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Trucking Companies, Their Drivers and Lawyers: Why Do Juries Hate Us? *Part II: What Can We Do About It?*

1. PRE-EMPTIVE – All of the issues involving why juries “hate” trucking companies can be diluted or avoided prior to litigation even being filed.

a. Develop a “Face of the Company”: A Safety Director or similar personnel whose job it is to think about safety, train about safety, and “live” safety issues. In the case of litigation, this person can be instrumental in showing that a company values safety and that a trucking company invests heavily in safety issues. This person can also present the “story” of the trucking company.

b. Don’t Always Focus on the Negative: DQ and personnel files that are often disclosed to plaintiff’s counsel during discovery are filled with purely negative aspects of a driver’s safety record (violations, accidents, etc.). Consider also keeping copies of the positive, i.e. accident-free awards, violation-free awards, other safety training.

c. Demonstrate the Company Values Safety

- i. Driver Code of Conduct
- ii. Driver Coercion
- iii. Mirror Check Station Set Up
- iv. Value Driven Principles

2. WITNESS PREPARATION – Preparing a witness prior to depositions is essential to ensure that drivers and company officials are not caught off-guard or trapped by any line of questioning from a Plaintiff’s counsel. Plaintiff’s counsel will often ask general and open-ended questions that beg an affirmative answer (“Do you believe your company is a safe company?”)

a. Drivers: Drivers should be prepared to “stay in their lane” at deposition, or not responding to questions outside of their expertise or skill. For instance, a driver should not answer questions more appropriate for a safety director or other company rep. concerning general safety procedures of the company. The driver **should** testify about their own safety training and background.

b. Company Rep./Safety Director: Be prepared to discuss the “story” of the trucking company when possible. Many of these trucking companies represent the American Dream – working up from a single truck outfit to employing many individuals and providing a great number of jobs and positive community impact.

c. Anti-Reptile Preparation: Not falling into the trap of answering broad questions concerning safety and regulations.

3. PRETRIAL –

a. Admit Liability: Contesting liability in a clear fault situation can paint a trucking company in a negative light. Admitting liability also changes the entire tenor of the case and puts plaintiff's counsel on the defensive in establishing and proving their alleged damages. This can also avoid tricky depositions of drivers and company reps. Even when liability is not clear, you may want to consider admitting liability to avoid potentially troublesome discovery/depositions.

i. Jurisdictional differences: Some states still use contributory negligence, where admitting liability is not likely an effective strategy if a jury could find the plaintiff even 1% at fault.

b. Deal with Argument that Truck Driver Should Be Held to a Higher Standard of Care

i. FMCSRs impose obligations on CMV driver that passenger driver does not have.

ii. *Gruenbaum v. Werner* case: Even when lost battle on MSJ, won the war in getting great law in Ohio that truck drivers only had a standard duty of care and FMCSRs did not establish a heightened standard of care in Ohio.

c. Preventability Determinations and Self-Critical Analysis Privilege

i. Numerous courts across the country have held that preventability determinations are not discoverable material since the standard for preventability is much different from a negligence standard. Questions about preventability determinations to company reps. and safety directors can similarly be objectionable under the self-critical analysis privilege.

d. Mock Trials

i. Very useful in high loss cases; *Estes* case (Brad Wright) – Very revealing how jurors talked about issues involving damages.

4. TRIAL – Plaintiff's counsel will try to conflate every little fact into a story about an unsafe trucking company and unsafe driver. At trial, the key is to present our own theme and story about the trucking company and driver, while avoiding potential evidence pitfalls and a bad jury selection.

a. Motions in Limine: These motions can make or break a case. Do not take these lightly. The proper motions can restrict the ability of a plaintiff's counsel to develop their theme and knee-cap their case before opening arguments.

i. Citations: Whether a citation is admissible may depend on your jurisdictions. In many jurisdictions, evidence of a citation may not be admissible but evidence of a guilty plea or conviction in a traffic matter can be used to impeach a witness. Depending on your jurisdiction, a no-contest plea cannot be used as an admission.

ii. Other accidents: Evidence of a driver's other accidents (or even a company's accident history) may be used to present the trucking company in a negative light. These accidents are almost always irrelevant. Properly objecting and filing a Motion in Limine on this issue can cut-off one of plaintiff's counsel's likely arguments and themes of an unsafe trucking company/driver.

iii. Irrelevant/prejudicial evidence: Preventability determinations, independent adjuster reports and recommendations, the fact a driver was arrested in the past, etc.

iv. are generally not admissible.

b. Daubert Motions

i. DOT experts who want to testify regarding causation: There are often many reasons for the exclusion of plaintiff's FMCSA regulations expert. Most of them arise out of Rule 702-703 of the Federal Rules of Evidence, or the state law equivalent.

1. Not Qualified. The expert lacks the expertise to offer opinions in this specific area. Lack of a Certified Director of Safety Designation (CDS) or Certified Transportation Professional (CTP) is a key indicator of persons who want to offer opinions but have not done the work to be certified to be a professional in this field. This lack of certification may reflect lack of underlying experience that would qualify, inability to pass the testing and certification procedures, OR the certification that may have been previously held has expired or been withdrawn.
2. Not Reliable. The expert's opinions are not supported by sufficient facts and data.
3. Not Helpful. The expert's specialized knowledge or expertise is not required. Here, watch for the double-edged sword. If the defense will be presenting an FMCSA regulations expert to offer opinions, his opinions may be stricken on this basis as well, since the basis relates to the area generally and not to the plaintiff's expert's specific opinions or qualifications.
4. Irrelevant. The expert's opinions do not bear on an issue in dispute in the case (e.g. the driver's negligence, where the driver's negligence has been admitted).
5. Unduly Prejudicial. The expert's testimony is specifically designed to inflame and anger the jury in a manner unduly prejudicial to defendants and misleading to the jury. Keep in mind, the expert brings an aura of reliability and trustworthiness to the trial that may be unwarranted and improper.

ii. Cumulative. When another expert is opining on the same issue.

c. Bifurcate: There are different opinions on bifurcating and may depend on jurisdiction. Bifurcating a trial may assist in keeping the issues focused on liability and/or direct damages as opposed to discussion about possible punitive damages. However, if you receive an unfavorable jury decision in one part of the bifurcated case, it is an uphill battle to prevail on the other part.

- i. Liability and Damages
- ii. Punitive Damage

d. Voir Dire/Jury Selection

i. Potential jurors' negative experiences with trucks and truck drivers: Ask direct questions during voir dire about prior experiences with trucking companies in general.

1. Accidents/incidents
2. Anxiety/Intimidation re: size, weight and speed of trucks

ii. Perception that truck drivers drive dangerously, exceed HOS, take drugs

iii. Explain plaintiff's strategy/theme: Plaintiff's counsel will be working on their strategy with potential jurors at this stage and "priming" the jurors for their strategy. It is important to not just let these questions go by. It may be worthwhile to point out what plaintiff's counsel is attempting to do (reptile theory, standard of care, hindsight bias/"Monday-morning quarterbacking, etc.).

iv. Millennials: Having Millennials on a jury may be dangerous. Millennials have strong anti-corporate beliefs stemming from their experience with the banking crisis, Great Recession, BP Oil Spill, etc. Further, there is a high unemployment rate for Millennials, who have toiled away at school for years, only to find an oversaturated and under sourced job market. Along with this, studies have indicated that millennial jurors tend to favor higher damages awards against corporate defendants.

e. Jury Consultants: Having a jury consultant on-board early in the large loss cases can be very helpful and cost efficient. A Jury Consultant can help develop themes during depositions, Motions in Limine and throughout voir dire.

f. Trial Themes: Talk about all the positive aspects of the trucking industry in general and the trucking company specifically. For instance, Wal-Mart has a negative reputation (Tracy Morgan case), but has some of the best safety records in the country. Talking about the company's history and record are paramount in combating a plaintiff's theme of the case.

- i. Trucks are critical to the economy
- ii. Truck drivers are well-trained
- iii. Our company cares about safety and places it before profits
- iv. This case is about a single (fluke) accident, not about major policy issues
- v. Accentuate differences between jurors and plaintiff; e.g., jurors never would've taken the risk plaintiff took
- vi. Point out the hypocrisy of plaintiff and their counsel; e.g., they aren't doing this to make the world safer but rather for their own financial gain

g. Experts: Experts can make or break a case early on. In particular, experts can speak for the trucking industry as a whole and place a trucking company in the context of the entire industry. A good DOT Safety Expert can opine on a company's entire safety record and expand the scope of the case beyond the subject accident.

- i. DOT Safety Expert to convey themes, statistics, etc.: When your driver and/or motor carrier exhibits excellent statistical data within the FMCSA scoring system, has a computed crash rate per million miles far below the FMCSA threshold, or has extensive Safety Management Controls in place pursuant to Part 385 of the FMCSR, use that data to defend the overbroad and frequently over reaching attacks of the plaintiffs expert who will likely ignore such data.
- ii. Accident recon expert to convey themes

h. Dealing with Allegations of Violations of Internal Safety Policies/Procedures

i. Dealing with Allegations of Violations of FMCSRs

j. Don't Allow Plaintiff's Counsel to Expand Scope of Evidence Beyond What is Relevant:

Typically, plaintiff's counsel wants to make the case less about the accident facts and more about extraneous facts that don't cast the company or driver in a favorable light and prejudice a jury towards making a decision based on larger issues of community safety.

k. Object to Improper Questions and Argument and Request Curative Instruction or

Mistrial: Be vigilant during plaintiff's counsel's examinations and argument and look for Golden Rule Violations.

I. Jury Instructions: Do not underestimate Jury Instructions! Where possible, fight with a plaintiff's counsel to get good jury instructions. The last thing a jury hears before deliberating is the judge's instructions. This can have a major impact on how they deliberate and think about the case.

m. Credibility

- i. Be prepared
- ii. Don't waste the jury's time or insult their intelligence
- iii. Don't try to prove what you can't