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New York

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

The so-called "self-critical analysis privilege" has never been recognized under New York Law (*see Lamitie v. Emerson Elec. Co.-White Rodgers Div.*, 142 A.D.2d. 293, 535 N.Y.S.2d 650 (3rd Dept. 1988). *lv. dismissed* 74 N.Y.2d 650 (1989). The privilege is designed to protect an entities internal reviews and investigations from disclosure based on the policy encouraging companies to assess their compliance with regulations and laws without fear of reprisal in future litigation.

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?

In New York State, there is no statutory obligation requiring a party to disclose the existence of a litigation funder or litigation funding agreement to the opposing party or to the court. The issue of whether an opposing party can discover whether litigation funding is being utilized remains an unsettled area with only limited court decisions on the issue mainly found in federal courts. Discovery of 3rd party litigation funding files generally turns on whether the requested information is relevant, see Kaplan v. S.A.C. Capital Advisors, L.P., 2015 WL 5730101.

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?

In New York State, settlement of a claim for injuries to a minor requires court approval, which is applied for with a motion or a special proceeding brought on by an order to show cause pursuant to CPLR § 1207. CPLR § 1208(b)(1) requires counsel to provide the "reasons for recommending the settlement" set forth in supporting affirmations and affidavits setting forth in detail why the proposed settlement is fair and reasonable addressing issues of liability, damages and the infant's current complaints. In New York State, for most personal injury cases, an infant may file a lawsuit up to three years after their eighteenth birthday, *see* CPLR § 208.

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?

As a starting point, it is incumbent to determine the legal status of the driver for the purposes of determining whether the driver is truly independent or, alternatively, whether the driver is acting within the "scope of employment" for the motor carrier. The reason for making this distinction is because a motor carrier is generally not liable for the wrongful acts committed by independent contractor drivers if the acts were

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committed outside of the "scope of employment". When it is admitted that a driver was in the "course and scope" of employment for a direct negligence claim, the benefit is that the motor carrier has control over the driver. This is especially beneficial if the driver's actions confirm the driver was not culpable in bringing about the accident. The detriment in making such an admission is that the motor carrier is bound by the negligent actions of the driver.

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

In New York State, a party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind and that the destroyed evidence was relevant to the moving party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense, *see Bill's Feed Service, LLC v. Adams*, 132 A.D.3d 1400, 17 N.Y.S.3d 567 (4th Dept. 2015).

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

The general rule in New York is a plaintiff who has sustained an injury by way of a defendant's wrongful conduct is permitted to recover the "reasonable value of all medical expenses that are necessary to treat or cure the injury." At trial, a 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. Pursuant to CPLR § 4533-a itemized invoices or bills up to $2,000 which are marked paid and are accompanied by a statement that the rates charged are usual and customary will become prima facie evidence of the reasonable value and necessity of the services.

Defendants are entitled to engage in broad pre-trial discovery relative to all amounts paid to challenge the reasonableness and necessity of the medical expenses.

Plaintiff can submit medical bills to a jury, even if they have been paid by a collateral source. If the action is tried by a jury, no evidence of collateral source payments should be taken in the presence of the jury. The jury should determine plaintiff's losses without reference to any reimbursement that plaintiff may have received. CPLR §4545.

Pursuant to CPLR §4545, the issue of collateral source payments is resolved in a post-trial hearing before the trial judge. Any deduction from a plaintiff's damage award is assigned to the trial judge alone. A medical provider's write-off of a balance on medical bills is not an item of damages for which a plaintiff can recover, since the plaintiff incurred no liability for those bills. *Kastick v. U-Haul Company*, 292 A.D.2d 797 (4th Dept. 2002).

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

New York has a very liberal scope of disclosure for both parties and non-parties. New York Civil Practice Law and Rules ("CPLR") 3101 states:

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:

(1) a party, or the officer, director, member, agent or employee of a party;

(2) a person who possessed a cause of action or defense asserted in the action;

(3) a person about to depart from the state, or without the state, or residing at a greater distance from the place of trial than one hundred miles, or so sick or infirm as to afford reasonable grounds of belief that he or she will not be able to attend the trial, or a person authorized to practice medicine, dentistry or podiatry who has provided medical, dental or podiatric care or diagnosis to the party demanding disclosure, or who has been retained by such party as an expert witness; and

(4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.

CPLR 3120 allows for a party to serve upon any other party a notice or on any other person a subpoena duces tecum to permit inspection of property of person served for the purpose of inspecting, measuring, surveying, sampling, testing, photographing or recording.

Courts typically apply a "reasonable and necessary" standard when reviewing whether the inspection of a non-party's property is to be ordered. *Aylward v. Assessor, City of Buffalo, Bd. of Assessment Review for City of Buffalo,* 125 A.D.3d 1344, 3 N.Y.S.3d 818 (4 Dept. 2015).

Attorney's should also be aware of CPLR 3102(c) which allows for pre-action discovery to preserve such information by Court Order. CPLR 3102(c) can be used to Order an individual or entity to preserve all evidence including EDR data. *See Hoffie v. The Port Authority of New York and New Jersey*, No. 151256/2020, 2020 WL 2933628, at *2 (N.Y. Sup. Ct. New York Cnty. May 29, 2020) (Ordering Respondent to preserve various data including any and all event data recorder ("black box" data), speed data, braking data, etc.); *Patel v. New York City Dept. of Parks and Recreation*, No. 150857/2019, 2019 WL 1003768, at *1 (N.Y. Sup. Ct., New York Cnty. Feb. 26, 2019).

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?

Punitive damages are only warranted where the conduct "evidences a high degree of moral culpability, [or] is so flagrant as to transcend simple carelessness or constitutes willful or wanton negligence or recklessness so as to evidence a conscious disregard of the rights of others." *Mahar v. U.S. Xpress Enterprises, Inc.*, 688 F. Supp. 2d 95, 110 (N.D.N.Y. 2010) citing *Evans v. Stranger,* 307 A.D.2d 439, 441 (3d Dep't 2003).

"Because the standard for punitive damages is a strict one and punitive damages will be awarded only in exceptional cases, the conduct justifying such an award must manifest spite or malice, or a fraudulent or evil motive on the part of the defendant, or such conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton". *Miller v. Silvarole Trucking Inc.*, 211 A.D.3d 1544, 1546, 182 N.Y.S.3d 403, 406 (2022) quoting *Gaines v. Brydges*, 198 A.D.3d 1287, 1287, 154 N.Y.S.3d 340 (4th Dept. 2021). Punitive damages may be awarded "based on intentional actions or actions which, while not intentional, amount to gross negligence, recklessness, or wantonness ... or conscious disregard of the rights of others or for conduct so reckless as to amount to such disregard". *Miller* 211 A.D.3d at 1546 quoting *Home Ins. Co. v. American Home Prods. Corp.*, 75 N.Y.2d 196, 200, 551 N.Y.S.2d 481, 550 N.E.2d 930 (1990).

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?

In the last three years there has not been any notable punitive damages awards specific to motor carriers.

New York's Pattern Jury Instruction on Punitive Damages can be found at N.Y. PJI 2:278.

In *Bauta v. Greyhound Lines Inc.*, JVR No. 1811150034 (2019) a jury in the United States District Court for the Eastern District of New York awarded punitive damages in the amount of $3,235,000. Plaintiff claimed he suffered a traumatic brain injury, right knee internal derangement, disc herniations at C4-C7 and L5-S1, disc bulges at C2-C4 and L2-L5, and facial and lower leg contusions, underwent a posterolateral fusion at L4-S1, a lumbar laminectomy at L4-S1, a facetectomy, foraminotomy and discectomy at L4-S1, and neurolysis at L4-S1, and was left totally disabled when he was a passenger on a bus owned by defendant Greyhound Lines Inc. The driver fell asleep at the wheel and drove into the back of a tractor-trailer. Plaintiff utilized expert testimony of a Rehabilitationist and Biomechanical Engineer.

Greyhound moved to vacate and set aside the portion of the punitive damage award as it pertained to them. The Court found the jury instructions and form provided were done in error and set aside the verdict for punitive damages but refused to dismiss Plaintiff's claim for punitive damages. Greyhound once again requested the Court reconsider its position and ultimately vacated the portion of the previous order directing a new trial on punitive damages.

Despite the lack of "punitive damage" awards, "nuclear verdicts" in New York are still on the rise. According to a recent study by the U.S. Chamber of Commerce Institute for Legal Reform (https://instituteforlegalreform.com/research/nuclear-verdicts-trends-causes-and-solutions/). New York had 151 "nuclear verdicts," defined as when a state or federal court awarded at least $10 million, paying out more than $5 billion, according to the study, which looked at nearly 1,400 personal injury and wrongful death cases in state and federal courts from 2010 to 2019. New York was only outpaced by Florida's 213 verdicts and California's 211.

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?

Yes. In New York State, expert opinions are admissible when the witness testifies on subjects involving "professional or scientific knowledge or skill not within the range of ordinary training or intelligence." *Hurrell-Harring v. State of N.Y.*, 119 A.D.3d 1052, 1053 (3d Dept. 2014). Trial courts have specifically allowed expert testimony of a vehicle safety and accident reconstructionist that referred to the FMCSRs. *See Kinnally v. Perlman*, 2018 NY Slip Op. 34148, ¶ 8 (Westchester Cty. Sup. Ct. 2018).

In addition, "opinion testimony of an expert witness necessarily enters upon the jury's province, since the expert—and not the jury—draws conclusions from the facts, which the jury is then asked to adopt." *People v. Cronin*, 60 N.E.2d 351, 352 (1983). Therefore, expert witnesses can testify as to how the FMCSRs apply to the facts of the case.

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?

No. Absent the broker or shipper controlling the means or methods by which the injury occurred, neither will be liable for a motor carrier's negligence. *Melbourne v. N.Y. Life Ins. Co.*, 271 A.D.2d 296, 297 (1st Dept. 2000).

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

New York is a pure comparative fault State. Liability will be apportioned among all at-fault parties, including the plaintiff. The plaintiff's recovery will then be reduced by his or her share of comparative fault. Under most circumstances, where there are multiple defendants at fault, they will all be jointly and severally liable to the plaintiff. There is an exception to the joint and several liability rule which sometimes limits liability for non-economic (pain and suffering) damages in personal injury cases, but this exception does not apply in motor vehicle accident cases. In instances where this exception does apply, however, a defendant whose percentage of fault is found to be 50% or less will be responsible for no more than that defendant's pro rata share of the total amount of non-economic loss. New York CPLR Articles 14 and 16 address these matters.

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

Three years for personal injury and two years for wrongful death. *See* CPLR 214 and EPTL § 5-4.1.

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?

Under New York Estates, Powers and Trusts Law §5-4.1, only the duly appointed personal representative of a decedent's estate has standing to maintain a claim to recover for wrongful death. The duly appointed representative of the decedent's estate is either the Executor named in the decedent's will or the court-appointed Administrator in the absence of a will.

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

Evidence of the non-use of a seat belt is admissible only as to the issue of determination of damages. Failure to use a seat belt does not amount to negligence *per se* or contributory negligence, and it may not be considered in resolving the issue of liability. *Bongianni v. Vlasovetz*, 101 A.D.2d 872 (2nd Dept. 1984). The defendant must demonstrate a causal connection between the plaintiff's non-use of an available seat belt and the injuries and damages sustained.

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.

Not applicable.

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

New York follows an "interest analysis" in resolving choice of law issues. Interest analysis focuses on determining

which jurisdiction has the greatest concern with the specific issue raised in a litigation based upon its relationship or contact with the occurrence or the parties. *Cooney v. Osgood Mach.*, 81 N.Y.2d 66 (1993).

A primary consideration in the interest analysis is whether the substantive law at issue constitutes a "conduct-regulating" or a "loss-allocating" rule. *Schultz v. Boy Scouts of America, Inc.*, 65 N.Y.2d 189 (1985).

The framework for resolving choice of law disputes in tort cases are known as the "Neumeier Rules" based upon the New York Court of Appeals case *Neumeier v. Kuehner* (31 N.Y.2d 121 (1972).

Neumeier Rule 1: When the plaintiff and the defendant in a motor vehicle accident are domiciled in the same state, the law of that state controls.

Neumeier Rule 2: When the defendant's conduct occurred in the state of his domicile and that state does not assess liability for the conduct at issue, the defendant's state law applies. A plaintiff should not be permitted to invoke the laws of their domicile state to impose liability upon the defendant in such a case.

Neumeier Rule 3: The law of the State where the accident occurred governs unless it can be shown that displacing the normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.