STATE LAW SUMMARY
Overview of the State of New York

Preparer:
John C. Lane and Peter C. Bobchin
Law Offices of John C. Lane
New York, New York

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Overview of the State of New York Court System
   A. Trial Courts
Bronx County and Kings County (Brooklyn) continue to be the most disadvantaged venues for all target defendants, including trucking companies. Wherever possible, we recommend removal to federal court in every case brought in one of those counties. New York County (Manhattan) has seen some improvement in juries. Richmond County (Staten Island) and Queens County tend to be more suburban in nature, although very high verdicts are not unheard of in Queens County. The Long Island Counties of Nassau and Suffolk, and the nearby upstate counties of Westchester,
Rockland, Putnam, and Dutchess, are more favorable defendant venues. Orange County has shown a trend toward higher verdicts.

B. Appellate Courts

Unlike most states, in New York, the Supreme Court is the trial court of unlimited jurisdiction. It generally only hears cases that are outside the jurisdiction of other trial courts (such as local districts, county, and city courts) that have limited jurisdiction.

Appellate Terms of the Supreme Court have been established in the First and Second Departments to hear appeals from civil and criminal cases originating in the Civil and Criminal Courts of the City of New York.

In the Second Department, the Appellate Terms also have jurisdiction over appeals from civil and criminal cases originating in District, City, Town, and Village Courts.

The County Courts in the Third and Fourth Departments (although primarily trial courts) hear appeals from cases originating in the City, Town, and Village Courts.

Appellate Division: There are four Appellate Divisions of the Supreme Court; one in each of the state's four Judicial Departments. These Courts resolve appeals from judgments or orders of the trial courts of original jurisdiction in civil and criminal cases and review civil appeals taken from the Appellate Terms and the County Courts acting as appellate courts.

The Court of Appeals: The Court of Appeals is New York State's highest court. It is composed of a Chief Judge and six Associate Judges, each appointed to a 14-year term. New York's highest appellate court was established to articulate statewide principles of law in the context of deciding particular lawsuits. The Court, thus, generally focuses on broad issues of law as distinguished from individual factual disputes. There is no jurisdictional limitation based upon the amount of money at stake in a case or the status or rank of the parties.

Procedural

A. Venue

Generally, venue shall be in a county where one of the parties resides at commencement of the action; if no party is then a resident, venue shall be in any county designated by the plaintiff. A domestic corporation, or a foreign corporation authorized to do business in New York, is a resident of the county in which it maintains its principal New York place of business. A railroad or other common carrier shall also be a resident of the county where the cause of action arose. CPLR Section 503.

B. Statute of Limitations

1. Bodily Injury/Property Damage Claims

   The New York statute of limitation for commencement of an action to recover for bodily injury or property damage, arising from negligence, is three years, measured from the date of the accident.\(^1\)
The statute is tolled during periods of incapacity to sue, such as infancy (adulthood is at age 18) and insanity, until the incapacity is lifted. Thus, in a negligence action in New York a minor plaintiff has until his 21st birthday to bring his suit.\(^2\)

2. **Wrongful Death**

The statute of limitation for the commencement of a wrongful death action in New York State is two years from the date of death.\(^3\) The statute of limitation is tolled, however, if the tortfeasor is the subject of a criminal prosecution arising out of the same occurrence. In that situation, the executor or administrator of the decedent’s estate may bring the wrongful death action within one year after termination of the prosecution.\(^4\)

3. **Breach of Contract/Bad Faith Claims**

In New York, actions based upon express or implied contractual obligations are governed by a six-year statute of limitations.\(^5\) A cause of action for breach of contract accrues upon the breach. Absent fraud, it is irrelevant that the plaintiff is unaware of the breach or that damages are merely nominal.\(^6\) Where fraudulent misrepresentations exist, the statute of limitations will be equitably tolled until the fraud is discovered.\(^7\)

Actions for contribution or indemnification accrue in New York at the time of payment and are governed by the six-year statute, which accrues from the date payment is made by the party seeking indemnification.\(^8\) An action based upon a sale governed by Article 2 of the Uniform Commercial Code is subject to a four-year limitation, measured from the date of the sale.\(^9\)

C. **Time for Filing An Answer**

20 days if served personally within the state; 30 days if served out of state, or after completion of substituted service allowed by statute, service upon a state official where authorized, or by publication pursuant to court order.

D. **Dismissal Re-Filing of Suit**

Not applicable.

**Liability**

A. **Negligence**

To set forth a claim in negligence, a plaintiff must prove the existence of a duty on the part of the defendant to plaintiff, a breach of that duty, and show that the breach was a substantial cause of the resulting injury.\(^10\)

B. **Negligence Defenses**

1. **General**

A defendant is required to plead any defense which, if not pleaded, would be likely to take the adverse party by surprise or would raise an issue of fact not
appearing on the face of a prior pleading. Such affirmative defenses include arbitration and award, collateral estoppel, comparative negligence, discharge in bankruptcy, illegality by statute or common law, fraud, infancy or other incapacity, payment, release, res judicata, statute of frauds, statute of limitations, no fault threshold, and failure to wear a seatbelt. These defenses, as well as affirmative defenses for lack of personal jurisdiction, lack of legal capacity to sue, prior action pending, failure to state a cause of action, and failure to name a proper party, can be the basis of a motion to dismiss under CPLR § 3211. A motion to dismiss based on lack of personal jurisdiction must be made within 60 days of service of the answer.

2. No-Fault Threshold

Under New York law, in order to maintain an action arising out of negligence in the operation of a motor vehicle, plaintiff must establish that he sustained a serious injury as defined under N.Y. INS. Law § 5102(d). Specifically, the statute defines a serious injury as follows:

A personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

To establish that he or she has sustained a serious injury, plaintiff must present "competent medical evidence based upon objective medical findings." Subjective complaints of pain, unsupported by credible medical evidence, do not satisfy the threshold requirement for a serious injury. It has routinely been held that the mere presence of a herniated or bulging disc is insufficient to establish a serious injury under New York’s insurance law. To establish a serious injury, plaintiff must present "objective medical evidence of the qualitative nature of the alleged physical limitation and comparing the limitation to normal function." Historically, the Courts looked to documented limitations of motion, as long as the limitations are well documented and not merely part of a generalized conclusion. The Court of Appeals, though, has rejected any rule that would require that such measurements be made contemporaneous to the date of accident.

An unexplained gap in medical treatment can also be grounds for dismissal of a claim for failure to sustain a serious injury.
Under New York law, to satisfy the serious injury threshold with a non-permanent injury, the plaintiff may present objective medical evidence to demonstrate that alleged injuries impaired the plaintiff’s ability to perform substantially all of the material acts which constitute such person's usual and customary daily activities for at least 90 days of the first 180 days immediately following the occurrence of the injury or impairment. The fact that plaintiff may have missed 90 days from work during this period will not satisfy this requirement where there is no evidence that other daily activities were substantially hindered.

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

The bar for the imposition of punitive damages in New York is extraordinarily high. A defendant’s conduct must not simply be intentional, but must evidence “a high degree of moral turpitude,” as well as a “wanton dishonesty as to imply a criminal indifference to civil obligations.” The person’s conduct must rise to malicious, wanton, or reckless conduct.

In the transportation industry, two cases of note are Marcoux v. Farm Service & Supplies, Inc., 283 F. Supp.2d 901 (S.D.N.Y. 2003) (poor maintenance of trailer tires, hiring and retention of a truck driver with a substantial adverse driving record, does not evidence the degree of recklessness and wantonness requisite for an award of punitive damages); and Evans v. Stranger, 307 A.D.2d 439, 440-41, 762 N.Y.S.2d 678, 680 (3d Dept. 2003) (University’s hiring and retention of a bus driver with a known recent DWI conviction and repeated drug abuse is not so flagrant as to transcend mere carelessness or evince conscious disregard for the rights of others).

D. Negligent Hiring and Retention

In cases in which an employer has vicarious liability for the acts of its employees or agents, liability theories based upon negligence in the hiring, training, supervision, or retention of the employee are generally dismissible under New York law (the same can be said of negligent entrustment - see Section E, below), because they are duplicative and prejudicial to the defendant. They allow introduction of otherwise inadmissible evidence, such as a past driving record or a past criminal record, when the jury should concentrate on evaluating the employee’s conduct, on a negligence standard. Unless such theories are necessary to create vicarious liability, or to support a claim for punitive damages against the employer, claims for negligent hiring, training, supervision, or retention (and negligent entrustment, as well), should be dismissed.

In those situations in which an employer cannot be held vicariously liable for torts committed by its employee (such as where the employee acts outside the scope of his employment), the employer can still be held liable under theories of negligent hiring and retention. The negligence of the employer in such a case is direct, not vicarious, and arises from its having placed the employee in a position to cause foreseeable harm; harm which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee. An essential element of a negligent hiring or retention claim is that the employer knew, or should have known, of the employee's propensity for the sort of conduct which caused the incident.

E. Negligent Entrustment
If the offending tortfeasor is not an employee or agent of the vehicle owner, the owner can be held liable for the driver’s tortious conduct if he knowingly entrusts his vehicle to a person who is incompetent or unfit to operate the motor vehicle.\textsuperscript{27}

Entrusting a vehicle to an unlicensed driver is some evidence of negligence which can be overcome by evidence that the driver, though unlicensed, is thoroughly competent to drive a vehicle. \textit{Austin v. Rochester Folding Box Co.}, 111 Misc. 292, 181 N.Y.S. 275 (1920).

VTL § 388 (subject to the limitations of the Graves Amendment) virtually emasculated the claim for negligent entrustment in New York, because the vehicle owner always has vicarious liability when he entrusts his vehicle to another, regardless of how competent that other person is.

F. Dram Shop

New York’s Dram Shop Act is codified under New York’s General Obligations Law. Section 11-101 provides as follows:

1. Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.

2. In case of the death of either party, the action or right of action given by this section shall survive to or against his or her executor or administrator, and the amount so recovered by either a husband, wife, or child shall be his or her sole and separate property.

3. Such action may be brought in any court of competent jurisdiction.

4. In any case where parents shall be entitled to such damages, either the father or mother may sue alone therefor, but recovery by one of such parties shall be a bar to suit brought by the other.

G. Joint and Several Liability

Article 1601 of the Civil Practice Law and Rules brought about a significant limitation upon the rule of joint and several liability; holding that a defendant whose responsibility for an accident is less than 50 percent of the total fault will be responsible only for his percentage share of non-economic damages. Unfortunately, injuries resulting from motor vehicle accidents are expressly excepted from this reform statute.\textsuperscript{28}

H. Wrongful Death and/or Survival Actions

In New York, a personal representative, duly appointed in New York or another jurisdiction, of a decedent who is survived by distributees, may bring an action to recover damages for any wrongful act, neglect, or default which caused the decedent’s death. It is to be pled as a separate cause of action. Such an action may be brought
against the person who would have been liable to the decedent based on such wrongful conduct if death had not ensued. The right of action in a wrongful death suit only accrues to a distributee and as such, if there is no distributee, there is no right of action to anyone.

I. Vicarious Liability

In 1929, the New York State Legislature enacted a vicarious liability provision to the Vehicle and Traffic Law, originally Section 59 and now the infamous Section 388, placing vicarious liability upon the owner of any vehicle operated in New York for the negligence of anyone using the vehicle with the owner’s permission. In pertinent part, Section 388 provides as follows:

Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner, or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.

A quirk of statutory law, “VTL 388" led to unexpected results in trucking settings, as the statute made the owner of any vehicle operated in New York vicariously liable for the negligence of any permissive user. The statute holds that whenever vehicles are used “in combination,” the operator shall be deemed to be using or operating each vehicle in combination, “and the owners thereof shall be jointly and severally liable thereunder.” [VTL § 388 placed vicarious liability upon lessors of trailers, intermodal chassis, and rental cars as well.]²⁹

The 2005 Federal Highway Bill (“SAFETEA-LU”), Section 10208 (49 U.S.C. § 30106) was passed with the intent to preempt state laws, such as VTL § 388, for traditional leasing companies regularly engaged in the business of renting or leasing motor vehicles, as long as there is no negligence or criminal wrongdoing on the part of the lessor. The federal preemption was to apply to all lawsuits filed on or after August 10, 2005. This provision came to be known as the Graves Amendment.

The New York Appellate Courts have recognized that the Graves Amendment preempts VTL § 388 on commercial lessors and is “a constitutional exercise of congressional power pursuant to the commerce clause of the United States Constitution.” ³⁰ The conclusion is that actions against leasing companies based solely on vicarious liability may no longer be maintained.

VTL § 388 also requires that both the tractor and trailer have mandatory automobile insurance coverage. This provision has brought about unexpected insurance results, especially for non-trucking (bobtail) insurers.

Bobtail insurance has been treated very differently in New York because of VTL 388. Federal and state courts have held that the trucking exclusion in the non-trucking (bobtail) policy (excluding coverage when the covered vehicle-usually the tractor - is under dispatch to another) is void because it violates the statutory mandate that both tractor and trailer carry insurance. Even more, the bobtail policy has been held to be

But see, *Connecticut Ind. Co. v. Varella*, 1995 U.S.Dist. Lexis 365, 1995 WL 16800 (S.D.N.Y. 1995 - not officially reported) (an overdue recognition that the lessee’s trucker’s MCS-90 also covers the tractor; the “bobtail exclusion” was found to be valid because it was effective only if truckers insurance was actually in place, which it was. Thus, the bobtail insurer had no obligation at all.)

Similarly, some relief for the bobtail insurer can also be gleaned from *Royal Indemnity Company v. Providence Washington Insurance Company*, 92 N.Y.2d 653, 684 N.Y.S.2d 470, 707 N.E.2d 425 (1998). A trucking exclusion to a non-trucking (bobtail) policy would seemingly be valid if it is expressly conditioned upon the existence of trucker’s insurance, from the lessee, covering the owner-operator in a given accident claim. The New York Court of Appeals, answering a certified question from the U.S. Court of Appeals for the Second Circuit, held that it is not enough that the bobtail insurer’s underwriting practice – followed in this instance – required the owner-operator to provide proof that his lessee has trucker’s insurance, because that insurance could lapse or be cancelled in the interim. Nor is it enough that in the particular instance the lessee actually did have trucker’s insurance coverage which is extended to the owner-operator. According to the Court of Appeals, for a non-trucking exclusion to be valid under Vehicle & Traffic Law § 388, the exclusion must, itself, be *conditioned* upon the existence of trucker’s insurance for the particular accident at issue. That was not the case here, and so the exclusion failed (notwithstanding the existence of trucker’s insurance) and the two policies were held to be co-primary, contributing ratably according to their limits, as called for in their respective “other insurance” clauses. See also, *Connecticut Ind. Co. v. 21st Century Transport Co., Inc.*, 186 F.Supp.2d 264 (E.D.N.Y. 2002).

Earlier cases holding the bobtail policy to be primary involved non-trucking policies containing no “other insurance” clause. Thus, the typical clause in the trucker’s policy made that policy excess to the bobtail coverage. Notably, these holdings make no distinction even though the truckers are from out-of-state and their policies are not issued in New York. *Id.*

Also of note is a decision by the Appellate Division, Second Department, in the case of *Connecticut Indemnity Company v. Hines*, 40 A.D.3d 903, 837 N.Y.S.2d 183 (2d Dept. 2007). Here, Connecticut Indemnity issued a Non-Trucking policy of insurance to Livon Hines, who leased a tractor-trailer to David P. McCarthy, Inc., for use in its business. The policy also contained a savings clause which limited coverage to state-law minimum required amounts if the non-trucking exclusion was found to be unenforceable. The Appellate Division found that the non-trucking use endorsement was void under VTL § 388, but ruled that the savings clause limiting liability to the statutory minimum (here $25,000) was enforceable. 837 N.Y.S.2d at 186. A contrary
position, however, has been taken by the Appellate Division, First Department, which holds that under such circumstances a savings clause would not be enforceable. See, *National Union Fire Ins. Co. of Pittsburgh, PA v. Connecticut Indemnity*, 52 A.D.3d 274, 277, 860 N.Y.S.2d 35, 38 (1st Dept. 2008).

Non-trucking insurers have begun to modify their policies to fall within the protections of these more recent cases.

J. Exclusivity of Workers’ Compensation
An employer’s exclusive remedy against his employer for on the job injury is Workers’ Compensation. If the employer fails to procure Workers’ Compensation Insurance, the employer can then opt to bring a negligence action. In such an action, the employer may not plead as a defense that the injury was caused by the negligence of a fellow servant, that the employee assumed the risk of his or her employment, or that the injury was due to the contributory negligence of the employee. N.Y. Workers’ Comp. Law § 11 (McKinney).

An employer’s liability for an on-the-job injury is generally limited to Workers’ Compensation benefits, but when an employee suffers a “grave injury,” the employer also may be liable to third parties for indemnification or contribution. See, *Rubeis v. Aqua Club Inc.*, 3 N.Y.3d 408, 412-13, 821 N.E.2d 530, 532 (2004). A grave injury is defined as, “death; permanent and total loss of use or amputation of an arm, leg, hand or foot; loss of multiple fingers; loss of multiple toes; paraplegia or quadriplegia; total and permanent blindness; total and permanent deafness; loss of nose; loss of ear; permanent and severe facial disfigurement; loss of an index finger; or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.” N.Y. Workers’ Comp. Law § 11 (McKinney).

**Damages**

A. Statutory Caps on Damages
There are no statutory caps on damages in New York.

B. Compensatory Damages for Bodily Injury
A personal injury plaintiff, upon a finding of liability, is to be compensated for all his past, present, and prospective damages. This includes fair and adequate compensation for past and future medical expenses, lost earnings, and also for past and future pain and suffering. A spouse may recover for loss of services and consortium of the injured spouse arising out of the injuries.

C. Collateral Source
Under CPLR 4545(c), in any action brought to recover for personal injury, there will be an offset against both past and future economic losses for any amount received from a collateral source such as No-Fault or Disability payments. This would not include those benefits derived from sources such as Workers’ Compensation, where a lien is held against the settlement proceeds.

D. Pre-Judgment/Post judgment Interest
Interest on damages in a personal injury action runs from the date that there is a determination on the issue of liability. See, CPLR Section 5002. In all other actions it runs from the date of accrual of the cause of action. CPLR Section 5001.
E. Damages for Emotional Distress

Intentional infliction of emotional distress has four elements: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress. See, Howell v. New York Post Co., Inc., 81 N.Y.2d 115, 122, 612 N.E.2d 699, 702 (1993). The requirements of the rule are difficult to satisfy and liability is generally only found “where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.” Id.

F. Wrongful Death and/or Survival Action Damages

In wrongful death actions, recovery is limited to general damages which result from the pecuniary loss of those distributees for whom the action is maintained. The measure of the pecuniary loss is the reasonable expectation of future assistance or support to the survivors had the decedent survived. The survivors may also recover for reasonable expenses of medical aid, nursing, and attention incident to the injury causing the death and reasonable funeral expenses of the distributees, or for the payment of which any distributee is responsible. There is no recovery for grief, heartache, or sorrow, but there is a recognized claim for loss of guidance, such as where an infant loses a parent. Damages from conscious pain and suffering are also recoverable. In addition, punitive damages may be recoverable if same would have been recoverable had the decedent survived.

G. Punitive Damages

The bar for the imposition of punitive damages in New York is extraordinarily high. A defendant’s conduct must not simply be intentional, but must evidence “a high degree of moral turpitude,” as well as a “wanton dishonesty as to imply a criminal indifference to civil obligations.” The person’s conduct must rise to malicious, wanton, or reckless conduct. Where liability arises through a theory of respondeat superior, the evidentiary standard is one of clear and convincing evidence. The same standard is applicable in cases involving libel. In other actions, however, the New York Courts have been inconsistent and will sometimes apply a standard of preponderance of the evidence, reflecting a split among the differing Appellate Departments, which will ultimately need to be ruled on by the Court of Appeals.

In the transportation industry, two cases of note are Marcoux v. Farm Service & Supplies, Inc., 283 F. Supp.2d 901 (S.D.N.Y. 2003) (poor maintenance of trailer tires, hiring and retention of truck driver with substantial adverse driving record, do not evidence the degree of recklessness and wantonness requisite for an award of punitive damages); and Evans v. Stranger, 307 A.D.2d 439, 440-41, 762 N.Y.S.2d 678, 680 (3d Dept. 2003) (University’s hiring and retention of bus driver with known recent DWI conviction and repeated drug abuse not so flagrant as to transcend mere carelessness or evince conscious disregard for the rights of others).

H. Diminution in Value of Damaged Vehicle

The New York Courts allow for the recovery of the diminished value of a vehicle calculated by the measure of the difference in the market value of the vehicle immediately before and immediately after the accident, only if the diminished value is
less than the reasonable cost of repairs to restore the vehicle to its former condition. If the vehicle is a total loss, the measure of damages is the reasonable market value immediately before the accident less any salvage value.

I. Loss of Use of Motor Vehicle
The New York Courts recognize the right to recovery for loss of use whether the vehicle is a total loss or is in need of repair. Where the recovery is based on the total loss the period of recovery is based on the date of loss through the date a replacement vehicle could reasonable be found. However, loss of use may not be recovered for any period attributable to any delay caused by an insurance carrier in determining total loss. When repairs are being made to a vehicle, an insurer may recover loss of use for the period of time the vehicle is being repaired. Loss of use can also include the cost of renting a replacement vehicle.

Evidentiary Issues
A. Preventability Determination
We could not find any cases specifically addressing preventability determinations, but would submit that the rule would mirror discoverability of company accident reports. The general rule here is that accident reports made in the regular course of business by uninsured or self-insured entities, are generally not privileged from disclosure as long as they are not prepared for the sole purpose of litigation. The burden of proving that a statement or report is privileged as material prepared solely in anticipation of litigation or trial is on the party opposing discovery. Sigelaskis v. Washington Group, LLC, 46 A.D.3d 800, 848 N.Y.S.2d 272, 273 (2nd Dept. 2007).

B. Traffic Citation from Accident
Evidence of a plea of guilty to a traffic offense arising out of the incident surrounding defendant’s alleged negligence is admissible at trial. The person who pleads guilty to the traffic offense may offer testimony at trial explaining the reason for the plea, and the jury will then decide what weight, if any, to give the testimony.

C. Failure to Wear a Seat Belt
A plaintiff's failure to utilize a seatbelt may be presented as evidence on the issue of mitigation of damages, but not as to comparative liability. See, Godfrey v. G.E. Capital Auto Lease, Inc., 89 A.D.3d 471, 479, 933 N.Y.S.2d 208, 216 (2011), leave to appeal dismissed, 18 N.Y.3d 951, 967 N.E.2d 696 (2012). Expert testimony is required to prove the effect the failure to wear a seat belt had on the claimed injury and the defense must be pled in defendant’s answer.

D. Failure of Motorcyclist to Wear a Helmet

E. Evidence of Alcohol or Drug Intoxication
It has been held that "whether a person exhibits signs of intoxication and the impact of intoxication on an individual's mental state is presumed to be within the ordinary experience and knowledge of jurors such that expert evidence to establish such facts is unnecessary." People v. Paro, 283 A.D.2d 669, 670, 724 N.Y.S.2d 531, 533 (2001).

With regard to the admissibility of drugs found in the vehicle, where there was no intoxication, there were no cases found directly on point. Though, we would expect that the prejudicial effect such evidence would have on a jury would outweigh its admissibility, absent some showing that the possession of the drugs, itself, contributed to the accident.

F. Testimony of Investigating Police Officer
Where a police officer does not witness an accident his opinion as to the cause of the accident is inadmissible, unless it is “based on post-incident expert analysis of observable physical evidence.” *Murray v. Donlan*, 77 A.D.2d 337, 347, 433 N.Y.S.2d 184, 190 (1980).

G. Expert Testimony
New York follows the more conservative *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), rather than the rule set down by the Supreme Court for federal trials in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Under *Frye*, a novel scientific methodology or technique “must be scientifically established as to have gained general acceptance in the particular field in which it belongs.” This rule applies only to novel methodologies. Any other expert testimony is admissible, if not purely speculative (as a net opinion) and if presented by a properly qualified expert. Although several trial courts have attempted to apply the *Daubert* test, the New York Appellate Courts have followed the *Frye* standard and consistently strike down any attempt by the trial courts to apply *Daubert*. Recognizing this distinction between New York State and Federal law, in products liability multi-district litigation the Courts have held joint *Frye/Daubert* hearings.

H. Collateral Source
CPLR 4545 extends collateral source reductions to all past and future awards in medical malpractice, dental malpractice, personal injury, and wrongful death actions where there is evidence that medical expenses, lost wages, or other economic loss have been or will be paid with reasonable certainty.

Pursuant to the Rule, evidence shall be admissible for consideration by the Court to establish that any past or future collateral source expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from the collateral source. Life insurance and those payments as to which there is a statutory right of reimbursement (such as PIP benefits) are not to be included as a collateral source set off.

The Court must find that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any such collateral source. Upon such finding, the Court will reduce the amount of the award by such expense, minus the premiums paid by the plaintiff for such benefits for the two-year period immediately
preceding the accrual of such action and minus an amount equal to the projected future cost to the plaintiff of maintaining such benefits. The Court must also find that the plaintiff is legally entitled to the continued receipt of such collateral source, pursuant to a contract or otherwise enforceable agreement.


1. **Recorded Statements**
   A party has a right to obtain a copy of his own statement regarding the incident being litigated from any other party.\(^{50}\) Claims files themselves, as a whole, are not discoverable, as they are created in preparation of litigation. However, certain items within a claims file may be discoverable by a plaintiff, such as adverse party statements, names and addresses of witnesses, accident reports made in the regular course of business, photographs of the scene or vehicles, prior pleadings, and expert witness information.\(^{51}\)

The statement of a non-party witness obtained in an investigation after an accident is immune from disclosure as material prepared for litigation.\(^{52}\) If, however, the non-party witness is deposed and gives testimony inconsistent with the statement, the statement should be disclosed.

J. **Prior Convictions**
   It has been held that the use of prior criminal convictions to impeach the credibility of a witness in a civil case is permissible. *Scotto v. Daddario*, 235 A.D.2d 470, 652 N.Y.S.2d 311 (1997). The general rule conviction must be one of “specific immoral, vicious or criminal acts which have a bearing on the witness's credibility.” *Badr v. Hogan*, 75 N.Y.2d 629, 634, 554 N.E.2d 890, 892 (1990). The nature and extent of such cross-examination is discretionary with the trial court and it must have “some tendency to show moral turpitude to be relevant on the credibility issue.” *Id.*

K. **Driving History**
   Generally, a trial court has broad discretion in determining the discoverability of a document, and there are cases which have held that a party’s driving history is irrelevant. *Brossoit v. O'Brien*, 169 A.D.2d 1019, 1020, 565 N.Y.S.2d 299, 301 (1991). Other Courts relying on the general rule that all record requests that are “material and necessary” are discoverable have taken a different view. *Kontomichalos v. County of Nassau*, 21 Misc. 3d 1139(A), 875 N.Y.S.2d 821 (Sup. Ct. 2006) aff'd, 49 A.D.3d 506, 855 N.Y.S.2d 175 (2008).

L. **Fatigue**
   Though we could not find any cases dealing with the current hours of service rules, in the past, the Courts have held that “before a violation of the statute may be said to constitute the proximate cause of an accident, there must be a finding by the jury that the driver was, in fact, experiencing fatigue caused by work in excess of the statutory period and that such fatigue so caused was a contributing factor to the accident.” *Montes v. H.C. Bohack Co.*, 284 A.D. 448, 454, 131 N.Y.S.2d 775, 781 (1st Dept. 1954).
M. Spoliation
A party who is found to have improperly disposed of evidence is subject to sanctions. This can include the striking of pleadings and can be applied even where the spoliation was the result of negligence as opposed to wilfulness. Sanctions can also be imposed where the evidence was destroyed before the spoliator became a party to the suit, provided that party was on notice that the evidence might be needed for future litigation. See, *MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*, 1 N.Y.3d 478, 483, 807 N.E.2d 865, 868 (2004).

Settlement
A. Offer of Judgment
An Offer of Judgment is known as an Offer to Compromise under New York’s civil practice rules. It may be made any time, but not later than ten days before trial. If within ten days of service, the claimant serves a written notice of acceptance upon the defendant, either party may file the summons, complaint, and offer, with proof of acceptance, at which time the clerk may enter judgment. If the plaintiff declines the offer and later recovers less than the offer made, he may not recover any costs from the defendant and is liable to the defendant for costs accrued from the time the offer was made until the culmination of the action.53

B. Liens
As a general rule, the potential proceeds of a lawsuit are an asset against which a lien may be effectuated. Statutory provisions exist under both the Workers’ Compensation Law and the Social Services Law that allow parties to assert a lien on the proceeds of a lawsuit. An injured employee’s Workers’ Compensation carrier can recover all amounts that it has paid to an injured employee out of the proceeds of the employee’s recovery from a third-person, regardless of whether it has been obtained by judgment or settlement.54

If the plaintiff’s injuries were sustained through the use of an automobile, the first $50,000 of recovery is treated as having been recovered under the PIP provisions of plaintiff’s automobile’s insurance policy. The effect of this is that the Worker’s Compensation carrier is entitled to recover the first $50,000 paid from the automobile insurance carrier, rather than the plaintiff himself. Any dispute as to this sum is to be settled between the Worker’s Compensation carrier and the automobile liability insurer through arbitration.55

C. Minor Settlement
A settlement with a minor must be approved by the Court. Generally, the plaintiff must prepare an infant’s compromise order. The Court will then schedule a conference date during which time the Court will review the infant’s compromise order.

D. Negotiating Directly With Attorneys
There is no rule in New York that would bar a claims adjuster from contacting an attorney to engage in direct settlement negotiations.

E. Confidentiality Agreements
Confidentiality agreements are allowed both as to items of discovery and settlements. CPLR 2104, however, requires that any “agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court,
is not binding upon a party unless it is in a writing, subscribed by him or his attorney, or reduced to the form of an order and entered.” The rule requires that with regard to a stipulation of settlement, “the terms of such stipulation shall be filed by the defendant with the county clerk.” The parties would, therefore, have to seek an order from the Court sealing the terms of the settlement.

F. Releases
A release in New York must be signed by the named party before a notary republic. If a party cannot read English, there should be a statement that the release was read to that individual and translated to the individual.

G. Voidable Releases

A circumstance such as fraudulent inducement to enter into the release would be grounds for voiding the release. *Id.*

**Transportation Law**

A. State DOT Regulatory Requirements
In general, New York State has adopted the Federal Motor Carrier Safety Regulations found in Title 49 of the Code of Federal Regulations, 49 CFR, Parts 390 through 397, and the Hazardous Materials Transportation found in 49 CFR, Parts 100 through 199, as they apply to interstate highway transportation. There are some specific exceptions to the regulations for vehicles operated strictly within New York State. Link to the New York state Code of Rules and regulations: [https://www.dot.ny.gov/divisions/operating/osss/repository/17%20NYCRR%20Part%20820.pdf](https://www.dot.ny.gov/divisions/operating/osss/repository/17%20NYCRR%20Part%20820.pdf)

B. State Speed Limits
The minimum speed on most expressways in the State of New York is 45 mph. The speed limits on expressways varies from 55 mph to 65 mph.

C. Overview of State CDL Requirements
When you apply for an original New York State Commercial Driver License (Class A, B or C) or a renewal, you must certify that:

1. You did not hold a driver license in any state or in the District of Columbia except NYS in the last ten years, or you must report every US state (or the District of Columbia) where you held a driver license in the last ten years.

2. You meet, or you do not meet, the requirements of the Federal Regulations in 49 CFR, Part 391, which include a requirement for a medical examination. The applicant must pass a skills road test, unless
they have Military Experience driving a commercial motor vehicle, which allows them to apply for a waiver of the test.

Insurance Issues

A. State Minimum Limits of Financial Responsibility
A motor vehicle registered in New York State must have minimum liability insurance coverage of $25,000 per person/$50,000 per occurrence; $50,000/$100,000 for death; and $10,000 for property damage.

B. Uninsured Motorist Coverage
Uninsured motorist coverage in New York is mandatory and based upon a standard endorsement that establishes certain minimum requirements permitting an insured to recover from his or her employer’s own insurance carrier in the event of an accident with either a motor vehicle or another motor vehicle that qualifies as “uninsured” within the statutory or endorsement definition.56

Under insured motorist coverage, or supplementary uninsured motorist coverage, is optional in New York State. This coverage is designed to afford protection to an insured in the event a tortfeasor has liability limits that are too low to compensate adequately for an injury. Essentially, the purpose of this type of coverage is to provide injured individuals with compensation for their injuries equal to the protection they, themselves, purchased to protect others from injuries they might have caused.57

C. No Fault Insurance
The Comprehensive Motor Vehicle Insurance Reparations Act - New York's no-fault insurance law, codified as Article 51 of the Insurance Law - was enacted to address various defects in the common-law fault approach. The no-fault scheme was intended to cure these infirmities by assuring prompt compensation to victims for substantially all of their basic economic loss, so as to “eliminate the vast majority of auto accident negligence suits,” and, concomitantly, to decrease premiums. See, Hunter v. OOIDA Risk Retention Group, Inc. 79 A.D.3d 1, 8, 909 N.Y.S.2d 88, 93 (2010). No-fault benefits will cover up to $50,000 in medical benefits and lost wages.

D. Disclosure of Limits and Layers of Coverage
In New York, a party may obtain discovery of the existence and contents of any insurance agreement under which any entity carrying on an insurance business may be liable to contribute, indemnify, or reimburse any part or all of a judgment entered in the action.58

E. Unfair Claims Practices
No insurer doing business in New York State can engage in unfair claim settlement practices, and as such may not:
1. Knowingly misrepresent to claimants pertinent facts or policy provisions relating to coverages at issue;
2. Fail to acknowledge, with reasonable promptness, pertinent communications as to claims arising under its policies;
3. Fail to adopt and implement reasonable standards for the prompt investigation of claims arising under its policies;
4. Not attempt, in good faith, to effectuate prompt, fair, and equitable settlements of claims submitted in which liability has become reasonably clear, except where
there is a reasonable basis supported by specific information available for review by the department that the claimant has caused the loss to occur by arson. After receiving a properly executed proof of loss, the insurer shall advise the claimant of acceptance or denial of the claim within 30 working days;

5. Compelling policyholders to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them; or

6. Failing to promptly disclose coverage pursuant to subsection (d) or subparagraph (a) of Paragraph 2 of subsection (f) of section 3,420 of this chapter. (b) Evidence as to numbers and types of complaints to the department against an insurer, and as to the department’s complaint experience with other insurers writing similar lines of insurance, shall be admissible in evidence in any administrative or judicial proceeding under this section or Article 24 or 74 of this chapter, but no insurer shall be deemed in violation of this section solely by reason of the numbers and types of such complaints. (c) If it is found, after notice and an opportunity to be heard, that an insurer has violated this section, each instance of noncompliance with subsection (a) hereof may be treated as a separate violation of this section for purposes of ordering a monetary penalty pursuant to subsection (b) of section 109 of this chapter. A violation of this section shall not be a misdemeanor. N.Y. Ins. Law § 2601 (McKinney).

F. Bad Faith Claims
The New York Courts have consistently held that “an insurer is not liable in excess of the policy limits for the breach of an insurance contract, absent bad faith.” When an insurer breaches that good faith, it will be required to remedy the harm caused to the insurer by paying any excess judgment.

In fact, the Court of Appeals has stated that, “the notion that an insurer may be held liable for the breach of its duty of ‘good faith’ in defending and settling claims over which it exercises exclusive control on behalf of its insured is an enduring principle...” The New York approach to bad faith is understandable and well-balanced. When confronted with a limits case and the possibility of a settlement within the policy limits, the insurer must not act in “gross disregard” of the insured’s interests and must not fail deliberately to place the insured’s interest on an equal footing with that of the insurer.

Bad faith is established only where liability is clear and the potential for recovery far exceeds the policy limit. There must be proof of a settlement demand and actual lost opportunity to settle within the policy limit, after all doubt as to liability is removed. An insurer cannot be compelled to concede liability and settle a questionable claim simply because an opportunity to settle is presented.

G. Coverage – Duty of Insured
There is no common law duty of an insured to cooperate. The duty to cooperate arises out of the language of the applicable policy. In order to deny coverage based upon lack of cooperation, it must be demonstrated by the insurer that (1) it acted diligently in seeking to bring about the insured’s cooperation, (2) the efforts employed by the insurer were reasonably calculated to obtain the insured’s cooperation, and (3) the attitude of the insured, after his or her cooperation was sought, was one of willful and avowed

H. Fellow Employee Exclusions
Fellow employee exclusions are generally enforceable in New York, though any such exclusions or exceptions must be specific and clear in order to be enforced, and are “not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction.” See, *Family Cas. Ins. Co. v. Habitat Revival, LLC*, 91 A.D.3d 903, 905, 938 N.Y.S.2d 126, 128 (2012), leave to appeal dismissed, 2012-633, 2012 WL 3742990 (N.Y. Aug. 30, 2012).

Endnotes

1. CPLR §214(5).
2. CPLR §214(5) and CPLR §208.
3. N.Y. Estates, Powers & Trusts §5-4.1.
4. CPLR §215; N.Y. Estates, Powers & Trust §5-4.1.
11. CPLR §3018(b).
12. Id.
13. CPLR §3211.

14. N.Y. Ins. Law §5102(d).


23. Id.


26. Id.


28. CPLR §1602(6).

29. N.Y. Vehicle & Traffic Law §388.


32. N.Y. Estates, Powers & Trust §5-4.3.

33. Id.


35. Id.


49. *Id.*

50. CPLR §3101(e).

51. CPLR §3101.


53. CPLR §3221.

54. N.Y. Workers Compensation Law §227.


56. N.Y. Ins. Law §3420(f)(2); N.Y. Workers Compensation Law §227.

57. *Id.*

58. CPLR §3101(f).


62. *Id.*

63. *Id.*