 1935972, at *3 (Del. Super. Ct. Apr. 16, 2018) (permitting expert testimony on the causes of decedent's cause of death, including the alleged mTBI caused by medical provider's inadvertent striking of decedent's head in hospital) (internal quotations omitted). A differential diagnosis is a "standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated." *Id*. (*citing Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4th Cir. 1999)). A proper differential diagnosis typically involves "conduct[ing] a physical examination, tak[ing] a medical history, review[ing] clinical tests, including laboratory tests, and exclud[ing] obvious (but not all) alternative causes." *Id*.

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

Yes, post-accident toxicology reports are admissible provided that the reports are supported by additional evidence, including expert testimony, showing the results of the report can be used to draw a causal connection between the accident and the relevant party's level of intoxication. Toxicology reports not supported by additional evidence may be excluded on the basis that the results would be irrelevant, confusing, or unfairly prejudicial. *See, e.g., Robbins et al. v. William H. Porter, Inc*., 2006 WL 2959483 (Del. Super. 2006) (excluding toxicology reports because "the bare toxicology reports are not admissible regarding causation" where proponents of the reports could not draw a causal relationship between the party's level of intoxication and the accident itself); *Holland v. Allstate Ins. Co*., 2008 WL 660330 (Del. Super. 2008) (excluding toxicology reports for lack of a causal connection to accident and finding non-intoxicated passenger's claim against insurer would be unfairly prejudiced by evidence of driver's intoxication).

7. What are some considerations for federally-mandated testing when drivers are Independent Contractors, Borrowed Servants, or Additional Insureds?

There are no Delaware cases directly addressing this question.

8. Is there a mandatory ADR requirement in your State and are any local jurisdictions mandating cases to binding or non-binding arbitration?

Yes. In civil actions not valued at over $50,000, a Plaintiff filing a Complaint in the Delaware Superior Court can "opt-in" to Mandatory, Non-Binding Arbitration ("MNA") pursuant to Delaware Superior Court Civil Rule 16.1:

"Notwithstanding and in addition to the ADR provisions contained in Rule 16, all civil actions, except those actions listed in subsection (b) hereof, in which (1) trial is available; (2) monetary damages are sought; (3) any nonmonetary claims are nominal; and (4) counsel for claimant has made an election on the Civil Case Information Sheet for mandatory non-binding arbitration (hereinafter "MNA"), are subject to mandatory non-binding arbitration. The jurisdictional authority of the arbitrator for any case in which such election has been made shall be limited to fifty thousand dollars ($50,000), exclusive of costs and interest." Del. Super. Ct. Civ. R. 16.1(a).

Exceptions to Rule 16.1(a) include:

(1) class action matters; (2) a replevin, declaratory judgment, foreign or domestic attachment, interpleader, summary proceedings, or mortgage foreclosure action; (3) any *in forma pauperis* action where the claims are substantially non-monetary; or (4) an action to enforce a statutory penalty. Del. Super. Ct. Civ. R. 16.1(b).

9. Can corporate deposition testimony be used in support of a motion for summary judgment or other dispositive motion?

Yes, but the testimony does not operate to "conclusively establish[] a fact" such that the evidence cannot be controverted. *See ADT Holdings, Inc. v. Harris*, 2017 WL 3913164, at *2 (Del. Ch. Sept. 7, 2017). A corporate defendant may offer evidence at trial that contradicts the 30(b)(6) deposition in the same way that an individual person may do so. *Id*. (holding that "a lawyer representing the corporation who designated the Rule 30(b)(6) witness may offer contradictory testimony or evidence, even if it has the effect of impeaching the testimony of the Rule 30(b)(6) witness.").

10. What are the rules in your State for contribution claims and does the doctrine of joint and several liability apply?

Delaware's Uniform Contribution Among Joint Tortfeasors Act, codified at 10 *Del. C*. §§6301 *et. seq*. provides that a claim against a joint tortfeasor may be reduced in accordance with the amount paid by another joint tortfeasor in settling a claim. *See* 10 *Del*. *C*. § 6304(a) (providing that a release by the injured person of one joint tortfeasor, whether before or after Judgment, does not discharge the other tortfeasor unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid).

The collateral source rule is "designed to strike a balance between two competing principles of tort law: (1) a plaintiff is entitled to compensation sufficient to make him whole, but no more; and (2) a defendant is liable for all damages that proximately result from his wrong." *Stayton v. Del. Health Corp*., 117 A.3d 521, 526 (Del. 2015) (*quoting*

Mitchell v. Haldar, 883 A.2d 32, 38 (Del. 2005)). The rule favors the plaintiff over the tortfeasor by preventing a tortfeasor from reducing its damages because of payments or compensation received by the injured plaintiff from an independent source. *Id*. at 527. This rule is "predicated on the theory that a tortfeasor has no interest in, and therefore no right to benefit from monies received by the injured person from sources unconnected with the defendant." *Mitchell*, 883 A.2d at 37-38. "Due to the potentially prejudicial effect of such evidence, the collateral source rule generally prohibits the introduction of evidence regarding payments made to an injured plaintiff from collateral sources." *Meals v. Port Auth. Trans Hudson Corp*., 622 F. App'x 121, 125 (3d Cir. 2015) (*citing Gladden v. P. Henderson & Co.*, 385 F.2d 480, 483 (3d Cir. 1967)); *see also Evans v. John Crane, Inc.*, 2019 WL 5457101, at *1 (D. Del. Oct. 24, 2019).

An employer is immune from contribution claims due to the exclusivity provisions of Delaware's worker's compensation statute. *See* 19 *Del. C*. § 2304; *see also Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 407 (Del. 1995) ("Because the employer cannot be held liable as a joint tortfeasor, it is not obligated to provide contribution to the third party."); *Echevarria v. State of Delaware Ins. Coverage Office*, 2019 WL 1077689, at *3 (Del. Super. Mar. 7, 2019) ("Under the pre-amended version of 19 *Del*. *C*. § 2304, Plaintiff's remedies are exclusive to those provided by the Workers' Compensation Act").

11. What are the most dangerous/plaintiff-friendly venues in your State?

There are three (3) counties in Delaware: New Castle, Kent, and Sussex. Sussex County is more rural and politically more conservative, and Sussex County juries tend to be more conservative. New Castle County tends to be more liberal and Kent County can be a wildcard. Generally, however, all three counties are fairly conservative as far as jury pools are concerned.

12. Is there a cap on punitive damages in your State?

a. Are punitive damages insurable?

Yes, unless the policy expressly excludes them. *See Jones v. State Farm Mut. Auto. Ins. Co.*, 610 A.2d 1352 (Del. 1992); *Whalen v. On-Deck, Inc.*, 514 A.2d 1072 (Del. 1986); *Price v. Continental Ins. Co.*, 768 A.2d 975 (Del. Ch. 2000).

b. Any limitations or how much may be awarded as punitive damages?

Yes. An award of punitive damages may not be disproportionate in amount to the award for compensatory damages. *Reynolds v. Willis*, 209 A.2d 760, 764 (Del. 1965). Additionally, punitive damages should not shock the judicial conscience or be manifestly unjust. *See Riegel v. Aastad*, 272 A.2d 715, 718 (Del. 1970) (court found award of punitive damages of $60,000 "shocking to the judicial conscience" and thus remanded for remittitur of $50,000 or a new trial).

13. Admissible evidence regarding medical damages – can the plaintiff seek to recover the amount charged or the amount paid?

Generally, medical bills can be boarded as special damages at trial, except for Medicare and Medicaid write-offs. In Delaware, the collateral source rule holds that "a tortfeasor cannot reduce its damages because of payments or compensation received by the injured person from an independent source." *Stayton v. Delaware Health Corp*., 117 A.3d 521, 527 (Del. 2015) (citation omitted). Under Delaware law, however, both Medicare and Medicaid "write-offs" are no longer "boardable" as special damages in a personal injury action. (*See Stayton v. Delaware Health Corp*., 117 A.3d 521 (Del. 2015) (Medicare); *see also Smith v. Mahoney, Richards, et. al*., (Del. Super., Nov. 20, 2015) (citation omitted) (extending *Stayton* to Medicaid).

These cases have not yet been extended to third-party insurers or self-insureds, and Delaware continues to apply the collateral source rule to non-Medicare/Medicaid provider write-offs as it does to third party payments. *Id*. at 529; *see, e.g., Mitchell v. Haldar*, 883 A.2d 32 (Del. 2005); *Onusko v. Kerr*, 880 A.2d 1022 (Del. 2005).

A plaintiff can also recover for future anticipated medical expenses. *Smith*, 150 A.3d at 1208. The Delaware Supreme Court held that the amount of future medical expenses will not be reduced for expected Medicaid/Medicare coverage because "Medicaid eligibility is purely speculative." *Id*.