FOR MORE INFORMATION

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

Generally, there is no specific self-critical analysis privilege, or similar doctrine governing the admissibility or discoverability of preventability determinations and internal accident reports, in New Hampshire. Certain healthcare entities do have a quality assurance privilege, which is similar to a self-critical analysis privilege. See RSA 151:13-a. An argument may be made by analogy that the self-critical analysis should be protected to promote policy interests of accident/injury prevention under the same considerations which underlay the confidentiality of quality assurance review. To the extent any such privilege does not apply, discoverability and admissibility would be governed by general relevance, subject to any exclusionary rules.

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?

There are no specific rules on obtaining discovery of third-party funding sources in New Hampshire. However, to the extent relevant, such discovery could theoretically be obtained by deposition and notice procedure if relevant to any issue in the underlying litigation.

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 procedure for resolving a claim for injuries to a minor is similar to that for non-minors. The key difference, however, is that any settlement must be signed by a parent, next friend or guardian. See N.H. Sup. Ct. R. 40(a). In addition, the court must approve the settlement of any suit or claim brought on behalf of a minor in which the net amount is more than $10,000.00. See N.H. Sup. Ct. R. 40(b). Additionally, if the minor is to receive a settlement while still underage, the court requires proof that the parent/guardian/next friend has been appointed guardian of the estate of the minor, subject to the duties set forth in RSA 463:19. N.H. Sup. Ct. R. 40(c).

The minor's age effectively tolls the statute of limitations until the minor reaches the age of majority, 18, at which point the person must commence a personal injury action within 2 years. RSA 508:8. However, in an opinion issued in February 2023, the New Hampshire Supreme Court held that to comply with equal protection guarantees under the state constitution, the statute permitting a minor to bring a personal action *against the state* within two years of obtaining majority must be read so as to toll a three-year statute of limitations.

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?

"Under the doctrine of respondeat superior, an employer may be held vicariously responsible for the tortious acts of an employee committed incidental to or during the scope of employment." *Trahan-Laroche v. Lockheed Sanders, Inc.*, 139 N.H. 483, 485

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(1995). Additionally, an employer may be liable for damages resulting from negligent supervision of its employees, *id*., and a plaintiff may maintain an independent action against a motor carrier, *Cutter v. Town of Farmington*, 126 N.H. 836 (1985). Accordingly, the primary detriment in admitting vicarious liability is the resulting exposure to the motor carrier. Another detriment may be the advantage gained by the plaintiff in avoiding the need to prove that a driver was acting in the scope of employment.

There may, however, be some benefit to making this admission. First, it could save the time and expense necessary to litigate this issue. Second, it may present the employer in a more favorable and credible image to the factfinder as an open, honest, and cooperative party. Finally, it may help to settle any potential dispute concerning insurance coverage for a driver acting in the scope of employment.

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

While New Hampshire courts and statutes have not specifically addressed the standard applied for spoliation, and have not established an independent claim for same, it is often addressed in the form of a negative inference instruction. *See, e.g.*, *New Hampshire Ball Bearings, Inc. v. Jackson*, 158 N.H. 421 (2009). An adverse inference can be made only when the evidence is destroyed deliberately, with fraudulent intent. *Rodriguez v. Webb*, 680 A.2d 604 (N.H. 1996). The timing of the destruction is not dispositive of the issue of intent. *Murray v. Developmental Servs*., 818 A.2d 302 (N.H. 2003).

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

There is a split on this issue 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.

Although the New Hampshire Supreme Court has not provided definitive guidance on this issue, parties are unlikely to have much success in obtaining the amounts actually charged and accepted by a healthcare provider for certain procedures, outside of a particular personal injury. Seeking such documents as insurance contracts with healthcare providers often attracts the objection of those third parties and, particularly with respect to trial judges who do not allow evidence of the amount of medical bills actually paid, courts may find such discovery not relevant to a given action.

However, if possible, the better practice is to obtain discovery of amounts actually paid v. amounts billed. In addition, the better practice is to raise as an affirmative defense that allowable damages for medical expenses are limited to the amount actually paid.

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

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. If the client is not the owner of the vehicle, EDR data may still be retrieved by a non-owner if one of the following circumstances exist:

a) The owner of the motor vehicle or the owner's agent or legal representative consents to the retrieval of information.

b) In response to an order of a court.

c) 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.

d) 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.

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).

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?

Unless allowed by statute, punitive damages, in general, are not recoverable. Under certain circumstances, the courts will allow "enhanced compensatory damages." When an act is wanton, malicious, or oppressive, the aggravating circumstances may be reflected in an award of enhanced compensatory damages, which are sometimes called liberal compensatory damages. *Stewart v. Bader*, 154 N.H. 75, 87 (2006). Enhanced compensatory damages may be awarded only in exceptional cases. *Id*. "The mere fact that an intentional tort is involved is not sufficient; there must be ill will, hatred, hostility, or evil motive on behalf of the defendant." *Id*. (quotations omitted). Some enhanced damages are awarded pursuant to New Hampshire statute. *See*, *e.g.*, RSA 358-A:10 (New Hampshire Consumer Protection Act, allowing for double or triple damages).

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?

Generally, New Hampshire does not permit punitive damages. Cases in which "enhanced compensatory damages" are awarded are rare. A plaintiff must show ill will, hatred, hostility, or evil motive on behalf of the defendant. *See Stewart v. Bader*, 154 N.H. 75, 87 (2006). Relatively recent cases show enhanced compensatory damages in the hundreds of thousands of dollars. *See*, *e.g.*, *Danboise v. Espinola*, No. 2009-0159, 2010 WL 11437203, at *3 (Oct. 27, 2010).

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?

New Hampshire courts have not explicitly addressed expert testimony in the context of FMCSRs, 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).

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?

New Hampshire does not have an anti-indemnification statute applicable to broker and motor carrier relationships, nor has this issue been contemplated by the New Hampshire Supreme Court.

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

Comparative fault is available in a modified form in New Hampshire. Comparative fault does not bar recovery if the plaintiff is not more that 50% at fault for the injury. If the comparative fault is more than 50%, the recovery is barred. If the comparative fault is 50% or less, the recovery will be reduced by the percentage of comparative fault. RSA 507:7-d.

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

All personal actions, including those based on personal injury and wrongful death, are to be commenced within three years of the act or omission complained of, subject to the discovery rule which allows the action to be commended within 3 years of when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of. RSA 508:4, I. Note that RSA 556:11 provides for a 6-year limitations period, but such period is subject to the provisions of RSA 508.

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?

Pursuant to RSA 556:19, "[a]ny person interested in the estate of a person deceased may begin an action as administrator, which shall not be abated nor the attachment lost because such person is not administrator, nor by his decease, if the administrator then or afterward appointed shall, at the first or second term of the court, indorse the writ and prosecute it as plaintiff."

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

Failure to wear a seatbelt is inadmissible at trial if being used to show comparative negligence. *See Thibeault v. Campbell*, 136 N.H. 698 (1993). Notably, RSA 265:107-a, IV which governs child passenger restraint requirements, specifically provides that any violation of the seat belt statute shall *not* be used as evidence of a party's contributory negligence in a civil action. This suggests that the legislature disfavors the admission of seat belt evidence to prove negligence.

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.

Motor vehicle insurance coverage is not mandatory in New Hampshire. In the event a person is required to have coverage under the Financial Responsibility Act as a result of an accident, then uninsured motorist coverage is required. *See* RSA 264:15, I. There is currently no cap on compensatory damages in New Hampshire after the New Hampshire Supreme Court declared a previous statute capping non-economic damages at $875,000 to be unconstitutional. *See Brannigan v. Usitalo,* 587 A.2d 1232 (N.H. 1991). Punitive damages are unavailable per statute. N.H. Rev. Stat. § 507:16. The collateral source rule applies. *See Cyr v. J.I. Case Co.*, 652 A.2d 685 (N.H. 1994). In certain loss of consortium cases, damage caps are in place. *See* RSA 556:12.

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

Beyond the ordinary considerations involved in a jurisdictional analysis, New Hampshire does not impose any specific rules or legal considerations when an employee is injured in this State. With respect to worker's compensation claims, New Hampshire will assert jurisdiction under certain circumstances, including if an employee is injured out of state. *See*, *e.g.*, RSA 281-A:12; RSA 281-A:5-c.