

HAWAII

1. What are the legal considerations in your State governing the admissibility or preventability in utilizing the self-critical analysis privilege and how successful have those efforts been?

In *Dowling v. American Hawaii Cruises*, the Ninth Circuit held that a party asserting the self-critical analysis privilege must show that: “[1] the information must result from a critical self-analysis undertaken by the party seeking protection; [2] the public must have a strong interest in preserving the free flow of the type of information sought; [3] the information must be of the type whose flow would be curtailed if discovery were allowed.” . . . [And 4, that the document] was prepared with the expectation that it would be kept confidential, and has in fact been kept confidential. *Dowling v. Am. Haw. Cruises, Inc.*, 971 F.2d 423, 426 (9th Cir. 1992) (citations omitted).

In *Dowling*, the Ninth Circuit permitted the injured plaintiff under the Jones Act, to discover the factual content of the defendant cruise ship’s pre-accident safety committee meeting minutes. The Court reasoned that “organizations have many incentives to conduct such reviews that outweigh the harm that might result from disclosure,” such as fear of other lawsuits or simply “to avoid developing a reputation for having an unsafe premise.” *Id.* at 426.

2. 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?

Hawaii does not statutorily mandate a party to disclose the existence of a litigation funder or litigation funding agreement. Hawaii Rule of Civil Procedure Rule (“HRCP”) 26(b), governs whether or not the discovery of such files is possible. Rule 26 provides that “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information or tangible things and the identity and location of persons having knowledge of any discoverable matter.”

3. Who travels in your State with respect to a Rule 30(b)(6) witness deposition; the witness or the attorney and why?

Hawaii Courts have not analyzed this issue yet. HRCP Rule 30(b)(6) allows a noticing party to unilaterally choose the deposition location but that choice is subject to the Court’s power to grant a protective order pursuant to HRCP Rule 26(c)(2). Thus, the Court has discretion in setting a location and will consider convenience and relative hardships to the parties.

4. What are the benefits or detriments in your State by admitting a driver was in the “course and scope” of employment for direct negligence claims?

Admitting a driver was acting in the “course and scope” of employment could be beneficial because the company has control over the driver. This could be used in a situation where a driver was not negligent in bringing about an accident. It could absolve the employer’s liability. For example, a negligent supervision claim must show that the employee who committed the wrongful act was acting outside the scope of their employment. *Pulawa v. GTE Hawaiian Tel*, 112 Haw 3, 18, 143 P.3d 1205, 1220 (2006). On the other hand, admitting a driver was in the “course and scope” of employment could be detrimental if the driver was negligent.

5. Please describe any noteworthy nuclear verdicts in your State?

On October 7, 2000, Dason Udac, a construction worker and fisherman, was driving his 1987 Nissan Pathfinder on Highway 11 south of Hilo, Hawaii, when he ran off the road. Udac was ejected from the Pathfinder. He broke his back and ended up a complete paraplegic. Udac sued Takata Corp., Tokyo, for products liability claiming that its TK-821 seat buckle system was defectively designed. Udac testified that his seatbelt was fastened, and his accident reconstruction expert, William Otto, testified that he did the initial inspection of the Pathfinder after the accident, including testing the driver's seatbelt system, and said that the plaintiff's seatbelt was fastened but that it was false-latched. Latching will occur because the buckle appears to be closed but is not. When a collision occurs with false latching the person becomes free from the movement of their body instead of being restrained by the seat belt. The jury found the defendant's liable, but also found that Udac was contributorily negligent. The jury assigned 65% of the fault to Takata and 35% to Udac. The jury awarded the plaintiffs \$19,350,000.00.

6. What are the current legal considerations in terms of obtaining discovery of the amounts actually billed or paid

Discovery of what a plaintiff spent for medical services may be used to determine the reasonable value. However, the plaintiff is not automatically entitled to the amount actually paid. For injured plaintiffs with private insurance in Hawaii, the proper measure of damages depends on the reasonable value of the services rendered, and not how much the plaintiff was actually charged by the health care provider. *Bynum v. Magno*, 101 P.3d 1149, 1160–61 (Haw. 2004) (“Jurors are thus instructed that plaintiffs are entitled to compensation for medical treatment, but these damages are not limited to out-of-pocket expenses” citing Hawai’i Civil Jury Instr. No. 8.9). Injured plaintiffs are entitled to recover the full value of medical services without consideration for the amount actually paid.

For injured plaintiffs who have Medicare or Medicaid, damages are not reduced to reflect Medicare and Medicaid payments actually received by health care providers. Plaintiff not limited to out-of-pocket medical expenses and can recover the full, reasonable value of medical services billed. *Bynum v. Magno*, 101 P.3d 1149 (Haw. 2004).

To recover future medical expenses, a plaintiff must provide sufficient evidence to show that future medical expenses are necessary and the charges reasonable. *See, e.g., Condron v. Harl*, 46 Haw. 66, 76, 374 P.2d 613, 619 (1962); *Kometani v. Heath*, 50 Haw. 89, 95, 431 P.2d 931, 936 (1967).

7. How successful have efforts been to obtain the amounts actually charged and accepted by a healthcare provider for certain procedures outside of a personal injury? (e.g. insurance contracts with major providers)

This has not been squarely addressed in Hawaii.

8. What legal considerations does your State have in determining which jurisdiction applies when an employee is injured in your State?

This would depend on the type of litigation at issue. Whether a conflict exists between the law of the forum and the competing jurisdiction should be resolved first.

If the parties choose the law of a particular state to govern their contractual relationship and the chosen law has some nexus with the parties or the contract, that law will generally be applied. *Airgo, Inc. v. Horizon Cargo Transport, Inc.*, 670 P.2d 1277 (Haw. 1983).

For conflicts of law questions, Hawaii courts have relied on the Restatement (Second). *Beals v. Kiewit Pacific Co., Inc.*, 825 F. Supp. 926 (D. Hawaii 1993); *Peters v. Peters*, 634 P.2d 586 (Haw. 1981) (determining which state's law to apply requires an assessment of the interests and policy factors involved with a purpose of arriving at a desirable result in each situation).

Restatement (Second) of Conflict of Laws § 145 (1971) states:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (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.

Peters v. Peters, 634 P.2d 586 n. 16, 63 Haw. 653 n.16 (Haw. 1981)

If the lawsuit involves a tort, in Hawaii the payment of workers' compensation benefits is governed by Hawaii Revised Statutes § 386-3(a). It provides "If an employee suffers personal injury either by accident arising out of and in the course of the employment or by disease proximately caused by or resulting from the nature of the employment, the employee's employer or the special compensation fund shall pay compensation to the employee or the employee's dependents as provided in this chapter. Accident arising out of and in the course of the employment includes the willful act of a third person directed against an employee because of the employee's employment."

9. What is your State's current position and standard in regards to taking pre-suit depositions?

Pre-suit depositions are not commonly done in Hawaii. However, HRCR Rule 27 allows a person to file a verified petition in the circuit court in the circuit of the residence of any expected adverse party before an action or pending appeal.

10. Does your State have any legal considerations regarding how long a vehicle/tractor-trailer must be held prior to release?

Spoilation of evidence would be considered. Hawaii courts have "wide-ranging authority to impose sanctions for the spoliation of evidence." *Stender v. Vincent*, 92 Haw. 355, 362, 992 P.2d 50, 57 (2000). In addition to discovery sanctions available under HRCR Rule 37(b), the court can "fashion a remedy to cure prejudice

suffered by one party as a result of another party's loss or destruction of critical evidence" even in the absence of specific statutory remedies. *Richardson v. Sport Shinko*, 76 Haw. 494, 507-08, 880 P.2d 169, 182-83 (1994). A finding of bad faith is not necessary for the court to impose spoliation sanctions. *Stender*, 92 Haw. at 364, 992 P.2d at 59.

11. What is your state's current standard to prove punitive or exemplary damages and is there any cap on same?

In Hawaii to recover punitive damages, an injured plaintiff must prove with clear and convincing evidence that the defendant has acted: (1) "wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations"; (2) in willful misconduct; or (3) with a "conscious indifference to consequences." *Masaki v. Gen. Motors Corp.*, 71 Haw. 1, 16-17, 780 P.2d 566, 575 (1989).

Whether an award of punitive damages is appropriate, the primary consideration is the defendant's mental state. *Masaki*, 71 Haw. at 7, 780 P.2d at 570-71. The nature of a defendant's conduct is a secondary consideration. *Id.* An award of punitive damages always requires a "positive element of conscious wrongdoing." *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 908 cmt. b). Hawaii does not place a cap on punitive damages.

12. Has your state mandated Zoom trials? If so, what have the results been and have there been any appeals.

The chief judges of each circuit in Hawaii have the discretion to implement their own plans for jury trials provided that all operations are in compliance with social-distancing mandates and that the public health circumstances and any countywide orders in each circuit are taken into account. The chief judges of each circuit, or the presiding judge in a case, may postpone matters if necessary, to ensure health and safety. A presiding judge may opt to conduct proceedings telephonically, or make other arrangements, whether determining the feasibility of using video technology to conduct court proceedings.

There has not been any appeals regarding this issue.

13. Has your state had any noteworthy verdicts premised on punitive damages? If so, what kind of evidence has been used to establish the need for punitive damages? Finally, are any such verdicts currently up on appeal?

On February 19, 1988, a Hawaii jury returned a verdict finding that a van produced by General Motors Corporation ("GM") was defective and that GM was negligent. Both the defect and GM's negligence were legal causes of the plaintiff's injuries. The jury awarded the plaintiff \$6,776,115 in compensatory damages and \$11,250,000 in punitive damages.

A plaintiff must show by clear and convincing evidence that the defendant's behavior meets the standard of conduct stated above. *AMFAC, Inc. v. Waikiki Beachcomber Inv. Co.*, 839 P.2d 10, 82 (Haw. 1992).