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Vermont

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

The State of Vermont has not directly addressed the admissibility of preventability determinations. Like all evidentiary rulings, the decisions would be subject to a determination of relevance, and whether, pursuant to Vermont Rules of Evidence ("V.R.E.") 403, the decision's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Further, there may be an argument that such evidence should be excluded as a subsequent remedial measure under V.R.E. 407. Also, the attorney-client privilege and the work product privilege may play a role in determining discoverability and/or admissibility depending on the facts of the case and whether the preventability determination/internal accident report was commissioned in preparation for trial.

To the extent that preventability determinations and internal accident reports are serving as self-critical analysis, the Vermont Supreme Court has not yet had occasion to determine directly whether Vermont recognizes the self-critical analysis privilege. However, Federal courts applying state law have predicted that Vermont will not. *Lawson v. Fisher Price, Inc.*, 191 F.R.D. 381, 382 (D. Vt. 1999). *Lawson* noted that the Vermont Supreme Court has consistently used the four-part test in "Wigmore on Evidence" to determine whether a privilege should be recognized. Id. The Wigmore factors are:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Douglas v. Windham Superior Court, 157 Vt. 34, 40, 597 A.2d 774, 777-78 (1991), quoting 8 Wigmore on Evidence § 2285, at 527 (McNaughton ed. 1961).

Applying the Wigmore factors in *Lawson,* the federal court concluded that the self-critical analysis privilege did not meet the Wigmore standard, and therefore the Vermont Supreme Court would likely not recognize the self-critical analysis privilege as it has been laid out in other states. *Lawson* at 386. However, it should be noted that

the communications in *Lawson* involved communications between the defendant corporation and the Consumer Product Safety Commission, and the Court concluded that because such communications are mandatory, the facts in *Lawson* did not require confidentiality to maintain the relation between the parties. Nevertheless, the court in *Weatherly v. Gravel & Shea, P.C.*, 2012 WL 12991459 (Vt. Super. Ct.) (Trial Order), a law firm partnership/employment dispute, cited Lawson as "rejecting creation of 'self-critical analysis' privilege" in Vermont regardless of the particular facts. *Weatherly* at n. 2.

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 is no caselaw on this topic, and neither the Vermont Supreme Court nor Vermont Federal Courts have ruled on this matter. However, depending on how the relationship between the plaintiff and the third party litigation funder is structured, there is a potential to obtain these materials in discovery, especially if plaintiff's counsel was not involved in the relationship between the plaintiff and the third party litigation funder.

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 Vermont, a court must approve any settlement, and sometimes the court will also require ongoing oversight of any money recovered. For recoveries of $1,500 or less, a Vermont Superior Court Judge must approve the settlement in proceedings brought by a specially appointed guardian on the child's behalf. This guardian, usually one or both of the child's parents, is appointed by petition to the probate court in the county where the child lives. After the judge approves the settlement, the guardian can manage the settlement funds, acting in the child's best interests.

For settlements greater than $1,500, the Probate Court requires that the guardian hold the funds in trust and periodically report to the court until the minor turns 18 years old. The court must approve any expenditures from the recovery fund, and it typically only allows expenses related to medical treatment, medical equipment, education, or some other compelling need. Probate judges largely prohibit the use of these funds for parental financial obligations, such as gifts, trips, or household expenses.

As for the statute of limitations, it generally begins to run on the minor's eighteenth birthday and, the statute of limitations for personal injury claim in Vermont being three years, generally ends on the plaintiff's twenty-first birthday. 12 VSA § 551(a).

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?

In Vermont, a motor carrier that admits that it is vicariously liable for any fault or liability assigned to the driver can still be subject to an independent claim for negligence (including negligent hiring, retention, and training). The Vermont Supreme Court has established that "[a] principal may, in addition to being found vicariously liable for tortious conduct of its agents, be found directly liable for damages resulting from negligent supervision of its agents' activities. *Brueckner v. Norwich University*, 169 Vt. 118 (1999). According to the Court, "direct liability for negligent supervision of employees or agents constitutes an entirely separate and distinct type of liability from vicarious liability under respond eat superior. *Id*. Thus, if the motor carrier admits that it is vicariously liable for fault and/or liability of its agent, the driver, a plaintiff may still bring independent negligence claims against the motor carrier.

The benefits of admitting a driver was in the "course and scope" of employment lie largely in potentially avoiding extraneous discovery. Specifically, this admission can hamper a plaintiff's attempts to use the "Reptile Theory" to obtain a wide expensive swathe of irrelevant discovery that might assist the plaintiff in putting the defendant on trial instead of litigating the circumstances of case. Plaintiffs hope that jurors will view the defendant corporation as a threat to public safety and act out of an emotional desire to protect themselves, and society at large.

However, note that if a defendant corporation admits the driver was in the course and scope of employment, it naturally waives any defenses based on the driver's potential ultra vires actions (intoxication, frivolity, horseplay, etc.).

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

The only Vermont case discussing destruction of evidence in a civil context ruled that a party must have a reason or obligation to preserve evidence before a "presumption of falsity" will arise. *Lavalette v. Noyes*, 205 A.2d 413, 415 (Vt. 1964). Other cases have implied without ruling on the matter that an instruction on lost evidence or spoliation may be appropriate at a civil trial. See e.g. *In re Campbell's Will*, 102 Vt. 294 (1929).

The Second Circuit has defined spoliation as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). Vermont federal courts would be bound by this definition and would likely issue jury instructions and orders similarly to other states in the circuit, i.e., New York and Connecticut.

A court may not impose sanctions on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system. Vt. R. Civ. P. 37(f). Note that this applies only to "routine" operation — the result of the basic design of the system to serve its intended purposes. The rule also requires "good faith" operation, precluding the knowing continuation of an operation that results in destruction of information that a party was obligated to preserve. Vt. R. Civ. P. 37, Reporters Notes – 2009 Amendment.

The Vermont Supreme Court has used the "traditional approach" of discovery sanctions to punish a spoliator of evidence. See *Naylor v. Rotech Healthcare*, Inc., 679 F. Supp. 2d 505, 511 (D. Vt. 2009) collecting the following cases: *Lavalette v. Noyes*, 124 Vt. 353 (1964) (considering whether to apply a presumption of falsity, as a sanction for destruction of evidence); *In re Campbell's Will*, 102 Vt. 294, (1929) (applying sanctions for spoliating evidence); *Ellis J. Gomez & Co. v. Hartwell*, 97 Vt. 147 (1923) (noting the rule that willful destruction of evidence gives rise to rise to an inference that the contents would be injurious to the one who destroys it); and *Judevine v. Weaks*, 57 Vt. 278 (1884) (noting a deposition is presumed to contain evidence against a party who suppresses it).

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

No – that information is barred by Vermont's collateral source rule. See *Buker v. King*, Docket No. 523-11-05 Wrcv (Vt. Super. Ct. Jun. 23, 2008)(Morris, J.)(refusing to limit the reasonable value of plaintiff's medical services to the amounts plaintiff's medical providers agreed to accept as a recipient of Medicaid funds); See also *Beaudin v. Kupersmith*, Docket No. S 0803-07 Cnc, (Vt. Super. Ct. Oct. 26, 2010) (Skoglund, J.) ("To the extent that Defendant's argument is that reasonable value of medical services can most accurately be proven through market

transaction, i.e. the amount of payment the providers accepted, it is unavailing.") The public policy reasoning is that a plaintiff's arrangement with a medical provider should not benefit the tortfeasor in a civil action.

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

Vermont has no specific caselaw on this point, but the considerations relating to V.R.C.P. 45 subpoenas would likely apply, including the protections therein and the consideration of whether the request is both relevant to the dispute and not overly burdensome to the respondent.

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 meant to punish a defendant for its behavior and to stop others from acting similarly in the future. Punitive damages may be awarded if it is found find that the defendant acted recklessly or wantonly without regard for the plaintiff's rights, or showed personal ill will to the plaintiff in injuring her/him or acted with evident insult or oppression towards the plaintiff. It is not enough for the acts of the defendant to have been simply wrong or unlawful. Instead, punitive damages are used when a defendant's actions have the character of outrage frequently associated with a crime. A plaintiff must prove two distinct elements: (1) "wrongful conduct that is outrageously reprehensible" and (2) "malice." *Fly Fish Vermont, Inc. v. Chapin Hill Estates, Inc*., 2010 VT 33, ¶ 18.

To award punitive damages against a corporate defendant, the jury must find that the behavior justifying punitive damages were corporate acts. Generally, where responsible management of the corporation has knowledge of a wrongdoing on the part of lower-level employees or was involved in the acts itself, the corporation will be determined to have permitted the act. "The fact that the defendant is a corporation does not prevent an award of punitive damages in an appropriate case, but the malicious or unlawful act relied upon must be that of the governing officers of the corporation or one lawfully exercising their authority, or, if the act relied upon is that of a servant or agent of the corporation, it must be clearly shown that the governing officers either directed the act, participated in it, or subsequently ratified it." *Shortle v. Central Vt. Pub. Svc. Corp.*, 137 Vt. 32, 33 (1979). There is no cap on punitive/exemplary damages in Vermont. However, large verdicts are rare in Vermont, as are so-called "runaway" juries.

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?

While there have been recent significant transportation settlements in Vermont, there have not been any trucking or transportation cases taken to verdict in the last several years. (In this tiny jurisdiction, only about eight to 15 civil cases of any type go to verdict statewide in any given year). There are a couple of recent punitive damages verdicts in non-transportation cases, however, that may be illustrative.

Rousseau v. Coates, 488 F.Supp.3d 163 (2022). A woman who alleged a fertility doctor impregnated her with his own sperm without her knowledge was awarded $250,000 in compensatory damages and $5 million in punitive damages by a jury in Chittenden Superior Court, the exact amount she sought.

Heco v. Foster Motors, 2015 VT 3. Injured driver brought claims for strict liability, negligence, and breach of warranty alleging a defective seating system against an automobile dealer. A child was paralyzed in the back seat

of the car. The Chittenden Superior Court entered judgment in favor of manufacturer, and the award was upheld on appeal. Total award: $43,000,000.00 (thought to be the largest award in Vermont state court).

In both cases, evidence of the extreme nature of the injuries (psychological impact, etc.), was admitted, combined with evidence of extensive high-level organizational/corporate involvement with the decisions leading to the injuries, and with evidence of the financial condition of the defendant/defendant corporation. Neither decision is on appeal.

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?

While there is no specific caselaw on this point, the answer under V.R.E. 702 is presumably yes. V.R.E. 702 states:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Thus, in-depth knowledge of the FMCSRs are likely to be interpreted as specialized knowledge, and an expert who can meet the qualifications outlined in V.R.E. 702 and applies the principles of the FMCSRs to the facts of the case is likely to be permitted.

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?

There is no case law in Vermont on this particular issue, as brokers and shippers are generally not included in these types of cases. Thus, Vermont courts are likely to analyze this issue on a case by case basis and to require some additional involvement of the broker or shipper beyond the typical broker/shipper-motor carrier relationship in order to rule that the two were a joint venture (perhaps a joint loading case or something of that nature), and the analysis will be fact-specific.

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

Vermont follows a modified comparative negligence rule. If the plaintiff is more than 50% negligent, the plaintiff recovers nothing. Otherwise, an award for the plaintiff is proportionally reduced by the percentage of negligence of the plaintiff, as determined by the trier of fact. 12 V.S.A. § 1036.

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

The statute of limitations for tort actions in Vermont is three years for injuries to persons. 12 V.S.A. § 512(1) and § 512(4). An action for wrongful death must be commenced within two years from the discovery of the death of the person, but if the person against whom the action accrues is out of the State, the action may be commenced within two years after the person comes into the state. If the death of the decedent occurred under circumstances such that probable cause is found to charge a person with homicide, the action shall be commenced within seven years after the discovery of the death of the decedent or not more than two years after the judgment in that criminal action has become final, whichever occurs later. 14 V.S.A. § 1492(a).

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?

Only the personal representative (sometimes called the "executor") of the deceased person's estate may file the wrongful death claim. (V.S.A. 14, § 1492). If the deceased person had a will, he or she probably named a personal representative as part of that plan. However, if the deceased person did not have a will, an administrator will need to be appointed by the Probate Court.

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

No. Vermont's seatbelt law is codified in 23 V.S.A. § 1259 and this section stated that "[n]oncompliance with the provisions of this section shall not be admissible as evidence in any civil proceeding." 23 V.S.A. § 1259(c). To be even more specific, the section adds the following: "[f]ailure to wear a safety belt in violation of this section shall not constitute negligence or contributory negligence in any civil proceeding. 23 V.S.A. § 1259(d). As such, a plaintiff's failure to wear a seatbelt is not admissible at trial.

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.

No.

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

In motor vehicle cases, as in all tort and contract cases, Vermont courts apply the most significant interest test of the Restatement (Second) of Conflict of Laws (*McKinnon v. F.H. Morgan*, 750 A.2d 1026, 1028 (Vt. 2000); *Pioneer Credit Corp. v. Carden*, 245 A.2d 891, 894 (Vt. 1968)). For such items as the "rules of the road," the law of the state where the accident occurred would typically be applied.