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**WHAT GOES UP, MUST COME DOWN: AN UPDATE ON JURY VERDICTS IN
MOTOR VEHICLE CASES**

I. INTRODUCTION

Recent Verdict and Settlement Trends

Jury verdicts in the commercial transportation industry are volatile. This is often true whether or not the case is properly defended. The runaway jury is not just for books and theater. It is real. The perception of deep pockets attracts both the seasoned plaintiff's attorney and those trying to make a name for themselves. The plaintiff's Bar continues to become more sophisticated and creative, and plaintiff attorneys are finding a way to circumvent Tort Reform. As a result, cases that might have resulted in more reasonable verdicts 5-10 years ago, are now shockingly high and routinely in the seven-figure range.

Surveying the Root Causes of the Trending High Verdicts

Tapping into the jury's fear has become a science. Though not the topic of this paper, defense attorneys are becoming all too familiar with the "Reptile" approach that is being implemented by plaintiff's attorneys. The target on the back of commercial transportation defendants is a result of plaintiff attorneys preying on the stigma associated with commercial trucks. Jurys are made to feel a personal responsibility to make the roads safer by "punishing" the negligent driver, whether exemplary damages are plead or not. Additionally, medical damages have become artfully maximized. Many states have set damage ceilings and/or limits on medical damages to the amount actually paid. Plaintiffs are also developing and retaining medical experts that are becoming professional testifiers. In addition, plaintiff firms are often now hiring third party medical device companies and medical expense guarantees, so that no medical bills are adjusted. Finally, the media has put every tragedy across the nation into everyone's living room, every day. The accident involving Tracey Morgan has the feel of empathy from all communities across the nation. The bottom line, the stigma attached to commercial trucks and the transportation industry generally is alive and well.

What it means for the Future

Year to year, litigation involving commercial truck accidents result in some of the highest settlements and jury verdicts across the country. These verdicts are steadily rising. The result is that emboldened plaintiff attorneys know that the best business decision for defendants is often

to pay more in settlement than run the risk of a runaway verdict. They are coming to mediation, with increasingly higher demands. In some instances, the client's best interests are still served by contesting liability by taking a case all the way to a trial. To sell a story in front of twelve jurors, the seasoned trial attorneys know that no expense can be spared. Any well prepared case likely includes multiple expert witnesses, sophisticated multi-media presentations, and countless hours of attorney preparation. The bottom line: the financial burden of commercial transportation litigation is steadily rising.

II. REVIEW OF VERDICTS

The Reptile at Work: \$281M

Jose Luis Aguilar, et. al., v. Heckmann Water Resources, Inc., and Rueben Osorio Gonzales, 293rd Judicial District, Dimmit County, Texas.

In this matter, the Plaintiff was a passenger in a pick up truck. Defendant's tractor trailer was heading the opposite direction. As they approached each other, the drive shaft broke loose from under the tractor trailer, and flew through the windshield of the Plaintiff's vehicle, killing him. The suit alleged that a lack of proper maintenance caused the drive shaft to break free. The jury agreed.

Dimmit County is located near the Mexico Border. The trial was in the town of Carrizo Springs with a population 5,600 before the fracking boom. Now the population is 40,000. It is reported that prior to trial, buttons were reportedly passed out amongst town people stating: "Remember Carlos who was killed by American corporate greed". The Plaintiffs' attorney argued: "They are tired of all these oil companies coming into their community causing all these problems and killing all the locals" or words that effect. Preying upon their fears.

There was bias at work in the community and within the courthouse. Not only was the community jury pool biased, the courtroom was dangerously biased as well. The Plaintiffs' attorney had been a 30 year Judge in the County. The sitting judge is a paraplegic from an accident involving GM. The discretionary decisions were all found in favor of the plaintiffs. No discretionary battles were won by Defendants. The verdict was \$281M. The jury found the company, Heckmann negligent, but not the individual driver, Gonzales. The compensation was primarily for Aguilar's children. The jury awarded \$181M in actuals and \$100M in punitive damages. At post trial motions, the plaintiffs agreed to wave the punitive damage findings and asked for the judge to enter a judgment for \$181M. After several post-trial motions, the court ultimately entered a judgment for \$100M.

Perceived Higher Standard: \$58M

Santa Fe Trust, for the Estate of Kevin Udy v. Zia Transport Inc., 1st Judicial District Ct., Santa Fe, NM

A New Mexico jury recently awarded the family of a person killed on a 2010 truck-involved accident \$58.5M damages, believed to be the largest truck accident verdict in New Mexico history. The case was brought by Santa Fe Trust, on behalf of the wife and children of

Kevin Udy. Mr. Udy was killed when his pick up truck collided with a Zia Transport Inc. truck that was hauling water for a natural gas well exploration site. It is alleged that the truck made a left turn into Udy's path. The plaintiffs also alleged that the companies involved permitted their trucks to run with numerous safety and traffic violations as well as improper repair and maintenance issues. The verdict allowed for \$11.5M in compensatory damages, and \$47M in punitives. Following the verdict, the Jury Foreman commented: "*our hope is that our judgment will clearly communicate that we expect a much higher standard of safety from the trucking industry.*"

Failure to Stay Current- Paper Logs: \$15M

Marie Simmons, as Personal Representative of the Estate of Carl R. Simmons, deceased, Devin Simmons v. Landstar Ranger, Inc. GW Goller Transportation Group, Inc., Gerald Goller, and Roger Wirick, 9th Circuit Ct., Orange County, Florida.

On June 2, 2011, Carl Simmons and another motorcyclist were killed in Orlando, FL, after running into a tractor trailer, leased to Landstar Ranger Inc., by GW Goller Transportation Group, Inc., and driven by Roger Wirick. Mr. Wirick attempted to turn at an intersection, in front of Mr. Simmons. It is alleged that Ms. Simmons collided with the very back of Mr. Wirick's trailer. The impact ultimately killed Mr. Simmons.

During the case investigation and discovery, it was learned that Mr. Wirick had falsified the paper logs he was required to keep, showing his hours of service. These falsified records also hid the fact that he was driving for longer than the legal limit of 11 hours. Counsel for the plaintiff was able to compare the paper logs to the digital black box that was installed in the truck by the owner, GW Goller, Transportation Group, Inc. The comparison established that Wirick had been driving for 11 hours and ten minutes, at the time of the incident. This was ten minutes beyond the permitted time limit of 11 hours. Additionally, before driving, Mr. Wirick had taken only a nine-and-a-half hour break, while the required break time is a full 10 hour consecutive break. There was testimony offered by the plaintiff's expert that Mr. Wirick had only slept for a total of eight hours in the last 30 hours. The case showed "quite a bit of falsification of logs."

Moreover, in addition to targeting the driver, the plaintiff attorneys also pushed hard against Landstar. The plaintiff's attorney recites that the crux of the case was not only that the driver was over the legal limit of driving when he hit Simmons; but also that a major trucking company like Landstar shouldn't still allow the use of paper logs, as most major companies have switched to electronic logging. This jury found that "the trucking company was not only negligent vicariously for the acts of its driver, but, also independently for failing to have electronic logging." The defense attempted to argue that the extra ten minutes on top of 11 hours was not connected to the cause of the accident. Also argued by the defense was the fact that tractor trailer accidents amount to less than five percent of all fatalities on the road per year, and that in 2011, the year this accident happened, paper logs were completely legal. None of these arguments were accepted by the jury.

This jury returned a comparative fault verdict against Mr. Wirick for 93%, and Mr. Simmons, for 7%. It also found that Landstar was partially responsible for causing the death of

Simmons. \$10,914,197.00 was the verdict for the wife, Marie Simmons; \$5,191,166 was awarded to the daughter, Devin. The verdict was reduced by the 7% of causation attributed to Mr. Simmons, and the final verdict was \$14, 141,685.

Sophisticated Damage Model- TBI: \$42M

Joshua Rojas and Kiara Torres v. Brian English, and Concrete Designs, Inc., and Jovanny Martinez, Court of Common Pleas, Cuyahoga County, Ohio.

The accident occurred in the early hours of November 14, 2010, on the Lorain-Carnegie Bridge, in Cleveland Ohio. The liability facts were highly disputed. Brian English, who was driving a dump truck for his company Concrete designs, allegedly cut in front of 1992 Honda, driven by Jovanny Martinez, a move that caused the crash. Both vehicles were headed east. Martinez struck English from behind. English maintained that it was not he, but Martinez that caused the crash, and that Martinez' speed was the main factor, in causing the accident.

Martinez was carrying three passengers, Yarlene Santiago, Joshua Rojas and Kiara Torres. Rojas was the front seat passenger and Torres was in the back seat behind Rojas. Both Rojas and Torres alleged to have lost sight in their right eyes. Both are also said to have suffered extensive head injuries. Rojas suffers severe functional limitations and uses a wheel chair.

At the end of the case, the jury completely exonerated Martinez, though he hit English from behind. They found English 100% responsible. Interestingly, Martinez was criminally charged in the accident and received a 6 month probated sentence for negligent assault.

Bad Timing on Admission of Liability: \$34.5M

Alan Casillas v. Landstar Ranger, Inc., Superior Court of California, County of Los Angeles.

Mr. Casillas was riding a bike on the morning of Dec, 7, 2012 and came to a stop at the intersection of Tweedy Blvd., and Alameda Street in Los Angeles, CA. A Tractor trailer, owned and operated by Landstar Ranger proceeded into the intersection in an attempt to make a right turn onto Alameda street. The truck drove the 55 foot long trailer over the sidewalk striking Mr. Casillas bicycle and knocking him to the ground. The rear wheel of the trailer ran over Mr. Casillas left leg, causing him severe injuries, resulting in a leg amputation.

It is noted in the case report that Landstar waited until the start of trial to admit fault for the accident, initially arguing that Mr. Casillas was partially responsible for being hit while on the sidewalk because he was himself inattentive and should have avoided the trailer. The defense argued for an award for between \$5M-\$7M. The argument of the plaintiff counsel at closing was that Mr. Casillas life was forever changed as a result of this horrific accident, and rather than accept fault for their negligence, the defendants chose to put blame on Mr. Casillas, right up until the eve of trial, and then still contested his damages.

III. RISK ASSESSMENT

Weaknesses and Exposures

The Reptile Effect

In recent years, there has been much discussion of how to combat the “Reptile Effect” that is often used by plaintiff attorneys. This Reptile method is considered to be the latest and greatest technique to generate higher verdicts and to prey upon the primal emotion of fear of the jurors. This technique is combined with a plea to “protect their own”. Plaintiff attorneys attempt to worry jurors into believing that they have an obligation to protect society from the reckless trucking industry, and the rogue truck driver. They prey upon the fear of the community at large, that if no one will stop the large truck companies, then these trucks will be free to roam the highways, killing off members of their communities, one by one. This “reptile effect” is in play when we see cases like those above, wherein the jury foreman decides they have to protect the community, from “American corporate greed.”

Convincing a jury that it is acceptable to hold truck drivers to a higher standard than other drivers is particularly concerning. The creation of imaginary “standards in the industry” has been an effective tool implemented by plaintiff attorneys. Former safety directors within the industry have been enlisted as “experts” to tell jurors why motor carriers should be punished for so much more than just their driver’s conduct out on the road. For this reason, depositions have become difficult mine fields for the drivers and the companies for which they work. Drivers *want* to hold themselves out as professionals. But, jurors are left with the impression that the truck driver must be a safer driver than the public at large. Therefore the “reasonable ordinary” safety measures undertaken by truck drivers are often found by the lay jury to be lacking. They are unwittingly held to standard for which there is no legal basis. The end game is ultimately higher verdicts.

Staying Current

Another area of concern is the advent of electronic logs and GPS systems. All such communication devices are being used primarily to improve safety. Ironically however, if companies do not have electronic systems, some courts are permitting their absence to be considered an element of negligence. Truck drivers already face a dangerous situation, whereby they are considered negligent if their administrative skills are questionable. The targeting of Driver’s Logs has become commonplace amongst plaintiff truck lawyers. The imperfect logs are used to argue that not only was the driver tired, but, that he or she routinely falsified trip documentation to avoid compliance with driving limits. Now, companies must consider the financial investment of transitioning to electronic systems, or run the risk of a negligence assessment for not having such a system in place. Without them. Plaintiff attorneys are free to argue that bad crashes are a result of corporate recklessness and greed rather than the momentary lapse of judgment behind the wheel.

Sophisticated Damage Model – TBI

Traumatic Brain Injury cases are the latest in the series of recent measures to increase the value of otherwise ordinary claims. While the existence of a TBI may be difficult to prove, it is unfortunately equally difficult to defend against. There are many times where there exists no pre- and post-accident, objective evidence relevant to the alleged traumatic brain injury. This absence has not stopped the plaintiffs' stable of medical experts from exploiting the theory, regardless of whether or not supported by evidentiary science. This is why we see that in almost every case involving TBIs the damages are hotly contested and extraordinary Demands are the norm.

An example of one recent case demonstrates the concern: In Virginia, a minor rear end collision resulted in some "dazed" moments by the plaintiff. He was able to basically do his own accident reconstruction. He got out of his car, measured the length of skid marks, photographed the skids, and told the responding trooper that he was not injured and didn't want to call an ambulance, nor go to the hospital. Later in the day he sought medical care for a sore neck and jaw pain. Neck strain was diagnosed and CT was normal. Four days later, he was diagnosed with Post Concussion Syndrome. One month post-accident, he was diagnosed with severe concussion. Three months later, he was diagnosed with a Traumatic Brain Injury. (TBI). *No objective evidence was ever produced or testified to.* However, the plaintiff attorney hired a neuropsychiatrist, an economist and a vocational rehab expert, that all worked off of the premise that his impairments were permanent, and he could not work any more. Because the existence or non existence of a TBI is very difficult to prove, the defense was unable to dispute its existence. Two days prior to trial, the case was settled for \$2.4M.

Anticipating the Potholes and How to Avoid Them

At almost every trucking seminar one attends these days, there is a program segment which addresses the perceived trend that larger verdicts against trucking companies are becoming more frequent across the country. The plaintiff's Bar is becoming more cooperative with each other, and more sophisticated in their pursuit of damages. So how are we to respond to this trend? Each case has its own unique set of facts, and the defense of case will take different approaches. There are however, certain measures that, at a bare minimum, should be implemented in every case:

- 1) **Be aware.** Know your trial venues, local judges, and connections of Plaintiff lawyers.
- 2) **Be proactive.** Do an early and comprehensive investigation using counsel and reconstruction experts.
- 3) **Be ready.** The trucking company often will not win discretionary decisions, and must assume that no continuances or delays desired by the trucking company will be granted.
- 4) **Be aggressive.** Pursue discovery and evaluate the case as early as possible so that proper business decisions can be made regarding the handling of the case.

IV. SUCCESS STORIES

Tips and Tricks of the trade for a Successful Defense/ Implementation

Plaintiffs' attorneys are getting more emboldened by the day. Every defense attorney has heard the argument: "I'll get South-Texas money", or "I'll get Cook County money," on a particular case. One of the single best things a defense attorney can do is to be aware of the venue in which they have to defend their cases. It is not just about "face booking" the plaintiff. It is about knowing everything you possibly can about the other side in general. Know the plaintiff counsel you are up against. Study the jurisdiction. If it is a particularly bad venue, find out if there are any recent successful defense cases that have come down and reach out to the defense counsel that handled the case. Some times it is appropriate to hire local counsel. Even the defense will catch some breaks if the person arguing for the defense is often seen in the courtroom.

Make sure your clients have your entire trucking and transportation section of your firm on speed dial. Many a case is won and lost based upon what can be gathered at the time of the accident. Skid and gauge marks vanish. Evidence is lost or destroyed. Have your expert accident Reconstructionist available to go on site as soon as an accident occurs. Most cases with investigation, accident reconstruction and attorney presence *at the time of the incident*, are much more equipped for the defense of a case, than those who do not have the on-site advantage. On occasion, an investigator will be able to gather information from law enforcement. Occasionally, having the conversation with the driver on the night of an incident can be his saving grace. They are scared and unfortunately, nervous talkers. The attorney's presence can mean the difference between a regular and a gross negligence pleading.

Communicate early and often with your client, that defending a truck or large commercial vehicle accident case cannot be done successfully without an investment in your expert witnesses. Make sure they know that the expense of having the experts on site at the time of the accident is the best investment they will make during the pendency of the case.

Know that the attorney representing the plaintiff wants to be paid yesterday. For this reason, it is important to be ready and be aggressive in your pursuit of the defense. Do not let the plaintiff attorney drive the train and set the pace. Get out in front by serving discovery early and asking for depositions at the time your answer or written discovery is filed.

V. DISCUSSION OF LEGAL COST CONSIDERATIONS IN DEFENDING A BAD CASE

Timing, Type and Financial Considerations.

The decision as to when to "show your cards" can be the single most important decision you, as a defense attorney make in a case. Depending on the size and complexity of the case, it may be able to resolve before the case moves into litigation. Often Wrongful death claims are the most difficult to resolve. While it might seem that litigation would be heartbreaking and stressful, plaintiff attorneys often say that continuing the fight for the lost loved one, is the last

thing the family feels they can do for them. It keeps them alive in some degree. The closure of the case is sometimes the last “good-Bye.” For this reason, early settlements offering to set up scholarships and Memorials are sometimes advisable. This gives the family a legacy to grasp hold of.

Cases with contested liability are very difficult to resolve without the development of some basic background information and facts. We find that often resolution can’t be achieved without basic discovery. We have noted above that large commercial vehicle cases are difficult to develop without assistance from multiple experts. However, sometimes, the quality of the stable of experts that you have can help get the case settled. At the time the Designation of Experts is due, it is worth considering a negotiated agreement to postpone the production of expert reports, until after Mediation is concluded. The reports will thus only be necessary if the case doesn’t settle. This can be a highly effective way to save your clients a lot of money, and still get the desired result from the presence of your highly skilled experts.

Mediation is often times the most effective process to get a case successfully resolved. If the case must go to mediation before it can be resolved, typically there are strongly differing views of either or both liability and damages. If you have had any recent favorable trial results, on a same or similar scenario, or know of others who have had success in your jurisdiction, it is advisable to get the copy of the jury charge and present it to the plaintiff at Mediation. This is not necessarily to “brag” about your abilities to zero out a plaintiff, but it is a reality check. It puts teeth in the notion that there are juries that will award a plaintiff absolutely nothing. Talking about “recent jury verdicts” just doesn’t have the same bite.

Most commercial transportation cases settle. There are the occasional cases for which the demand is too high or unreasonable, and must be tried. In those cases, it is imperative that no stone be left unturned. For this reason, it is important that the defense attorneys be in constant communication with the client as to the budget for experts and for cost of defense. There is no client that wants a case to be tried with an underprepared attorney trying to convince twelve strangers that they are right. But, the preparedness is costly. Clients also want to be prepared themselves to answer the hard questions in budget meetings. WE MUST give our clients all of the information they need to make sure that they are fully equipped in such meetings to back up the decisions that have been made to support the expense that goes into a Trial budget.

VI. CONCLUSION

The trends tell us that verdicts are rising. All the while transportation companies are doing more and more to advance the safety of their vehicles and drivers. This means that the general public is possibly the controlling factor in causing the majority of the accidents... No matter. As long as there exists a general bias and prejudice against the transportation industry, these cases will exist and the verdicts will continue to be sensational in certain circumstances. With the right approach and the right attention to the issues, transportation companies and their counsel can work to resolve most cases before they are left in the hands of a potential run away jury. They can also work together to be prepared, both professionally and economically, for the battle should trial be a necessity. If the communication is in place, and the work has been done, and the experts are prepared... Bring it.