NEW YORK

Michael P. Sullivan
Rochelle K. Lawless
Jenna E. McDonnell
GIBSON, MCASKILL & CROSBY, LLP
69 Delaware Avenue, Suite 900
Buffalo, NY 14202
Phone: (716) 856-4200
Fax: (716) 856-4013
E-Mail: msullivan@gmclaw.com
E-Mail: rlawless@gmclaw.com
E-Mail: jmcdonnell@gmclaw.com
www.gmclaw.com

Felice J. Cotignola
LESTER SCHWAB KATZ & DWYER, LLP
100 Wall Street
New York, New York 10005
Phone: (212) 964-6611
Fax: (212) 267-5916
E-Mail: fcontignola@lskdnylaw.com
www.lskdnylaw.com

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

New York Vehicle and Traffic Law § 416-b governs vehicle data recording. Under this statute, vehicle manufacturers must include the fact that a vehicle is equipped with an "event data recorder", commonly referred to as a vehicle black box, in or with the vehicle manual information. An "event data recorder" is a feature which records one or more of the following after a crash: (1) vehicle speed and/or direction; (2) vehicle location; (3) vehicle steering performance; (4) vehicle brake performance, including whether brakes were applied; (5) driver's seatbelt status; or (6) has the ability to transmit information concerning a crash to a central communications system when a crash occurs, e.g. OnStar. Under this statute, data which is recorded through a black box may only be downloaded under the following circumstances: (1) by the owner of the vehicle or their agent or legal representative; (2) in response to an Order by a court or other judicial or administrative body; (3) for purposes of improving motor vehicle safety, security or traffic management (provided the registered owner of the vehicle or driver is not disclosed); (4) by a licensed new motor vehicle dealer or registered motor vehicle repair shop for the purposes of diagnosing, servicing, or repairing a motor vehicle; or (5) for purposes of determining emergency medical response for a motor vehicle crash.

Under New York law, courts have held that the admission of data recorded on an event data recorder is admissible as evidence and does not require a *Frye* hearing as it is "'generally accepted as reliable and accurate by the automobile industry and the

[National Highway and Traffic Safety Administration.]'" *People v. Hopkins,* 46 A.D.3d 1449, 1450 (4th Dept. 2007) (internal citations omitted). A recent trial court case dealt with the admission of a printout from an event data recorder in an ambulance which was being admitted under the business record exception to the hearsay rule by a witness who claimed no expertise, training or experience in the operation of the event data recorder. *See Sardar v. Park Ambulance Service, Inc.,* 56 Misc.3d 756, 764 (Sup. Ct. Kings. Cty. 2017). There, the court held the proper foundation for the admission of a business records must be made by someone with personal knowledge of the maker's business practices and procedures. *See id.* Another recent case concerned the imposition of an adverse inference charge against a defendant tractor trailer company where such data is potentially destroyed. *See Gitman v. Martinez,* 169 A.D.3d 1283, 1286087 (3d Dept. 2019). The Court held that "[a]lthough any EDR data was destroyed before this action was commenced or any demand had been made for preservation or production of such information, [vehicle owner] should have reasonably anticipated that a multi-vehicle accident resulting in personal injuries would likely result in litigation." *See id.* at 1287 (internal citation omitted).

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.

Under New York law, computer animations which are used for illustrative and demonstrative purposes are admissible provided they fairly and accurately echo the oral testimony offered and they serve as an aid to assist in the jury's understanding. *See People v. McHugh,* 476 N.Y.S.2d 721, 723 (Sup. Ct. Bronx Cty. 1984) (noting whether diagram is hand drawn or computer drawn is of no difference in its introduction provided it is not offering scientific evidence and a proper foundation is laid); *Datskow v. Teledyne Continental Motors Aircraft Products,* 826 F. Supp. 677, 683 (W.D.N.Y. 1993). In essence, the trial court judge must weigh the danger of unfair prejudice, e.g. jury confusion of art and reality, with the probative value of the evidence. *See Kane v. Triborough Bridge & Tunnel Auth.,* 8 A.D.3d 239, 241-42 (2d Dept. 2004); *see Aitcheson v. Lowe,* 144 A.D.3d 848, 848-49 (2d Dept. 2016) (holding that party introducing computer generated animation and still images must set forth grounds for admission of demonstrative evidence); *Mercante v. Hyster Co.,* 159 A.D.2d 492, 493 (2d Dept. 1990) (finding abuse of discretion in admitting instructional video prepared by defendant where circumstances were vastly different from that at time of accident and machine was available for inspection and demonstration at courthouse during trial). In the Second Department in New York, the trial court is required to instruct the jury that the evidence that the limited purpose of the animation is to illustrate the expert's opinion and the jury is not to consideration the animation as evidence in and of itself. *See Kane v. Triborough Bridge & Tunnel Auth.,* 8 A.D.3d 239, 2442 (2d Dept. 2004). With respect to computer models and simulations offering independent substantive evidence, New York adheres to the *Frye* standard, which requires general acceptance in the relevant scientific community. *See Frye v. United States,* 293 F. 1013 (D.C. Ct. of App. 1923).

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?

In New York, spoliation sanctions may be imposed even if destruction occurred through negligence rather than willfulness, and even if the evidence was destroyed before the spoliator became a party, provided the party was on notice that the evidence might be needed for future litigation. *Simoneit v. Mark Cerrone, Inc.*, 122 A.D.3d 1246, 1247 (4th Dept., 2014). In a recent New York case, plaintiff was entitled to an adverse inference charge against defendant tractor trailer company for failing to download and preserve EDR data even though the data was destroyed before the action was commenced or any demand had been made for preservation or production of such information. *Gitman v. Martinez*, 169 A.D.3d 1283 (3d Dept. 2019). The Court held that the, "[tractor trailer company] should have reasonably anticipated that a multi-vehicle accident resulting in personal injuries would likely result in litigation", and thus the adverse inference charge was reasonable. *Id*. at 1287.

The majority of claims documents are protected by privilege and not discoverable pursuant to CPLR §3101(b) and (d)(2), but the burden is on the party claiming privilege to prove. It is recommended that a demand for preservation and production of social media be served on a claimant as soon as practicable, and that an attempt to substantiate a basis in order to obtain access to postings on private social media accounts be established through discovery. *Forman v. Henkin*, 30 N.Y.3d 656 (2018). With respect to law enforcement, there are few legal drawbacks to dealing with law enforcement early and obtaining copies of any investigative documents and reports as soon as possible.

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?

In New York, the issue of whether a truck driver is an employee, independent contractor or borrowed servant is generally a question for the triers of fact. *Carrion v. Orbit Messengers, Inc.*, 82 N.Y.2d 742 (1993); *Bratt v. Midland Asphalt Corp.*, 8 N.Y.2d 963 (1960). Central to the determination is whether the company had control and/or supervision over the method and means by which the driver's work was done. *Meyer v. Martin*, 16 A.D.3d 632 (2d Dept. 2005). If the operator is found to be an independent contractor or borrowed servant, then the owner cannot be charged with negligence under the common-law principle of respondeat superior. *Gfeller v.* Russo, 45 A.D.3d 1301 (4th Dept. 2007); *Swarts v. Country Log Homes, Inc.*, 135 A.D.2d 807 (2d Dept. 1987); *Carey v. AAA Con Transp., Inc.*, 61 A.D.2d 113 (3d Dept. 1978). Nonetheless, the owner may still be charged with statutory liability for negligent acts of an independent contractor or borrowed servant to whom a vehicle was entrusted under VTL §388. *Aarons v. Standard Varnish Works*, 163 Misc. 84 (Sup 1937), *aff'd*, 254 A.D. 560 (1st Dept. 1938). Moreover, in order for the operator of a tractor trailer to be deemed an additional insured within an omnibus clause, it is not necessary that there be an employer-employee

relationship, rather protection may be accorded to other persons, such as independent contractors. *Ar-Glen Corp. v. Travelers Ins.,* 8 Misc.2d 589 (Sup. 1957).

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

New York still adheres to the "*Frye* test" to determine the admissibility of expert testimony and scientific evidence. *Frye v. United States*, 293 F. 1013 (D.C. Ct. of App. 1923). The *Frye* test holds that expert testimony must be based on scientific methods that are generally accepted by a meaningful segment of the associated scientific community. *Id.* The determination as to whether a specific expert is qualified is entrusted to the sound discretion of the trial court. *Meiselman v. Crown Hgts. Hosp.*, 285 N.Y.389 (1941).

New York courts have generally allowed qualified neuropsychologists to give expert testimony in TBI claims. However, there has been some success in striking or limiting the testimony/claims of these experts. In *Guzman ex rel. Jones v. 4030 Bronx Blvd. Associates,* 54 A.D.3d 42 (1st Dept. 2008), plaintiff's neuropsychologist was qualified to render a medical opinion as to the extent of the plaintiff's neurological deficits and that such symptoms are consistent with the history of head trauma/TBI, but the expert was not permitted to testify as to the proximate cause of these deficits. The Court held as follows:

> [E]ven assuming, as plaintiffs contend, that [the neuropsychologist] is qualified to definitively state that plaintiff's neurological deficits are the result of trauma so as to rule out genetic, perinatal and psychosocial causes, plaintiffs have failed to identify any evidence and accepted methodology that would permit their expert to state, within 'accepted standards of reliability', that those deficits are the result of one traumatic incident as opposed to another, or event to rule out nontraumatic causes or the cumulative effect of the series of head traumas sustained by plaintiff. *Id.* at 49-50.

Also, more recently, in *Brouard v. Convery*, 59 Misc. 3d 233 (Suffolk Sup. Ct. 2018), plaintiff's TBI expert was precluded from relying upon Diffusion Tensor Imaging (DTI) technology in support of his opinion. The Court found that DTI technology did not satisfy the *Frye* test for admissibility as the standard in clinical/medical treatment of patients treated for TBI. *Id.*

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

Pursuant to CPLR 4518(a) and 4518(c), a post-accident positive toxicology report is admissible in a civil action in the State of New York as long as the record is certified or it can be authenticated by a qualified physician or other individual delegated for that purpose.

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

All drivers that operate a commercial motor vehicle as defined in 49 CFR §382.107, which requires a driver holding a commercial driver's license, are subject to the Drug and Alcohol testing requirements in 49 CFR Parts 40 and 382. This includes but is not limited to: full time, regularly-employed drivers; casual, intermittent or occasional drivers; leased drivers and independent owner-operator contractors pursuant to the Federal Motor Carrier Safety Administration. Some considerations for testing include pre-employment screening, reasonable cause, random tests, post-accident, return-to-duty testing and follow-up testing.

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

In 2019 "presumptive" ADR was introduced into the New York State Court system, whereby an early settlement conference is scheduled in a majority of civil cases as an opportunity to resolve matters early on in the litigation process. However, this ADR initiative does not mandate that cases to be submitted to either binding or non-binding arbitration.

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

In the State of New York, the standard governed by CPLR §3101(a)(1) states that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof by a party, or the officer, director, member, agent or employee of a party.

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

New York State has a modified joint and several liability statute pursuant to *CPLR 1601*. Joint and several liability will apply except when it involves a personal injury defendant who is found to be 50% or less of the total liability. In that case, the defendant tortfeasor is limited to its own percentage of fault for non-economic (pain and suffering) damages. With respect to economic damages under the same scenario, Article 16 allows an injured plaintiff to enforce the full judgment against any of the defendants held jointly and severally liable regardless of their apportioned shares of fault. Since wrongful death actions seek recovery for pecuniary loss, Article 16 does not apply to such actions.

CPLR 1404(b) and *CPLR 1602(2)(ii)* also preserves subrogation rights, such as the right of a defendant tortfeasor, after paying the judgment, to seek contribution from another tortfeasor. If an express contract of indemnification is involved, the contract will govern and may not be changed by *CPLR 1404(b).*

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

The most dangerous venues in New York State with respect to transportation claims continue to be located within New York City. These venues include: the First Judicial District – New York County, the Second Judicial District – Kings County, the Eleventh Judicial District – Queens County, the Twelfth Judicial District – Bronx County and the Thirteenth Judicial District - Richmond County.

It is important to note that northern venues throughout upstate New York continue to be dangerous jurisdictions especially those containing large metropolitan areas such as Western New York – the Seventh and Eighth Judicial Districts including Erie and Monroe County as well as East New York – the Third Judicial District including Albany County.

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

There are no statutory caps on compensatory or punitive damages in New York.

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

Plaintiff may seek to recover the amount charged by medical providers so long as the amount charged is fair, reasonable and necessary. See *N.Y. PJI 2:285*; *Kavanaugh v. Nussbaum*, 129 A.D.2d 559 (2d Dep't 1987). Evidence of future medical expenses are admissible and such expenses are recoverable, provided that they are "reasonably certain to be incurred" and are necessitated by the plaintiff's injuries. See, *Lloyd v. Russo*, 273 A.D.2d 359 (2d Dep't 2000).

Under New York law there is a basis for post-verdict reductions or off-sets. New York's collateral source statute (CPLR 4545) provides a post-trial hearing to determine if any past or future cost of medical care, custodial care or rehabilitation services, loss of earnings, or "other economic loss" will, with reasonable certainty, be indemnified or replaced in whole or in part by a collateral source. The collateral source statute does not apply to statutory rights of reimbursement. Charitable contributions that a plaintiff receives is not considered a collateral source payment and cannot be used to offset the amount that a jury awards.