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East Bound and Down: Tips, Tactics and Technology to Avoid a Crash at Trial

INTRODUCTION

Accidents involving trucks and motor vehicles are a part of doing business in this day and age. As such the issue is not "if" a claims professional, trucking industry personnel or others "may" be involved in litigation but "when". Once involved in a claim, all parties, counsel, claims professionals and experts will need practical advice and approaches to the unique issues raised by transportation litigation.

The defense of a lawsuit involving a motor vehicle and a truck presents distinct challenges as every driver in America has had some interaction with a truck at least once while traveling from their Point A to Point B, and has likely developed strong opinions and biases as a result of that interaction. Plaintiffs often seek to exploit these biases, and therefore it is imperative that the client, claims professional and defense counsel work together to use tools available to them through discovery, technology and best practices to keep the focus on the accident itself and not on the trucking industry as a whole. The appropriate use of technology during mediation or trial is also imperative to successfully present information in a manner that is accessible to a jury or mediator. This presentation is designed to review the challenges present in trucking accident litigation and how best to navigate the legal process to avoid any pitfalls.

I. TIPS

A. Bias – A Predisposition to Fault Truckers/Trucking Companies

Jurors tend to possess predispositions based on personal bias and fear of truckers and trucking companies such that there is an unspoken inference of fault that must be overcome from the beginning of the presentation including *voir dire*.

The bias by jurors against truckers is real. The Federal Highway Office of Motor Carriers conducted a series of focus groups around the country to assess attitudes toward trucks and truck drivers, and found that most drivers: (1) like truck drivers, but don't like trucks; (2) feel

intimidated by the size, weight and speed of the trucks; (3) believe that commercial driver license training should be upgraded; and (4) see a need for public education programs on safety when sharing the road with trucks.[1]

It is natural that trucking litigation can trigger strong emotional responses from jurors. Jurors can have strong feelings of anxiety, anger, or fear in trucking litigation because most jurors can relate to the feeling of sharing the road with a truck, or have been or know someone who has been in a motor vehicle accident. Thus, in trucking litigation it is crucial to address these feelings when selecting a jury and *voir dire.* It is important to address areas such as juror anxiety about driving, accidents, and trucks in general at the onset of the case. A juror's anxiety can cloud its judgment, and an anxious juror is less likely to comprehend information presented at trial and come to rational conclusions.

Below are some juror attitudes a defense lawyer should try to determine during *voir dire*:

- Attitudes on Truck Safety
    - Are trucking regulations being enforced;
    - Are trucking companies and drivers adhering to regulations; and
    - Are trucks safer now than in the past?
- Truck Accidents
    - Personal experience of accidents involving trucks (individual juror or friend/family member)
    - Personal experience with debris from trucks;
    - Opinions on whether trucking accidents are increasing or decreasing;
    - Opinions on the predominant cause of accidents involving trucks.
- Personal Driving Experience
    - Does the juror have a license?
    - Does the juror have a license but does not drive regularly?
    - Does the juror drive a SUV or sedan?
    - Does the juror drive on highways or busy streets?
    - Does the juror drive at night?
- Opinions on Truck Drivers/Company
    - Are truck drivers concerned about public safety?
    - Do truck drivers work long and drive fast over concerns about their pay?
    - Are drivers properly trained?
    - Do trucking company(ies) adequately monitor and regulate their drivers?
    - Do truck drivers push themselves to work longer for financial gains?
    - Are truck drivers adequately rested while on the job?
    - Who bears more of the safety burden – trucks or cars?

It is often difficult to elicit such feelings and attitudes from jurors during *voir dire*, but the following provides a guideline so as to better unearth a juror's attitudes:

[1] *See* Moore, Robert S., et al. "An Investigation of Motorists' Perceptions of Trucks on the Highways." *Transportation Journal*, vol. 44, no. 1 (2005).

- Juror questionnaires;
- Aggressive pursuing cause challenges for biased witnesses;
- In camera or chambers *voir dire* when possible;
- Addressing critical issues in *voir dire* or juror questionnaires;
- Greater attention to alternate jurors (cases involving catastrophic loss can be lengthy and alternate jurors may be needed in deliberation)

B. **Discussion on juror reasoning/bias on causation –**

As noted above, jurors may have a preconceived bias against trucks which may come into play in trucking litigation. These biases also may have an effect on how jurors address the issues of cause and responsibility or blame for an accident. Additionally, attorneys have to be aware of two other aspects which come into play in juror decision making in trucking litigation: hindsight bias and counterfactual thinking.

With respect to hindsight bias, psychological scientists Neal Roese of the Kellogg School of Management at Northwestern University and Kathleen Vohs of the Carlson School of Management at the University of Minnesota have proposed that there are three levels of hindsight bias that stack on top of each other, from basic memory processes up to higher-level inference and belief. The first level of hindsight bias, memory distortion, involves misremembering an earlier opinion or judgment ("I said it would happen"). The second level, inevitability, centers on our belief that the event was inevitable ("It had to happen"). And the third level, foreseeability, involves the belief that we personally could have foreseen the event ("I knew it would happen"). Their research shows that we selectively recall information that confirms what we know to be true and we try to create a narrative that makes sense out of the information we have. When this narrative is easy to generate, we interpret that to mean that the outcome must have been foreseeable. Furthermore, research suggests that we have a need for closure that motivates us to see the world as orderly and predictable and to do whatever we can to promote a positive view of ourselves.[2]

Accordingly, people, and especially jurors, tend to believe that they can prevent bad things from happening by doing the right thing. As such, when something bad occurs, jurors may assume, through hindsight, that someone did the wrong thing and that they personally should have known better. For instance, if a truck experienced brake failure causing an accident, a juror may reason, using hindsight bias, that the truck driver should have known that the unforeseen brake failure was a possibility, and place the blame of the accident on the truck driver.

Another concept litigators have to be aware of in juror decision making is counterfactual thinking. Counterfactual thinking is when a person evaluates an event by analyzing how easily it could have been prevented to create a different outcome. As an example, if a truck driver

[2] Roese, J. Neal, "Hindsight Bias," *Perspectives on Psychological Science*, vol. 7, no. 5 (2012).

routinely checked his brakes, an accident resulting from brake failure could have been prevented. If there are few counterfactual situations a juror can think of, it may be harder to place blame on a truck driver. If a juror can create numerous counterfactual situations where the accident could have been prevented, it will be easier for a juror to place blame on the driver.

Thus, to overcome these psychological biases in decision making, a litigator must uncover all the various ways that a juror may analyze how the accident occurred and how the accident could have been prevented. The goal for a defense litigator in this regard is to try and develop a theory that no matter what circumstances you changed surrounding an accident, the outcome would have still been the same. Such strategies can be addressed in *voir dire*, i.e., by directly asking jurors about these concepts, or in an opening statement by educating the jurors on such issues.

II. TACTICS

A. Driver Distraction, Fatigue, Qualifications and Record Keeping

Almost every 'pedestrian' driver has had an encounter with a truck during their time behind the wheel. Unfortunately, many of these encounters do not engender positive feelings about truckers or trucking companies. High profile accidents, such as that which seriously injured comedian Tracy Morgan on the New Jersey Turnpike, remain in the public consciousness for a long period of time. The accident that injured Morgan was attributed to driver fatigue. When seeking to combat accusations from a plaintiff that a driver was fatigued, distracted or unqualified, good record keeping and strong internal policies are the foundation upon which a defense is built.

Federal Motor Carriers must abide by the Federal Motor Carrier Safety Regulations (hereinafter "FMCSR"), 49 C.F.R. Parts 300-399, which are promulgated by the Federal Motor Carrier Safety Administration (hereinafter "FMCSA") which is part of the Department of Transportation (hereinafter "DOT"). All Federal Motor Carriers have a file with FMCSA, which is easily accessible by plaintiffs and claimants via a request made pursuant to Freedom of Information Laws (hereinafter "FOIL Requests"). Counsel should be mindful of any such requests made, and seek copies of any such FOIL responses via discovery.

Internal motor carrier polices must seek to echo the regulations, as any deviation to push truck drivers beyond them will be exploited by plaintiffs. For example, FMSCR §392.3 (49 C.F.R. §392.3) sets forth:

> "No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired,

through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle."

The motor carrier's policies should echo this rule and encourage their drivers to abide by it. Part of this involves designing routes that do not force the driver to either drive longer than they should or to speed.

Another example is FMCSR §392.6 (49 C.F.R. §392.6), which directs that routes not be designed in a way that forces drivers to drive faster than posted speed limits. Internal company polices should make it clear that routes are to be designed to conform to this regulation, in concert with conforming with regulations regarding driver fatigue and the hours limitations set forth in FMCSR §395.3 (49 C.F.R. §395.3). Being able to show a jury that the motor carrier designed its policies in compliance with the regulations and with an eye toward safety will aid in bringing the focus back to the mechanics of the accident itself.

Company policies must also be clear that distracted driving is prohibited, and such policies must be enforced and documented. For example, it is likely that a motor carrier's driver will cross through many states enroute, each with differing rules regarding use of cell phones while driving. In order to proactively address any allegations of distracted driving, companies should consider an internal policy prohibiting drivers from using their cell phones while driving. It is likely that a plaintiff will seek discovery of the driver's cell phone records at the time of the crash, so the company should get ahead of any such issues before the rubber hits the road.

In addition to proactively creating internal policies complaint with the federal regulations, the motor carrier should establish a protocol for accident investigation. This will also assist in combating any allegations that a driver was tired or distracted when that was not the case. The drivers themselves should be directed to properly document the accident with photographs, and same should be immediately provided to the motor carrier. The driver should also be trained to not make any admissions or apologies at the scene of the accident as same may be detrimental to a liability defense. *See,* USCS Fed Rules Evid R 804(b)(3). The driver should speak only to any responding police officers, and get the officer's information so that a copy of the police report may be easily obtained. If the driver was using a dash cam, and if the camera activated as a result of the crash or otherwise recorded the incident, that footage must be preserved and sent to the motor carrier.

Any technology the truck was equipped with must also be considered, and the driver instructed how to proceed regarding same at the scene of an accident. Many newer trucks are equipped with technology akin to an airplane's "black box". These are known as Electronic Control Modules or Event Data Recorders. Depending on the type of recorder, any information gathered about the crash may be lost upon restart and driving of the vehicle. Policies must be established and drivers must be trained on how to preserve this information. "Black box" information is a very effective way to combat allegations that the driver was speeding or not observing posted limits. It should also be noted that more and more passenger cars are now

coming equipped with similar recorders. Motor carriers and their counsel should seek to ensure that any such data from plaintiff's vehicle, as well as plaintiff's cell phone and social media records are also preserved as it may show that plaintiff was in fact the one who was distracted or not following posted limits.

It is also important that the motor carrier be able to show that the involved driver was qualified and remained so during his employment, or, if an independent contractor, while driving under the motor carrier's dispatch. FMCSR Parts 383 and 391 (49 C.F.R. §§383, 391) set forth standards and qualifications for drivers, and when independent contractors are used, should be read in conjunction with FMSCR 376.11 (49 C.F.R. §376.11). Showing that the motor carrier followed the regulations, and established and followed internal hiring procedures will go a long way toward again narrowing the focus of the case presented to a mediator or jury.

B. Know The Regulations

Familiarity with the FMCSR will assist in the defense of a claim, before one even occurs. Claims professionals, trucking industry personnel, employees of the motor carrier, and their counsel should seek to become knowledgeable about the FMCSR and work to ensure compliance before any claims arise.

The saying goes that the best defense is a good offense, and therefore compliance with the FMCSR is the best tactic a motor carrier can engage in to position the company to successfully litigate any potential claims. The FMCSR contains rules regarding driver drug and alcohol use (49 C.F.R. §40 and §382), fatigue (49 C.F.R. §392), hours of service limitations (49 C.F.R. §387) and standards and qualifications of drivers (49 C.F.R. §383 and §391).

Compliance with the FMCSR will allow the company to combat plaintiff's attempts to distract a jury or mediator with allegations of a lack of compliance with the regulations, thereby forcing the focus of the case back on to the accident itself. One of the main strategies a motor carrier and their counsel should seek to employ is keep the focus of the case on the accident itself and not allow bleed into other areas such as hiring and record keeping. The goal is to make the case about the accident, which is a discrete moment in time, and not about the motor carrier itself or the trucking industry as a whole. Good record keeping and compliance with the FMCSR is critical to this strategy.

Specifically, FMCSR Part 379 (49 C.F.R. §379) sets forth what records must be preserved and for what amount of time. This regulation should be treated as a "floor" not a "ceiling". Once an accident occurs, all records relevant to that event should be immediately preserved by the company regardless of the schedule set forth in the FMCSR. Any failure to preserve relevant records will be exploited by plaintiff's counsel as evidence of shoddy practices, will expand the focus of the case beyond the accident itself, and likely be detrimental to the defense position.

C. Deficiencies in Internal Record Keeping and Policies and Procedures Enforcement

Compliance with the FMCSR is not optional. The regulations promulgated therein should be treated as a "minimum". These regulations should guide the motor carriers to craft internal policies that reflect the requirements of the FMCSR and seek to obtain compliance therewith. Again, nobody is perfect, and even the best intentioned internal policies will never be airtight, but 100% compliance should still be the goal. It is important to remember that compliance with the FMCSR is the best strategy for combating a claimant's attempt to expand the scope of the case beyond the accident itself.

Any deviation from the rules, or loss of records, should be immediately addressed by the motor carrier and remedied. It is important that any deviations or losses not show a pattern of sloppiness or malfeasance. Such allegations only serve to bolster any contentions that the company was derelict in its duties, that this dereliction was systemic, and bled into driver hiring and training, and therefore was a factor in the accident.

D. Driver and Corporate Witness Discovery

After an accident, but before suit is filed, it is imperative that relevant documents and witnesses be identified. As noted above, the driver should have previously been trained about behavior following an accident, and how to document same. If the company policies require an internal accident report be generated, such polices must be followed and the report preserved. It is important to speak with the driver quickly after the accident to gather the freshest recollection of events. The motor carrier should designate a department or an individual as responsible for gathering accident documentation to ensure consistency and that the policies are properly followed. All documents should be preserved and forwarded to counsel as soon as possible.

Often times, the driver and the company itself will both be named as parties to the litigation. If the driver is an employee of the company, then it may be possible to produce the driver as a witness for both. This would also serve to keep the focus of the case narrowed. The driver should be interviewed and prepared prior to the deposition to ensure the events are as recalled in any written reports.

However, when the driver is not a company employee or if the driver cannot address questions about internal policies, it may be necessary to produce a company representative. In most jurisdictions, a corporate defendant may select the witness it wants to produce. Generally this witness is the person at the company to whom the accident was reported. It will likely be the claimant's goal to expand the scope of the case beyond just the accident in an attempt to show poor practices on the part of the motor carrier enabled the events leading to the accident. Objections and, if necessary, protective orders should be utilized to keep the focus on just the accident.

Discovery tools should be utilized to keep the focus of the case narrowed as much as possible to the accident itself and prevent fishing expeditions. Counsel should be on the lookout for any overly broad discovery demands and subpoenas, and lodge timely objections to same. Even though many courts are very liberal when it comes to the scope of discovery, efforts should be made to see that limits are imposed where necessary.

III. TECHNOLOGY

A. Discussion of the challenges presented by technology available

In this day and age it is not simply witness testimony that carries a case from accident to jury verdict. There are many available technological sources of information from GPS and satellite tracking system to airbag control modules and other auto based technology to provide evidence of behaviors prior to and at the point of impact. Many entities have video installed to provide evidence of the facts and circumstances leading up to impact. Knowledge of what is available is necessary to ensure that all stones are overturned in the search for discoverable and available technology to assist in the presentation of you cases.

B. Discussion of courtroom techniques for presentation of your case

Experts have come a long way in recent years and demonstration to jurors are often very effective in lessening the bias and leading jurors to the conclusion you want them to reach. Included in the courtroom techniques are not only the use of the technology available in the trucking and industry but also recreation of the accident by experts, video demonstrations of the incident and how it occurred, presentation of the view point of the truck driver prior to impact and time lapsed presentations.