

Delaware

Are preventability determinations and internal accident reports discoverable or admissible in your state? What factors determine discoverability or admissibility?

To qualify for work product immunity, “materials [must] be written specifically in preparation for threatened or anticipated litigation.” See *State ex rel. Brady v. Ocean Farm Ltd. P’ship*, 2002 WL 259955 at *2-3 (Del. Ch. Feb. 14, 2002), citing *Zirn v. VLI Corp.*, 621 A.2d 773, 782 (Del.1993) (quoting *Riggs Nat’l Bank of Wash., D.C. v. Zimmer*, 355 A.2d 709, 715 (Del.Ch.1976)).

Internal reports that are prepared in the ordinary course of business for a non-litigation purpose are discoverable. *Hopkins v. Chesapeake Utils. Corp.*, 300 A.2d 12, 14 (Del. 1972). However, if a report is prepared in anticipation of litigation, then it may be protected as work product. See *State ex rel. Brady v. Ocean Farm Ltd. P’ship*, at *2-3.

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

Under Delaware law, documents regarding third party funding are analyzed under Delaware’s work product doctrine. *Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, 2015 WL 778846 at *9 (Del. Ch. 2015). Under this analysis, third party funding has generally been held to be covered by Delaware’s work product doctrine because they were prepared in anticipation of litigation and serve a litigation purpose. *Id.*; *Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co.*, 2015 WL 1540520 at *5 (Del. Super. Mar. 31, 2015). At the federal level, one federal district court judge in Delaware has required that the existence of a third-party litigation funding agreement must be disclosed, and that additional discovery can be sought if the funder has authority to make material litigation or settlement decisions. See *Standing Order Regarding Third-Party Litigation Funding Arrangements* (2022).

What is the procedure for the resolution of a claim for injuries to a minor in your state? Does the minor’s age affect the statute of limitations for a personal injury claim?

The Delaware Superior Court can approve settlements for minors or take other actions to place the settlement into funds for the minor’s benefit. *Delaware Superior Court Civil Rule 133*. Delaware’s Savings Statute for Infants or Persons Under Disability states that the statute of limitations does not bar an action for wrongful death or injury to personal property during the continuance of the infancy or for three years after. 10 *Del. C.* § 8116. However, this statute does not apply to personal injuries.

What are the advantages or disadvantages in your State of admitting that a motor carrier is vicariously liable for the fault of its driver in the context of direct negligence claims?

Delaware courts have allowed for independent negligence claims to move forward despite the fact that the defendant had admitted to vicarious liability. *Smith v. Williams*, 2007 WL 2677131 at *6 (Del. Super. Sept. 11, 2007).

What is the standard applied for spoliation of physical and/or documentary evidence in your state?

In order to show spoliation, there must be a finding of either intentional or reckless destruction of evidence. *Sears Roebuck v. Midcap*, 893 A.2d 542, 550 (Del. 2006). A party in litigation or who has reason to anticipate litigation has an affirmative duty to preserve documents. *Riverside Fund v. Shyamsundar*, 2017 WL 624856 at *1 (Del. Super. Feb. 14, 2017).

Is the amount of medical expenses actually paid by insurance or others (as opposed the amounts billed) discoverable or admissible in your State?

Under Delaware law, a person eligible for personal injury protection is precluded from introducing the amount paid into evidence at trial. 21 Del. C. § 2118. However, this does not apply when benefits are paid through worker's compensation. *Moore v. McBride*, 2001 WL 985115 at *2 (Del. Super. Aug. 21, 2001). Furthermore, under the collateral source rule, courts will not exclude the full amount of the medical bill from trial even though some of it may have been written off. *Mitchell v. Haldar*, 883 A.2d 32, 40 (Del. 2005). 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). This rule applies to future damages that could be covered by Medicare and/or Medicaid as well. *Russum v. IPM Dev. P'ship LLC*, 2015 WL 4594166 at *3 (Del. Super. July 15, 2015). 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).

What is the legal standard in your state for obtaining event data recorder ("EDR") data from a vehicle not owned by your client?

Delaware courts have not yet addressed this issue. However, they have held that that EDR is sufficiently reliable to be admissible. *State v. Byard*, 2018 WL 2077324 at *4 (Del. Super. May 1, 2018).

What is your state's current standard to prove punitive or exemplary damages against a motor carrier or broker and is there any cap on same?

In order to recover punitive damages, the defendant must have acted with a wanton or willful disregard for others. *Estate of Rae v. Murphy*, 956 A.2d 1266, 1270 (Del. 2008); *Porter v. Turner*, 954 A.2d 308, 312 (Del. 2008). Punitive damages are imposed when the defendant's actions are particularly reprehensible such as being reckless or motivated by malice or fraud. *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 529 (Del. 1987). Mere inadvertence and mistakes of judgment that constitute negligence do not suffice for an award of punitive damages. *Id.* Delaware does not put a limit on punitive damages, but the punitive damages award must be proportional to the amount of the compensatory damages award. See *Cloroben Chem. Corp. v. Comegys*, 464 A.2d 887, 892 (Del. 1983). A verdict will not be disturbed unless it is so excessive that it indicates that it was the result of passion, partiality, or a manifest

disregard of the evidence. *Id.* A verdict should not be set aside unless it would shock the conscience. *Id.*; *Riegel v. Aastad*, 272 A.2d 715, 718 (Del. 1970).

Has your state had any noteworthy recent punitive damages verdicts? If so, what evidence was admitted supporting issuance of a punitive damages instruction? Finally, are any such verdicts currently on appeal?

There have not been any recent noteworthy punitive damages verdicts in Delaware.

Does your state permit an expert to testify as to content of the FMCSRs or the applicability of the FMCSRs to a certain set of facts?

Delaware Courts have not yet addressed this issue.

Does your state consider a broker or shipper to be in a “joint venture” or similar agency relationship with a motor carrier for purposes of personal injury or wrongful death claims?

Delaware Courts have not yet addressed this issue.

Provide your state’s comparative/contributory/pure negligence rule.

Delaware is a modified comparative negligence state. Under Delaware’s comparative negligence statute, the plaintiff’s contributory negligence will not bar recovery unless the plaintiff’s negligence is greater than the defendant’s or the combined negligence of all defendants, but the plaintiff’s award will be reduced in proportion to the amount attributable to the plaintiff. 10 *Del. C.* § 8132; see *Helm v. 206 Mass. Ave., LLC*, 107 A.3d 1074, 1079 (Del. 2014).

Provide your state’s statute of limitations for personal injury and wrongful death claims.

The statute of limitations is two years for personal injuries and for wrongful death. 10 *Del. C.* § 8107; 10 *Del. C.* § 8119.

In your state, who has the authority to file, negotiate, and settle a wrongful death claim and what must that person’s relationship to the decedent be?

An action for wrongful death must be for the benefit of the spouse, parent, child and/or siblings of the deceased person. 10 *Del. C.* § 3724. If there is no one who qualifies as a spouse, parent, child and/or sibling of the deceased, then the action can be for the benefit of anyone related to the deceased person by blood or marriage. *Id.*

Is a plaintiff’s failure to wear a seatbelt admissible at trial?

No. Failure to wear a seatbelt is not evidence of either comparative or contributory negligence, nor is failure to wear a seatbelt admissible as evidence in the trial of any civil action or insurance claim adjudication. 21 *Del. C.* § 4802(i).

In your state, are there any limitations on damages recoverable for plaintiffs who do not have insurance coverage on the vehicle they were operating at the time of the accident? If so, describe the limitation.

There are not limitations on damages recoverable for plaintiffs who lack insurance coverage. See *Phillips v. Ocasio*,

2014 WL 1390454 at *2 (Del. Super. Apr. 9, 2014) (“An uninsured plaintiff cannot be deemed self-insured, and thus be prevented from seeking medical expenses and lost wages directly from the tortfeasor”).

How does your state determine applicable law/choice of law questions in motor vehicle accident cases?

When conducting a choice of law analysis, Delaware courts use the most significant relationship test in the Restatement (Second) of Conflict of Laws. *Sinnott v. Thompson*, 32 A.3d 351, 354 (Del. 2011). This test provides seven factors in the inquiry, which are “(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.” *Id.* When applying these factors, the Court will take into account the following contacts: “(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.” *Id.*