

# TRUCK/CAR ACCIDENTS

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## I. INTRODUCTION

The last 75 years have seen automobiles develop from lethargic, converted horse carriages to opulent, reliable vehicles traveling effortlessly at 75 miles per hour. Accessibility of the automobile to the general populace expanded ownership of autos during that same interval from one vehicle per one hundred households to at least two vehicles per every household in this country.

In the same manner, the trucking industry has undergone a similar metamorphosis. Seventy-five years ago a "truck" consisted of a converted automobile frame with an open rear cargo area, capable of little more than increased storage capacity. Deliveries were principally confined to local drayage and supplementary transportation to support rail freight. Today, the trucking industry employs nearly 10 million people in over 600,000 companies, generating nearly 400 billion dollars in gross revenues. In 1997, the industry hauled 6.7 billion tons of freight and traveled 170 billion miles with over 4 million medium and heavy trucks. A full 81% of the entire nation's freight bill passed through the trucking industry.<sup>1</sup>

This dramatic increase in the use of trucking for the nation's freight has prompted an increased interaction between the trucking industry and the general populace. The presence of trucks on our highways has increased each year, and during the one-year period of 1995 to 1996, it increased by 41%. During the next five years it is anticipated that the volume of freight carried by the trucking industry will increase 24% and the number of miles driven will increase by 29%.<sup>2</sup>

The foregoing statistics are provided to emphasize why this section of materials has been included in this year's seminar. With the burgeoning use of trucking to haul freight and the sheer size and weight of the vehicles being used to transport that freight, the number of trucking collisions and the gravity of collisions involving trucks and automobiles has promoted a plethora of litigation and legislation. This article is designed to provide

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<sup>1</sup>U.S. Department of Labor, The Bureau of Labor Statistics (1997).

<sup>2</sup>Statistics from Team 2000, 430 First Street Southeast, Washington, D.C. 20003.

an overview of the trucking industry and some of the unique aspects of litigation in this area.

Counsel representing plaintiffs and defendants have polarized perceptions of the industry. Plaintiffs' counsel refer to the industry as consisting of "trucks loaded beyond capacity and patched together to make a final haul" and operated by "small volume, short-sighted, hand-to-mouth operators which happen to own a tractor-trailer rig and have no policies or ethics other than to get their load from point a to point b for the least cost and the highest profit."<sup>3</sup> On the other hand, defense counsel view the trucking industry as composed of professional, trained, hard-working individuals who have an accident rate less than half that of car drivers, with an 1800% less rate of operator intoxication in collisions to that of the auto industry. The day-to-day operation of the trucking industry, however, varies from company to company and driver to driver. The industry is dynamic, continues to grow at an incredible rate and forms an ever-increasing role in the daily dynamics of American transportation.

## II. DISTINCTIONS FROM AUTO COLLISIONS

There are several factors associated with the trucking industry which are not prevalent in normal auto collision cases. These factors or considerations are generally present in all trucking collision cases. Of course, each case will encompass these elements to a greater, or lesser degree, based upon the individual fact setting; however, the existence of these factors should influence the attention given to a trucking case by the trucking company, its insurer, plaintiff and defense counsel, and those parties working with the foregoing.

The factors generally distinguishing a trucking collision case from a routine auto accident are:

1. the impact of legislation applicable to the trucking industry;

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<sup>3</sup>Frank Branson, Trucks Wrecks: Plaintiff's Perspective, Preparing, Trying and Settling Auto Collision Cases (1996).

2. the composition of the operator of the commercial vehicle; and
3. the application of industry standards.

These distinctions are more fully discussed in the following sections.

### A. Impact of Legislation

The origin of legislation to regulate the freight industry may be found in the government's attempts to offset the monopolistic practices of the railroads in the late 1800s. The tremendous influence exerted by the railroads on the Nation's economy prompted Congress to create the Interstate Commerce Commission in 1887. Immediately, the ICC took a pro-active role to offset the railroad's powers. The trucking industry was reluctantly added to the medley of regulated industries but with little special attention given to its requirements until 1935, when Congress enacted the Motor Carrier Act and made it part II of the Interstate Commerce Act. This structure provided the formality to what was a previously informal transportation industry.

While the regulation of the trucking industry began as an afterthought to the railroad industry, and with little specific legislation covering its activities, it has progressed to the most heavily regulated commercial industry in the nation. There are more federal and state agencies, federal and state laws, and compliance standards applicable to the trucking industry than any other commercial transportation industry. The bulk of the federal regulations with which a litigant should be familiar are found within Title 49, Code of Federal Regulations, which generally apply to any commercial motor vehicle operated in the commerce of the United States. A Commercial Motor Vehicle is defined to be "a vehicle used in commerce having a gross combination weight of 26,001 pounds or more, or designed to transport 16 or more passengers, or used in the transportation of hazardous materials."<sup>4</sup>

The regulations applying to the trucking industry, whether viewed from the defense or the plaintiff perspective, are the most distinguishing characteristics from a normal auto collision case.

A simple listing of the index of topics found within the Federal Motor Carrier Safety Regulation Pocket Book,<sup>5</sup> displays the scope of regulatory activity involving the trucking industry:

### FEDERAL MOTOR CARRIER SAFETY REGULATIONS

#### SAFETY INDEX

PART 382-Controlled Substances and Alcohol Use and Testing . . . . .	17
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The foregoing represent only a portion of the regulations placed upon the industry and provide arguments for "negligence per se" allegations in some cases.

Unlike a standard auto collision case, the trucking defendant is to adhere to federal and state regulations encompassing every aspect of its operations, both pre and post-accident.

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<sup>5</sup>J.S. Keller and Associates, Federal Motor Carrier Safety Regulations Pocketbook, (Dec. 10, 1995).

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<sup>4</sup>49 C.F.R. 382.107 (1998).

The importance of these regulations mandates that each driver have a copy of the Federal Motor Carrier Safety Regulations in his/her possession and become familiar with those regulations. In essence, it becomes the “Trucker’s Bible.” Any defense or Plaintiff’s counsel who handles trucking collision cases should maintain a current copy of the Federal Motor Carrier Safety Regulations Pocket Book for ready reference and use in investigation and discovery.

## **B. Composition of Operator**

In a standard auto collision case, operators typically come from different backgrounds and have very little formalized training or education associated with the operation of an automobile. A commercial motor vehicle, however, will almost always be operated by an individual possessing specialized training, education and formalized instruction. He/she should possess a special license for operation of the vehicle and will have attended an independent trucking school or form of apprentice training within a trucking company. A driver is required to have certain knowledge, experience and training not required of a standard operator. Driver qualifications are found within 49 C.F.R. 391.11, in addition to those qualifications required for the securing of a commercial driver’s license by each respective state, such as Section 522, of the Transportation Code of the State of Texas.<sup>6</sup>

The training and experience of an operator in an auto collision case is seldom a significant consideration, absent special circumstances such as negligent entrustment. In a truck collision case, however, the qualifications of the driver, his/her training, education, experience, traffic violations, physical attributes, and mental status are always carefully scrutinized.

The increased demand for drivers of commercial vehicles burdens human resources departments of trucking companies to keep qualified operators behind the wheel of their commercial vehicles. All driver applications must be complete, accurate, and in compliance with the Motor Carrier Regulations. Federal investigative

agencies are increasingly reviewing the hiring processes of operators to determine the diligence employed by trucking companies through their screening processes. It is no longer sufficient for a company to take an employee’s application at face value. Deficiencies in the hiring procedures employed by a trucking company can be noted by a thorough comparison of the onerous investigative burdens placed by regulations. With the accessibility of information available on a variety of websites discussed in this paper, it is imperative that the trucking company adequately investigate each driver’s accident and traffic violation history.

## **C. Application of Industry Standards**

In a typical automobile accident case, the conduct of the defendant driver is measured against a “reasonable person” standard. It is unnecessary to make reference to any normal industry practices as these would not be applicable under that standard. In a commercial truck accident, however, the actions of the truck driver, and the company which employed him/her, are often subjected to a comparison to industry standards, i.e., negligent hiring, retention, retraining, and negligent entrustment. A case may, however, be made for exclusion of industry standards pertaining to the company on the basis that an admission of scope and agency by the company precludes a necessity for any further evidence of liability on the basis of *Respondeat Superior*.<sup>7</sup>

In any event, counsel must be mindful that the actions of the driver and the company, to include Human Resources Director, Safety Director, Maintenance Supervisor, and driver will all come under close scrutiny.

The accessibility of data from which a party can compare one trucking company to another, such as the Federal Highway Administrations SAFER System (Safety and Fitness Electronic Records System) permits a party to investigate a motor carrier’s safety record, safety rating, out-of-

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<sup>6</sup>See Appendix 1 to Paper. 49 C.F.R. 391 (1998).

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<sup>7</sup>*Willis v. Hill*, 159 S.E.2d 145 (Ct. App.Ga. 1967) (Excellent discussion of the different jurisdictional positions relative to the admissibility of evidence against a trucking company where *Respondeat Superior* has been alleged in the principle cause of action).

service inspection data, and similar information by the Internet.<sup>8</sup>

### III. OVERVIEW OF APPLICABLE TRUCKING LEGISLATION

As previously indicated, the trucking industry is one of the most heavily-regulated commercial industries in the nation. The breadth of this article restricts any thorough review of all legislation involving the trucking industry. The following discussion therefore focuses upon legislation, which typically arises in trucking litigation and proposed legislation applicable to such litigation.

#### A. Existing Legislation

##### 1. Federal

The following provisions of 49 U.S.C. as found at title 49 Code of Federal Regulations are summarized as follows:

###### a. Driver qualifications §391.11

(1) At least 21 years old, (2) read and speak English, (3) can safely operate the type of commercial motor vehicle he drives by reason of experience, training or both, (4) is knowledgeable concerning the cargo he carries and how to safely transport it, (5) familiar with methods and procedures for securing cargo, (6) physically qualified, (7) has a valid commercial driver's licence, (8) has furnished the company with a list of violations, (9) not disqualified to drive, (10) has completed a driver's road test, and (11) has furnished an application for employment under the Regs. A driver is disqualified if he has been convicted of driving a commercial vehicle under the influence of alcohol greater than .04% or has committed a felony involving the use of a motor vehicle, or operated one under influence of a prohibited drug.

###### b. Application for Employment §391.21

The application for employment includes specifics concerning the individual's background, their experience in operation of motor vehicles, a

listing of all motor vehicle accidents and violations during the preceding three years, as well as reflecting any suspensions or revocations of licenses. A motor carrier is obligated to investigate and make inquiry concerning their potential employees under 391.23.

###### c. Driver's Road Test §391.31

In addition to the commercial driver's license, a motor carrier itself must conduct or have conducted by an independent party a road test of their operator and certify that he has the skills to operate the vehicle, as well as to perform pre-trip inspections. This requirement is subject to waiver in the event the individual presents a certificate from a state indicating that he has passed a road test within the last three years.

###### d. Physical Qualifications §391.41

There are specific requirements concerning the ability of a driver to be physically able to perform his/her tasks, notably physical limitations which would impair his/her ability to operate the vehicle, or to perceive sound or sight data.

###### e. Driver Qualification Files §391.51

The company must maintain a complete file of the driver's qualifications within the corporate records of the company. All counsel should obtain a copy of this file in connection with discovery requests for the personnel file of the individual.

###### f. Controlled Substance and Alcohol Use Testing §382.601 et seq.

The employer must conduct a pre-employment testing for alcohol and drug use and conduct post-accident testing within two hours following the accident. Records of these tests are submitted to the Federal Highway Administration. In the event the company was not able to conduct the testing, the reasons for its absence of testing must also be noted. Records must be maintained for a period of five years. The employer must provide educational materials to explain the requirements and the employer's policies regarding alcohol and substance abuse. Section 382.601 provides that the employer shall provide referral, evaluation and treatment for drivers. Section 382.605.

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<sup>8</sup>Internet site to be accessed at [www.safersys.org](http://www.safersys.org).

**g. Commercial Driver's License Requirements §383.1**

This section provides for the requirement for the issuance of a commercial driver's license by the respective states and minimum criteria for such licensing. It additionally requires the driver to notify State officials concerning any convictions for traffic violations. Section 383.110 details the specific knowledge a driver must have in order to obtain a license.

**h. Financial Responsibility for Motor Carriers §387.1**

Generally, this section requires that motor carriers with a gross vehicle weight of 10,000 or more pounds have at least \$750,000 worth of financial responsibility, composed of insurance, surety bonds and endorsements. This financial responsibility is increased to a level of \$5 million for certain commercial carriers conveying hazardous materials. Commercial carriers conveying 16 or more passengers have minimum responsibility requirements of \$5 million.

**I. General Requirements §390.1**

These provisions mandate that companies cooperate with other Federal agencies and State agencies investigating accidents and require the maintenance of certain records.

**j. General Driving Regulations §392**

The regulations encompass the practices of commercial motor vehicles on the highways to include minimum equipment requirements, parking, fueling, lighting, and prohibited practices.

**k. Mechanical Equipment Requirements §393.1-393.209**

A detailed explanation of the parts and components and their operative characteristics for a commercial motor vehicle are contained in these sections.

**l. Inspection, Repair and Maintenance §396.3-25**

The requirements of a company and operator

concerning the inspection, repair and maintenance of the commercial motor vehicle and the qualifications of the inspectors conducting the inspections, as well as the maintenance for inspections, are included in these regulations. (See Appendix G to the Motor Carrier Safety Regulations, which is appended as Appendix 2 to this paper.)

**m. Hazardous Materials §397.1-225**

Specific requirements concerning the conveyance of hazardous materials and the vehicles which transport such materials are controlled by these sections.

**n. Employees Safety and Health Standards §399.201-211**

These provisions outline the requirements for the commercial cab equipment and internal composition to accommodate safe operator usage.

**o. Transportation Workplace Drug and Alcohol Testing Programs §40.1-111**

The DOT drug-testing programs required by employers and the maintenance of specimens collected with reporting requirements are contained in these sections.

**p. Hours of Service of Drivers §395.3, 395.8 and 395.15**

The maximum permissible hours of service for commercial motor operators and the maintenance of records reflecting such hours of service are governed by this statute. (See Appendix 3 attached.)

**q. Other Federal Rules of Regulations**

The Department of Transportation and Interstate Commerce Commission, as well as the Office of Motor Carriers and Federal Highway Administration, offer regulatory guidance and interpretation on numerous facets of the trucking industry. Many of these may bear on any particular case and each have websites on the Internet available to collect this information.

#### **r. Recently Enacted Trucking Legislation**

The major trucking legislation of any significance which has reached the legislation stage is the Transportation Equity Act for the 21<sup>st</sup> Century, which passed the House and Senate in May of 1998 and has been signed into the law by the President. A synopsis of this legislation is attached at Appendix 4 to this paper. This Bill has numerous provisions dealing with safety and requires increased company awareness of their drivers, both from a pre-employment and post-employment status. It includes a network of information data systems to be utilized by carriers, which will make it easier to identify unsafe drivers.

#### **2. State of Texas**

The following provisions of the Transportation Code of the State of Texas are regularly utilized by litigants in the investigation, discovery, and evaluation of a claim:

- a. Requirements for Commercial Driver's License, §522.
- b. Necessity for Reinspection Following Repairs After an Accident, §548.053.
- c. Safety Standards. §644.152 and §644.052.
- d. Disqualifications for Driving. §522.088.
- e. Braking Requirements. §547.401-408.
- f. Warning devices. §547.504.
- g. Alcohol and Drug Use. §522.101-106.
- h. Lights and Lighting. §547.351 et seq.
- i. Speed. §545.351 et seq.
- j. Size and Weight. §621.001 et seq.
- k. Right of Way. §545.151 et. seq.
- l. Parking. §550.001 et seq.
- m. Loads. §725.021.
- n. Rules of the Road. §541-600.
- o. Motor Vehicle Safety Responsibility. §601.
- p. Municipal Testing of Motor Vehicles. §726.
- q. Maximum Weight. §621.101.

#### **3. County and Municipal**

A complete review of Municipal Codes should be undertaken when a truck collision occurs within an incorporated city for the application of any code violations or special restrictions which may be applicable for commercial motor vehicles operating within the city streets and causeways.

#### **4. Publications**

The Federal Motor Carrier Safety Regulations, Texas Driver's Handbook issued by the Texas Department of Public Safety, and the Texas Commercial Motor Vehicle Drivers Handbook issued by the Texas Department of Public Safety should be carefully analyzed by litigators for use in discovery.

#### **IV. ANATOMY OF A TRUCK COLLISION INVESTIGATION**

There is no question that the detailed facts of each case determine the ultimate success of the litigant. All trial counsel are aware that the degree of preparation and investigation usually determines the ultimate outcome of a case. This is especially true in the truck collision case. The largest single factor of preparedness in truck collision cases originates from the accident investigation. The sooner defense counsel or plaintiff's counsel can organize and effect a thorough accident investigation, the better off he/she will be during the trial of the case. A competent accident investigation should be performed:

- a. as soon as possible after the accident;
- b. by competent, qualified team of professionals; and
- c. acting under the supervision and control of skilled counsel.

The investigation starts with the identification and tasking of the legal team which will be responsible for either defending or prosecuting the truck collision claim. Most trucking companies or their insurers have skilled counsel which they regularly utilize in truck collision cases. These counsel normally have identified a Truck Collision Team within their firm, consisting of attorneys, legal assistants, an investigator, and certain independent professional persons or organizations whom they regularly call upon as experts for utilization in connection with these types of cases. Such independent parties may consist of engineers, accident reconstructionists, computer graphics technicians, forensics specialists, metallurgist, certified safety specialists, and others.

The following scenario generally occurs in truck collision investigations.

## **A. Initial Notification**

The trucking company will likely be first notified of the trucking collision by its driver, or the State Highway Patrol if its driver is unable to communicate. If the trucking company utilizes a GPS tracking system or other on-board monitoring, they may receive almost instantaneous notification of the accident. At this point, they will normally have a policy in effect through their insurer, to provide immediate notification to the insurance carrier and to defense counsel.

As soon as the defense truck team receives verbal notification of the accident, individual responsibilities will be immediately assigned. An on-site investigation is usually accomplished as soon as possible. If necessary, communication should be made with individuals or organizations located at or near the scene of the accident to record all actions taking place by authorities and third-parties at the scene of the accident until the truck team can arrive to conduct their investigation. Often, debris will be removed, which could be critical to a later determination as to the cause of the accident. If the companies or organizations responsible for the clean of debris can be identified early, then a re-enactment of the debris and its location at the scene can be accomplished by the reconstructionist.

Counsel should inquire as to the carrier and company on whether they intend to have any internal investigation and coordinate with the individuals or groups conducting such investigation. Normally, the carrier will have its own investigator for purposes of reporting and the carrier may or may not defer to the truck team for the purpose of conducting an investigation with reporting to the claims manager.

There are distinct advantages to an investigation which is led by defense counsel because, although significantly diluted, there still exists some work-product exemptions made applicable to attorneys and their investigations.

## **B. Actions at the Scene of the Accident**

In the preceding section, it was noted to arrive at the scene as soon as possible. This means that if an accident occurred during the daytime, it is

prudent to arrive at the scene that evening. The purpose of rapid arrival at the scene is to preserve evidence which may be available at the scene, to communicate with witnesses, and prevent the destruction or alteration of any of the vehicles involved. Even though a thorough accident scene review cannot take place until daylight, there is still much that can be done which might end up being critical to a case.

Prior to arriving at the scene, identify all organizations and persons who have been at the scene prior to your arrival. This will typically include Highway Patrol, Sheriff's Department, Police Department, Department of Transportation personnel, towing companies, EMS, ambulance service, fire departments, highway courtesy patrol, special traffic investigators from municipalities, adjacent businesses and landowners, news media (newspaper, radio, television), companion truckers, and anyone else who can be readily identified.

Immediately go to the scene of the accident and record those aspects of the accident scene which are susceptible of alteration over time. Notably, these include:

- a. presence and location of debris;
- b. skid marks and track marks;
- c. damage to roadway and adjacent property;
- d. highway marking and post it signs;
- e. lighting conditions;
- f. obstructions on or near the roadway;
- g. presence of foreign objects on the roadway;
- h. location and condition of vehicles;
- i. oil or other liquid substances on the roadway;
- j. depressions and composition of roadway;
- k. Turns, rises, or depressions in the roadway.

The above should be photographed and/or videotaped, depending upon visibility and other factors. Caution should always be exercised in preserving and recording information.

Prior to arriving at the scene of the accident, defense counsel should contact the driver of the truck, if practical. Defense counsel will not want a driver issuing statements to anyone and, while he/she will need to cooperate with the legal authorities, he/she should have the benefit of legal advice before committing to statements. The

drivers should have the opportunity to collect themselves physically and emotionally before giving pertinent information. Given the lack of protection afforded to the collection of witness statements under the new Rules of Civil Procedure, litigation counsel will need to consider whether a written, taped, or transcribed statement is taken from any witnesses.<sup>9</sup>

The new Rules draw a distinction between “core” work product and other forms data more typically referred to as work product. While core work product is still protected (i.e., mental impressions, conclusions or legal theories), other work product is discoverable on a minimal showing of need, and some are specifically excluded from work product under Texas Rule of Civil Procedure 192.3.

Before a driver is asked to give a statement, defense counsel should carefully review the facts, driving logs, investigation reports, and any other records or data which may be applicable.

All statements taken from any witnesses should be taken by an investigator, adjuster or another independent person and not by the attorney, who may be a witness in the event the witness attempts to recant his/her statements.

### **C. Preservation of Evidence**

As discussed previously, trucking companies are required to maintain specific records and documents for required periods of time, depending upon the triggering of the event. Immediately following an accident, the following documents should be secured and preserved, if possible:

- a. driver’s logs for the day of the incident and 30 days prior;
- b. magnetic discs of any on-board computer systems;
- c. telephone and communication logs between the company and the driver;
- d. cellular phone logs;
- e. maintenance records for the tractor and any trailers attached for the year preceding to the accident;
- f. alcohol and drug testing for the five years prior to the accident in the event there were

- any negative reports on the driver, and for the last two years prior to the accident if there were no negative reports;
- g. post-accident alcohol and drug testing;
- h. the driver’s personnel file;
- I. all investigative reports, files, records, photos and other data;
- j. all statements obtained from any witnesses;
- k. copies of all news media coverage of the accident or the scene post-accident;
- l. the truck and vehicle involved in the incident should be collected and placed in a location free of any damage or further deterioration;
- m. debris which has been collected from the scene should be collected, and cataloged for future analysis, if necessary;
- n. Weather Bureau reports and data;
- o. Highway Department maps, drawings or diagrams of any scene;
- p. all police, fire, special traffic team and other related investigations;
- q. all NTSB, DOT or ICC investigative reports; and,
- r. all OSHA 200 forms.

Litigants have been expeditious in utilizing the destruction of evidence as a means to obtain negative jury instructions under the Rules of Evidence pertaining to spoliation. While Texas has not recognized spoliation as a separate tort, it does permit and authorize the Court to grant instructions by way of sanctions, which permit a party to argue that the destruction of the evidence should be taken as a negative influence that the evidence would have probably been adverse to the party who is charged with having it destroyed.<sup>10</sup>

### **D. Other General Considerations**

Following the analysis of the accident scene, the review and analysis of witness interviews, and the assembly of a truck team for a strategy session, legal counsel are in a better position to evaluate a future course of action with respect to continuing investigations and the retention of other independent experts. The results of these discussions usually prompt the production of a report to the carrier and company providing recommendations for future actions.

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<sup>9</sup>TEX. R. CIV. P. 192.

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<sup>10</sup>*Trevino v. Ortega*, 969 S.W.2d 950 (Tex. 1998).

## V. UNIQUE LEGAL ISSUES TO TRUCKING LITIGATION

There are a variety of legal issues unique to truck-driving litigation which distinguish this area of practice. Counsel for both defense and plaintiff should be aware of these issues and how they can affect their case. This section outlines some areas of the law unique to truck-driving litigation. Furthermore, this section advances various “pointers” to implement in the litigation of commercial-trucking cases.

The issues unique to truck-driving litigation can be categorized into four broad sub-topics: (1) defendant liability theories; (2) evidentiary issues; (3) accessibility of information; and, (4) the use of experts.

### A. Theories of Defendant Liability

Truck-driving litigation is unique in that it provides for multiple theories of defendant liability. A plaintiff can pursue causes of action under negligent hiring/retention/entrustment, negligent training/re-training/supervision, and vicarious liability/Respondeat Superior.

#### 1. Negligent Hiring/Retention/Entrustment

One particular factor that separates truck-driving litigation is the availability of negligent hiring, retention, and entrustment claims. These claims, however, are barred in a majority of jurisdictions when a defendant trucking company accepts vicarious liability for the actions of a driver.<sup>11</sup> These jurisdictions hold that information depicting negligent hiring, retention, and entrustment is immaterial when a defendant has assumed responsibility for its agent.<sup>12</sup> They further purport that such information is highly prejudicial and inflammatory.<sup>13</sup> Most of these jurisdictions restrict the admissibility of such information to the issue of calculating punitive

damages.<sup>14</sup> In a small minority of jurisdictions – Minnesota, Ohio, and Michigan – the plaintiff is allowed to raise concurrent claims of vicarious liability and negligent hiring/retention/entrustment.<sup>15</sup>

Texas law coincides with the majority of jurisdictions. Failure to conduct thorough background checks constitutes a breach of reasonable care.<sup>16</sup> However, if a defendant asserts vicarious liability, information regarding negligent hiring, retention, and entrustment is limited to the issue or punitive damages.<sup>17</sup>

Prudent counsel should be aware of negligent hiring, retention, and entrustment claims. Litigants should diligently inquire into their applicable state law. If plaintiffs’ counsel elects to claim negligent hiring, retention, or entrustment, he/she must prove the elements of traditional negligence.<sup>18</sup> In the past, plaintiffs have successfully established liability when a defendant has failed to inspect criminal records, driving records, and employment history.<sup>19</sup> To increase the potential of a claim, plaintiffs’ counsel will seek to establish deficiencies in a defendant’s hiring and retention policies. Defense counsel should advise their clients to implement company policies to restrict negligent hiring/retention/entrustment claims. Defense counsel should encourage trucking companies to conduct thorough background searches of drivers. They should also encourage companies to

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<sup>14</sup>*Estate of Arrington v. Fields*, 578 S.W.2d 173 (Tex. Civ. App.–Tyler 1979, writ ref’d n.r.e.).

<sup>15</sup>*Lim v. Interstate Systems, Inc.*, 435 N.W.2d 830 (Minn. App. 1989); *Perin v. Peuler*, 130 N.W.2d 4 (Mich. 1964); *Clark v. Stewart*, 131 N.E. 71 (Ohio 1933).

<sup>16</sup>*Guidry v. National Freight, Inc.*, 944 S.W.2d 807 (Tex. App. – Austin 1997, no writ).

<sup>17</sup>*Estate of Arrington Fields*, 578 S.W.2d at 175.

<sup>18</sup>*Gracia v. Duffy*, 492 So.2d 435 (Fla. Dist. Ct. App. 1986).

<sup>19</sup>*Smith v. Tommy Roberts Trucking Co.*, 435 S.E.2d 54 (Ga. Ct. App. 1993); *Kime v. Hobbs*, 562 N.W.2d 705 (Neb. 1997).

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<sup>11</sup>*Willis v. Hill*, 159 S.E.2d 145 (1967).

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

minimize post-accident liability issues by accepting vicarious liability.

## **2. Negligent Training/ Re-Training/Supervision**

Another factor that distinguishes truck-driving litigation is the availability of negligent training, re-training and supervision claims. Each jurisdiction requires different elements for maintaining these causes of action; however, some general themes exist in most jurisdictions. For example, liability is most easily established when a company:

- (1) knowingly permits its drivers to violate state and federal regulations;
- (2) allows drivers on the road with minimal operating experience; or
- (3) allows drivers to continue driving despite internal violations.<sup>20</sup>

Texas law is somewhat more expansive on what constitutes negligent training, re-training and supervision. In Texas, companies are required to take an active role in monitoring truckers' driving hours to help reduce the number of fatigue and stress-related accidents.<sup>21</sup>

Plaintiff and defense counsel should anticipate negligent training, re-training, and supervision claims in every trucking case. Plaintiffs' counsel can increase their chance of success by establishing substandard training, re-training, and supervision policies. Defense counsel should advise their clients to take certain pre-accident precautions such as safety courses, harassment seminars, defensive driving programs, and fatigue awareness lectures at the training level. At the re-

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<sup>20</sup>*Elbar, Inc. v. Claussen*, 774 S.W.2d 45 (Tex.App.—Dallas 1989, writ dismissed); *Andrews Transport, Inc. v. Ellison*, 1994 WL 485745 (Tex. App.—Beaumont 1994) (not designated for publication); *Wanke v. Lynn's Transportation Co.*, 836 F.Supp. 587 (N.D. Ind. 1993); *Gordon v. Schneider National Carriers, Inc.*, 951 F. Supp. 207 (M.D. Ala. 1996).

<sup>21</sup>*Dalworth Trucking Company*, 924 S.W.2d 728 at 731.

training/supervision level, counsel should advise the company to require standard safety meetings and mandatory re-training sessions after an established number of years or accidents.

## **3. Vicarious Liability**

Truck-driving liability is unique in that it allows an injured motorist to sue a trucking company through a theory of vicarious liability. In the majority of jurisdictions, trucking companies are liable in tort for the actions of their drivers.<sup>22</sup> Heavily insured trucking companies often become the target of exemplary damage claims. For example, one Texas court awarded a plaintiff 13% of a trucking company's net worth in punitive damages.<sup>23</sup>

### **B. Evidentiary Mediums**

Truck-driving litigation is further distinguished by a variety of evidentiary mediums. Evidence unique to truck-driving litigation consists of various forms of driver monitoring, as well as independent third-party investigations. Spoilation is also a frequent issue in truck-driving cases.

#### **1. Driver Monitoring**

Driver monitoring and regulation results in a multitude of useful evidentiary mediums. Federal law requires drivers to record their driving information in structured driver's logs.<sup>24</sup> Recent federal legislation authorizes the government to record driver registration, licensing, and safety performance.<sup>25</sup> The Federal Highway Administration has an entire computer network dedicated to monitoring interstate motor carrier

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<sup>22</sup>*Montgomery Ward and Company v. Marvin Riggs Company*, 584 S.W.2d 863 (Tex. Civ. App.—Austin 1978, writ refused n.r.e.); *Holland v. Dolese Company*, 643 P.2d 317 (Okla. 1982).

<sup>23</sup>*Dalworth Trucking Company v. Bulen*, 924 S.W.2d at 734.

<sup>24</sup>49 C.F.R. 395.8 (1998).

<sup>25</sup>*Transportation Equity Act for the 21<sup>st</sup> Century*, May 22, 1998.

safety.<sup>26</sup> On-board communications and tracking systems (GPS) are federally permitted and frequently utilized by trucking companies.<sup>27</sup> For example, QUALCOMM's OmniTRACS system can provide data on driving time, location, speed, and fuel consumption. Drug testing is mandated both during a truck driver's employment and immediately after accidents.<sup>28</sup> Truckers are limited in the amount of hours they can drive over any given period of time.<sup>29</sup> On-board surveillance cameras, trip recorders, and collision warning systems (black boxes) are in operation in numerous trucks across the nation.

The prudent attorney can make use of these various forms of evidence. Defense and plaintiffs' counsel should inquire into logs, communication systems, and any other form of evidence relating to the litigation in question. (See Appendix 5).

## 2. Third-Party Investigations

Third-party investigations are also a unique evidentiary feature that distinguishes truck-driving litigation. Various governmental agencies, both at the state and federal level, investigate commercial trucking accidents. They include the Department of Transportation, the Interstate Commerce Commission, the National Traffic Safety Board, State Departments of Public Safety, and local Special Traffic Investigation units. These agencies derive their investigative authority from a wide variety of sources.<sup>30</sup> The information these investigators uncover is a melange of topics. As an example, the NTSB investigates drug and alcohol use, fatigue, employment history, training, accident history, and past performance appraisals. Third-party investigators can thus provide a

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<sup>26</sup>Motor Carrier Management Information Systems (MCMIS).

<sup>27</sup>49 C.F.R. 395.15 (1998).

<sup>28</sup>49 C.F.R. 40 (1998).

<sup>29</sup>49 C.F.R. 395.3 (1998).

<sup>30</sup>For example, the DOT is appointed broad investigative powers under 49 U.S.C. 504 and 311.33, whereas the NTSB receives similar authority under 49 C.F.R. 831 and 49 U.S.C. 1131.

wealth of evidence to both plaintiff and defendant. Furthermore, while the Agency opinions are not admissible, their factual observations are admissible in most jurisdictions as an exception to the hearsay rule.<sup>31</sup>

## 3. Spoliation

Spoliation issues frequently arise during the discovery process of a truck-driving claim. Federal law requires that a trucking company retain different records for varying durations. For example, driver logs must be retained for a minimum of six months.<sup>32</sup> Accident registers must be kept for at least one year.<sup>33</sup> Alcohol and drug test results must be maintained for various lengths of time.<sup>34</sup> After this period, most companies destroy records routinely. When discovery of these destroyed records is deemed impossible, parties often claim spoliation. Each jurisdiction has its own rules on spoliation. In a minority of jurisdictions, not including Texas, spoliation exists as an independent cause-of-action.<sup>35</sup> In the majority of jurisdictions, the general rule mandates that destroyed evidence be presumed against the spoliator.<sup>36</sup> Still other jurisdictions permit spoliation when done in the routine course of business.<sup>37</sup>

Defendants and plaintiffs should pay special importance to the spoliation laws in their jurisdictions. Defense counsel should advise their clients to retain all driver records when an

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<sup>31</sup>FED. R. CIV. P. 803(8); *U.S. v. Paducah Towing Co., Inc.*, 692 F.2d 412 (C.A.6(Ky.) 1982).

<sup>32</sup>49 C.F.R. 395(8)(k) (1998).

<sup>33</sup>49 C.F.R. 390.15 (1998).

<sup>34</sup>49 C.F.R. 382.401 (1998) (5 years for positive results, 2 years for collection process data, and 1 year for negative results).

<sup>35</sup>Alaska, California, Florida, New Jersey, New Mexico and Ohio.

<sup>36</sup>*J. B. Hunt Transport, Inc. V. Bentley*, 427 S.E.2d 499 (Ga.App. 1992).

<sup>37</sup>*Ordonez v. M.W. McCurdy & Co., Inc.*, 984 S.W.2d 264 (Tex.App.—Houston [1<sup>st</sup> Dist.] 1998, n.w.h.).

employee is involved in even a minor accident. Plaintiff counsel, on the other hand, should look first for spoliation in violation of federal statute.<sup>38</sup> Destruction of records before the federally-mandated period can be construed as an attempt to conceal adverse evidence. If the plaintiff cannot establish that evidence was spoliated in violation of federal statute, it could be demonstrated that the evidence was spoliated earlier than its company policy.

### C. Accessability of Information

Few issues set truck-driving litigation apart like the accessability of information. Both plaintiffs and defendants can acquire a wealth of information on a driver without ever utilizing a traditional discovery method. The Internet is by far the most important technological tool in discovering background information. Various websites provide a trucker's driving record and personal profile. Trucking companies often establish these sites for commercial and marketing purposes. Skilled attorneys can utilize this information to establish witness character and reliability. The Internet also offers information from nonaffiliated, independent websites. These sites are usually created by the drivers themselves, and often contain reports of hours of service, training, and past driving violations. Recent legislation requires the federal government to maintain a network with driver registration, licensing, and safety information.<sup>39</sup> Still other sites are set up by plaintiff's groups, victim's groups, and various non-profit organizations.

#### 1. Topical Websites

The following topical websites may be useful to the trucking litigant:

##### Truck Company Websites:

Bennett International - [www.bennettig.com](http://www.bennettig.com)  
Jeff Foster Trucking - [www.jeffostertrucking.com](http://www.jeffostertrucking.com)  
Transus International - [www.transus.com](http://www.transus.com)

##### Attorney's Websites:

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<sup>38</sup>49 C.F.R. 395(8)(k) (1998).

<sup>39</sup>*Transportaiton Equity Act for the 11st Century*, May 22, 1998.

Association of Trial Lawyers of America (ATLA) - [www.atlanet.org](http://www.atlanet.org)

Texas Motor Transportation Association (TMTA) - [www.tmta.com/legal-legislative](http://www.tmta.com/legal-legislative)

##### Victim's Group Websites:

The Underride Network - [www.underridenetwork.org](http://www.underridenetwork.org)

Citizens for a Reliable and Safe Highway (CRASH) - [www.trucksafety.org](http://www.trucksafety.org)

##### Legislation Information Websites:

Bureau of Transportation Statistics - [www.bts.gov](http://www.bts.gov)

Department of Transportation - [www.dot.gov](http://www.dot.gov)

Truckline Legislative Information - [www.truckline.com/legislative](http://www.truckline.com/legislative)

### D. Use of Experts

Increased use of experts is also a unique feature of truck-driving litigation. The majority of jurisdictions allow for the use of an expert witness at trial.<sup>40</sup> Experts can be an invaluable tool in the litigation of truck-driving cases. Prudent defense counsel can use expert witness testimony to establish biomechanical defenses to causation. Plaintiffs' counsel can utilize experts to establish causation and liability factors, such as fatigue and substance abuse. Both sides should encourage their expert witness to inspect the accident site, interview significant witnesses, interview third-party investigators, photograph and document the vehicles, inquire into each vehicle's history, and perform all functions relative to a thorough accident reconstruction.

## VI. CONCLUSION

This article has been drafted with an objective to provide an overview of trucking litigation to the attorney whose contact with that body of law is limited or of recent vintage. The scope of this article does not permit review of other aspects of the litigation which normally would also be

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<sup>40</sup>TEX. R. CIV. P. 702.

important to consider, i.e., venue, removal actions, coverage issues, and specific trial tactics. The objective is to provide an overview in order that an attorney presented with a trucking collision claim may recognize those unique characteristics that deserve special attention.