

NEW HAMPSHIRE

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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.

Black boxes, or event data recorders, are governed by RSA 357-G:1. This statute applies to devices installed in a vehicle by the manufacturer of the vehicle and does any of the following for the purpose of capturing data for retrieval after a crash: records vehicle speed or direction; records vehicle location; records vehicle steering performance; records vehicle brake performance including whether brakes were applied before a crash; records the driver's seatbelt status; or has the ability to transmit information concerning a crash to a central communications system or other external device when a crash occurs. RSA 357-G:1, II.

Per RSA 357-G:1, the data recorded on the event data recorder is the property of the owner of the vehicle 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:

- I. The owner of the motor vehicle or the owner's agent or legal representative consents to the retrieval of information.
- II. In response to an order of a court.
- III. 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.
- IV. 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.
- V. RSA 357-G:1, VI.

The admissibility of event data recorder evidence is governed by the New Hampshire Rules of Evidence and will likely require expert testimony. See, e.g., *Com. v. Zimmerman*, 70 Mass. App. Ct. 357, 873 N.E.2d 1215 (2007) (affirming the admission of event data recorder evidence provided by an expert in accident reconstruction after an extensive hearing on the reliability of the data from the event data recorded).

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.

Videos, photographs or computer-generated animations may be used in evaluating accidents. Of course, such evidence will have to be admissible under New Hampshire Rules of Evidence. Per Rule 901(a), “[t]o satisfy the requirement of authenticating an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” See, e.g., *State v. Dodds*, 159 N.H. 239, 982 A.2d 377 (2009) (where the Supreme Court affirmed a trial court’s exclusion of a computer animation depicting how an accident occurred to illustrate the testimony of a traffic reconstruction expert where the trial court found there was no evidence to specifically substantiate the facts and figures the expert used in creating the animation). Even if the evidence is authenticated and relevant, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice under Rule 403. See *McLaughlin v. Fisher Engineering*, 150 N.H. 195, 834 A.2d 258 (2003) (affirming the exclusion of a gruesome accident photograph where the trial court found it to be more prejudicial than probative).

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?

Although the New Hampshire Supreme Court has not explicitly addressed each one of these narrow issues, parties handling post-accident claims should be cautious not to destroy any potentially relevant information. When it comes to handling social media, claims documents, or other electronically stored information, steps should be taken to preserve any potentially relevant information once a party is aware of a potential claim. New Hampshire Superior Court Rule 25(b) provides “[t]he parties have a duty to preserve all potentially relevant [electronically stored information] once the party is aware that the information may be relevant to a potential claim.” Additionally, counsel has a duty to notify their clients to place a “litigation hold” on all potentially relevant electronically stored information. N.H. Super. Ct. R. 25(b).

Similar to electronically stored information, efforts should be taken to preserve vehicles or other machinery involved in the accident. Destroying or altering potential evidence could result in a claim of spoliation or allow the opposing party to introduce evidence of the destruction at trial. *Rodriguez v. Webb*, 141 NH 177 (1996) (where the Supreme Court upheld a trial court order allowing the plaintiff to introduce at trial evidence that the defendant destroyed the faulty baler that caused the plaintiff’s injury, despite no direct evidence that the defendant acted with fraudulent intent).

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?

New Hampshire follows the general rule that an employer is not liable for the negligence of its Independent Contractors. *Valenti v. NET Properties Mgmt., Inc.*, 142 N.H. 633, 635, 710 A.2d 399, 400 (1998). This rule, however, will not apply under the following exceptions: (1) negligence of the employer in selecting, instructing or supervising the contractor; (2) employment for work that is inherently dangerous; and (3) instances in which the employer is under a nondelegable duty. *Lawyers Title Ins. Corp. v. Groff*, 148 N.H. 333, 336, 808 A.2d 44, 47-48 (2002). Additionally, liability may be extended where an employer exercised control over the Independent Contractor's work. See *Cont'l Ins. Co. v. New Hampshire Ins. Co.*, 120 N.H. 713, 717, 422 A.2d 1309, 1311 (1980) ("When a case involves borrowed servants, or employees of an otherwise independent contractor . . . control may be a decisive factor.") Indeed, the general rule is employers are not liable for the negligence of Independent Contractors; however, employers should be aware this rule may be circumvented by one of the many exceptions.

In New Hampshire, a vehicle owner's insurance extends to authorized drivers of that vehicle. Per, RSA 264:18, VI if a vehicle is insured, the "insurance applies to any person who has obtained possession or control of the vehicle of the insured with his express or implied consent even though the use in the course of which liability to pay damages arises has been expressly or impliedly forbidden by the insured or is otherwise unauthorized." Therefore, a vehicle owner's insurance will extend to drivers who may be considered Independent Contractors. Importantly, RSA 264:18, VI does not extend coverage in cases where the vehicle was stolen.

Independent Contractors, Borrowed Servants or Additional Insureds may qualify for workers compensation if they meet the definition for an "employee" under New Hampshire's Workers Compensation statute, RSA 281-A. Under the statute, any person who performs services for pay for an employer, is presumed to be an employee. RSA 281-A:2, VI (b)(1). This presumption, however, may be rebutted by proof that the individual in question meets all of the following criteria:

- I. The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.
- II. The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.
- III. The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.
- IV. The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.
- V. The person holds himself or herself out to be in business for himself or herself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations.

- VI. The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.
- VII. The person is not required to work exclusively for the employer.
- VIII. RSA 281-A:2.

Once the employer proves all of the listed criteria by a preponderance of the evidence, the presumption disappears and the employee bears the ultimate burden of persuasion. *In re Ann Miles Builder, Inc.*, 150 N.H. 315, 320 (2003).

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?

New Hampshire courts have not explicitly addressed expert testimony in the context of mild traumatic brain injury claims, but it is likely courts would address this issue as they do expert testimony in general. Under RSA 516:29-a, generally speaking, courts are required to exclude unreliable expert testimony.

RSA 516:29-a indicates that a court shall not allow a witness to offer expert testimony unless the court finds that the testimony is based on sufficient facts and data, is the product of reliable principals and methods, and that the witness has applied the principals and methods reliably to the facts of the case. RSA 516:29-a, I. In evaluating expert testimony, the court must consider whether the expert's theories and techniques have or can be tested, have been subjected to peer review, have a known or potential error rate, and are generally accepted in the appropriate literature. RSA 516:29-a, II (a).

Similarly, New Hampshire Rule of Evidence 702, regarding reliability of experts, accords with the requirements of *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993). *See Baker Valley Lumber, Inc. v. Ingersoll-Rand Company*, 148 N.H. 609, 611 (2002). Thus, Rule 702 demands that an expert's opinion be based on the "methods and procedures of science" rather than on "subjective belief or unsupported speculation"; the expert must have "good grounds" for his or her belief." *In Re: Paoli Railroad Yard PCB Lit.*, 35 F. 3d 717, 742 (3rd Cir. 1994) (citations omitted).

If appealed, a court's findings regarding the reliability of expert testimony will not be reversed absent abuse of discretion. *See, e.g., Baker Valley Lumber, Inc. v. Ingersoll-Rand Co.*, 148 N.H. 609, 614 (2002).

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

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

New Hampshire courts have not confronted this narrow issue. Courts would, however, likely address the same considerations as they would any issue involving truck drivers who may be considered Independent Contractors, Borrowed Servants, or Additional Insureds, to the extent those considerations arise in the context of complying with federally mandated testing requirements. *See supra* Question 4.

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

Yes. See Super.Ct.R. 32 Applicable in Civil Actions.

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

Yes. The general rule in New Hampshire is that deposition testimony may be used in support of, or in opposition to, summary judgment or similar dispositive motions. *See, e.g.,* RSA 491:8-a; *Tanguay v. Marston*, 127 N.H. 572, 575 (1986); *Panciocco v. Lawyers Title Ins. Corp.*, 147 N.H. 610, 613 (2002). There does not appear to be any reason that New Hampshire courts would depart from this rule to prohibit corporate deposition testimony as support for such a motion.

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

Comparative fault is available in a modified form in New Hampshire. In the event that more than 50% of fault for the at-issue injury is apportioned to an individual, then the liability is joint and several. If the liability apportioned to an individual is below 50%, the liability is several only. See RSA 507:7-d.

11. What are the most dangerous/plaintiff-friendly venues in your state:

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.

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

No, unless specifically authorized by statute.

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

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.