



2014 CLM Annual Conference

April 9, 2014 – April 11, 2014

**Boca Raton Resort
501 E. Camino Real
Boca Raton, FL 33432**

Roundtable 2: Thursday, April 10, 2014 (11:30 am – 12:30 pm)

“WHO CARES ABOUT THE FACTS; LET’S INFLAME THE JURY: TECHNIQUES USED BY PLAINTIFF’S COUNSEL TO MAXIMIZE DAMAGES AND DRIVE UP VERDICTS -- AND WHAT YOU CAN DO ABOUT IT.”

Your truck driver was involved in an accident at an intersection. He claimed he had a green light. The driver of an auto that was struck broadside by your truck claimed he had the green light. The accident occurred in the winter with slush and snow on the road. Your driver was traveling at or near the speed limit. He was unfamiliar with the intersection.

The Motor Carrier has not converted to Electronic Logging Devices (ELDs). Over the years the Motor Carrier has had a few CSA BASIC scores as well as SAFER SEA scores slightly on the high side, but nothing egregious. The driver's record is pretty good with a couple of speeding tickets and one out of service event due to a logging form and manner violation.

Though there is no indication of fatigue plaintiff asks about sleep apnea, whether the Motor Carrier has a screening program, and what they are doing despite the absence of Rulemaking by FMCSA.

The auto operator suffered multiple injuries including several fractures, disc herniations, and a mild brain injury. Your company contests liability on the basis of your driver’s statement, an inconclusive police investigation, and a somewhat favorable witness. Moreover, your defense medical review and examinations indicate that the claimed injuries are overstated or nonexistent. You get a demand for \$700,000 and you offer \$23,472.99. The case doesn’t settle and proceeds to trial.

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Here are some brief excerpts from the deposition of the driver:

"I'm going to show you a document. This is from the 2005 commercial driver's license manual in North Carolina. I'm going to try to zoom in here. There is a part of the commercial driver's license manual, and it's not just in North Carolina, the same language is in all the states, that says – first of all, do you agree that it's important to control your speed when you're driving a tractor – trailer, sir?"

A. Yes, correct.

Q. And then the manual says that, driving too fast is a major cause of fatal crashes. Any reason to disagree with that?

A. No.

Q. As a commercial driver, you must adjust your speed depending on driving conditions. Do you agree?

A. Yes.

Q. And those driving conditions include traction, curves, visibility, traffic and hills. Do you agree with that?

A. Yes.

Q. The – the commercial driver's license manual goes on to say, I think, some pretty obvious things, including that you – you can't steer or brake your vehicle unless you have traction. That's common sense, right?

A. Right.

Q. And then it talks about slippery surfaces, that wet roads can double stopping distance. Is that something you learned in your truck-driving classes?

A. Yes.

Q. That you must drive slower to be able to stop in the same distance on wet roads as you do on dry roads, correct?

A. Correct.

Q. And then the commercial driver's license manual says to reduce – let's go up to here – reduce your speed by about one-third on a wet road. Is that something that you learned in truck-driving school?

A. Yes.

Q. If you have packed snow, that you reduce your speed by half or more. Is that something you learned, sir?

A. Yes.

Q. And that even slower – if the surface is icy to reduce your speed to a crawl and stop driving as soon as you can safely do so. Do you agree that that's good advice for a commercial driver?

A. Yes.

Q. And then there's one other part of this. The – the CDL manual also talks about speed and traffic flow. One of the things it talks about is when driving in heavy traffic, the safest speed is the speed of other vehicles. Do you agree with that?

A. I agree."

Here are some brief excerpts, from the Motor Carrier Safety Director's Deposition, regarding sleep apnea:

"So, what I'm wondering is, certainly other truck companies have done this. Are you going to just wait until there's a regulation, or, knowing that now that rulemaking is required and that it will take many

years, is there any – any thought of looking further at using questionnaires or using different measurement devices, or is [Company] just going to wait until the rulemaking comes out?

Defense Attorney: Objection.

The Witness: Our intention – if you're asking about [Company's] intention, our intention is to ensure that we meet all of the requirements that the DOT has. Of course, that goes without saying.

As pertains to this issue, although it's not true in all cases, it tends to be an issue really primarily associated with weight loss, so from that standpoint, we, as a company, have already begun working on a wellness program to help – to help drivers lose weight.

The problem with sleep apnea is, it is – it is difficult to diagnose. You can't just diagnose based on BMI. We have considered using questionnaires in the screening, but we also don't want to do formal screening if, in fact, it doesn't make sense to do so.

We would – we would like to see what FMCSA decides on in the rulemaking to ensure that we are consistent with what they're doing to require, but we're certainly not waiting on FMCSA, but we've chosen to address the root issue, which is weight loss.”

You attend the trial. Voir dire is unusual in that the plaintiff's lawyer is spending a lot of time talking about safety, the need to protect society and the risk of trucks killing everyone. You and your lawyer are puzzled by this since the discovery seemed to go nowhere, but think the plaintiff's lawyer is unskilled and is taking this tack as he doesn't know how to handle a truck case. The trial proceeds, and the lawyer keeps asking your driver if he agrees that truck drivers should drive safely all of the time, that they should inspect their trucks every time they stop or have an indication of a defect, and related questions.

He then gets your safety director on the stand and asks questions about your driver training, safety programs, what the trucking company does to ensure every driver and every truck is the absolute safest it can be. He gets your witnesses to agree that trucks are big, heavy, potentially lethal when they hit cars, must be driven at all times with extreme caution and other similar admissions. The plaintiff's lawyer closes with a message to the jury that this case is about protecting themselves and their families along with society as a whole. Your lawyer doesn't object because he thinks the jury will find this laughable. Plaintiff's counsel makes a new demand of \$500,000 when the jury goes out. You reduce your offer to \$10,000.00. The verdict is \$750,000. You and your lawyer are very sad.

1. OVERVIEW OF THE CHALLENGE:

What we're accustomed to seeing from plaintiff's lawyers; transportation cases usually (were) not treated differently than routine auto cases.

This has expanded to the next level; patterned demands for documents, data retention. Plaintiff and Attorneys are going to school somewhere; maybe on the web, Association of Plaintiff Interstate Trucking Lawyers of America (APITLA) at seminars.

Lawsuits filed within days of the accident; maybe a sign of a bad or uninformed lawyer thinking this is the best way to handle the case, or, an aggressive and skilled lawyer using subpoena power and production requests to lock-in the information.

2. UNDERSTANDING THE REPTILE

Overview of the Reptile, a book co-authored by David Ball and Don Keenan. The purpose of the book is to manipulate jurors into granting huge awards to plaintiffs at trial. The authors boast that over \$4.8 billion in verdicts and settlements can be credited to employing the reptile theory.

What is it? The reptilian complex, another name for the basal ganglia, is part of your unconscious (subconscious) brain and is located at the base of the forebrain. The fight or flight principle arises out of the reptilian complex. Its primary function is to help genes survive and keep you alive.

What is the intent? Reptile theorists are using this science to tap into jurors instincts and to solicit feelings of immediate/imminent danger. The intent is to scare/upset jurors. Theorists insist that if a juror offers fair compensation to the client that this can diminish danger within their community.

Reptile theorists have established three rules:

- 1) There is no such thing as an accident (plaintiff attorneys are filing motions in limine to remove the word "accident" from being verbalized at trial and they have been successful in doing so). They always refer to a "crash";
- 2) It isn't what the accident was but what the accident could have been (it could have been your mother, your father, your child). It could have been catastrophic or fatal;
- 3) Businesses should never needlessly endanger the community.

Reptile theorists argue that sympathy is not enough to achieve a high award at trial. They must anger the jury. Sympathy + Fear + Anger = Reptile = \$\$\$\$\$

The setup: Plaintiff attorneys will depose the company Safety Director and ask them questions such as: "Wouldn't you agree that a business cannot needlessly endanger the motoring public?" "Wouldn't you agree that a trucking company should follow the company's safety rules?" Questions are formed in a way that locks the Safety Director into agreeing with plaintiff counsel. He will show clips of the Safety Director agreeing to these facts during the trial.

3. OPENING/CLOSING ARGUMENTS.

Plaintiff's counsel will start by saying a commercial trucking company must inspect his brakes every 24 hours otherwise he is needlessly endangering the public. He will reiterate that the company representative agrees with this statement. He will argue that the brakes failed and that the company needlessly endangered the community. He will point out that the driver, although traveling within the speed limit, was going too fast for conditions. The driver should have been retrained after his logging incident. By not equipping its fleet with ELDs, Motor Carrier is encouraging false logs. He will bring up fatigue and sleep apnea.

Opposing counsel will argue that the accident could have been much worse. It could have been your family member.

4. STRATEGIES IN DEFENSE OF THE TACTICS: DEFENDING THE REPTILE.

Defense counsel should be less concerned about juror sympathy and more concerned about inoculating the jurors against anger toward the insured. We need to remind defense counsel to recognize the reptile and to use objections during depositions. Also, to appeal to the "Primate", evolved part of the Jurors' brains and ask them to recognize fairness and reasonableness, not fear. As rational adults, they are above that.

Voir Dire - Gross demographics is disappearing as a predictor of attitudes. Case specific juror attitudes/experiences are most important in determining attitudes/awards. Uncover the adverse attitudes and exclude those jurors. Use motions in limine to limit argumentative statements. Be reasonable. Argue the accident was unforeseeable. Show the jury pictures and show that the insured exceeded the standard of care. Get the heat out of the case. Tell the jury why we are defending the case. Ask if

plaintiff's arguments make sense. Personalize the defendant. Show that the defendant did everything right. Have defense counsel sit with the defendant at trial. Expose the plaintiff attorney's hypocrisy. Most importantly, create a theme for your defense and argue that we are defending because of the evidence and based on law!

5. DISCUSSION: WHAT HAVE YOU SEEN? WHAT WORKS? WHAT DOESN'T?