

MASSACHUSETTS

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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.**

Judges generally allow black box technology and simulations into evidence if the proper foundation is laid. Typically, the jury is given an instruction that describing the scope and reliability of simulations.

- 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.**

None.

- 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?**

Once a defendant is notice of a potential claim, all evidence should be preserved. To avoid a spoliation argument, before a vehicle is released for repair or salvage, it is advisable to allow a reasonable period of time for the claimant to view a vehicle and other relevant evidence.

- 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?**

Massachusetts has a narrow interpretation of classification of an independent contractor under M.G.L. c. 149 § 148B. However, most transportation companies are exempt because the Massachusetts statute is pre-empted by Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. § 14501(c)(1) ("FAAAA"). *Schwann v. FedEx Ground Package Sys., Ground Package Svs.*, 813 F.3d. 429 (1st Cir. 2016).

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?

There is not a codified or common law legal standard pertaining to expert testimony on mild traumatic brain injury claims. Judges in Massachusetts follow the *Daubert* test for expert witness admissibility. *Commonwealth v. DiCicco*, 25 N.E.3d 859 (Mass. 2015). This test applies to expert testimony that involves “conclusions based on personal observation or clinical experience.” *Id.* Under this test, in order for expert testimony to be admissible, the expert’s testimony has to “have a reliable basis in the knowledge and experience of his discipline.” *Id.* The court will then determine “whether the reasoning or methodology” the expert used is “scientifically valid and whether that reasoning or methodology is properly applied to the facts in issue.” *Id.* If the expert’s testimony “lacks sufficient reliability” or the expert cannot “provide a reliable factual basis for his conclusions” then the testimony will not be admissible. *Id.*

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

Generally, yes.

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

It is advisable to be aggressive in obtaining testing for Independent Contractors, Borrowed Servants, or Additional Insureds.

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

No, except in Small Claims Court.

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

Yes.

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

Massachusetts is a pure “joint and several” jurisdiction. Massachusetts law on the negligence of joint tortfeasors, M.G.L. c. 231B § 1, is highly unfavorable to defendants in a joint tort scenario. A finding of any degree of negligence, even 1%, on the part of a joint tortfeasor exposes it to a pro rata share of joint and several liability. Therefore, in an event involving multiple tortfeasors, even if a defendant is deemed only 1% liable for the injuries of a claimant, the claimant can elect to collect the entire judgment from any

of the defendants. The defendants can then seek contribution from the other joint tortfeasor for up to one year after the judgment.

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

Suffolk County, which contains the City of Boston, and Middlesex County, which contains the City of Cambridge and suburbs north of Cambridge.

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

No. Outside of employment claims, punitive damages are only allowed pursuant to a wrongful death statute, M.G.L. c. 229 § 2, or for unfair claim settlement practices in the business of insurance, M.G.L. c. 176D.

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

The plaintiff can seek to recover for the amount charged. There are no post-verdict reductions or offsets. With an expert witness, usually a billing consultant, the defendant can seek to admit into evidence the amount the provider would ordinarily receive for the care or the treatment, which is generally less than the amount billed. *Law v. Griffith*, 457 Mass. 349, 360-61, 930 N.E.2d 126, 135-36 (2010), *superseding* 73 Mass.App.Ct. 1127, 902 N.E.2d 433 (2009).