TLA

Transportation Lawyers Association

CHICAGO

Regional Seminar and Bootcamp

January 23–24, 2025

Radisson Blu Aqua Hotel ❇ Chicago, IL

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What, Me Worry!

Exploring Effective Ways to Defend and Prevent Negligent Selection, Retention, Training and Wrongful Termination Claims

How to Avoid a Wrongful Termination or Discrimination Case Arising from Driver Discipline

This presentation is geared to:

- Lawyers counseling their clients
- In-House Lawyers answering questions from supervisors
- Outside Lawyers answering questions from In-House Lawyers, Managers and Supervisors
- Assume a non-union shop

If you are not sure what do to, print the following slide:

Donald J. Vogel
dvogel@scopelitis.com
(312) 255-7178

National Labor Relations Board

Areas of Concern in Handbooks:

- Social Media
- Confidentiality
- Non-Disparagement
- No Negativity
- Terms and Conditions discussions
- Employment at will discussions
- Discipline Procedures

Handbook Policies

In an effort to continue to expand its reach, the Board has restarted its efforts to scrutinize handbook policies that thwart organizing efforts – especially in non-union companies

The Biden Board returned to its earlier standard that an Employer violates the Act if a work rule "would reasonably tend to chill employees in the exercise of their Section 7 rights."

This is a bouncing ball with changing administrations

Trump Board Reversed Obama Board

In its *Boeing Co*. Decision, the Trump Board softened the standard to a balancing test - identifying 3 categories of handbook policies to be evaluated in these cases:

- Category 1 – lawful rules that don't interfere with Section 7 rights or are outweighed by Employer's justification for rule
- Category 2 – scrutinize on case-by-case basis
- Category 3 – unlawful rules that are not outweighed by Employer's justification for rule

What's Old is New Again

Biden Board took us back in time

Stericycle Decision issued on August 2, 2023

- Old (*Boeing*) Rule: Employed a balancing approach: the employer's legitimate reason for the rule vs. its chilling effect on employee's Section 7 rights
- New (*Stericycle*) Rule: Whether an employee could "reasonably interpret" the rule in question to have a "coercive meaning" even if a non-coercive interpretation is also reasonable.
- Employer's intent behind the rule is "immaterial"
- In other words, the employee now wins all ties
- Expect to see this change with the new administration

Handbook Policy Language

ABC Trucking endeavors to maintain a positive work environment. Each team member plays a role in fostering this environment. Accordingly, we all must abide by certain rules of conduct, based on honesty, common sense, and fair play.

Because everyone may not have the same idea about proper workplace conduct, it is helpful to adopt and enforce rules all can follow. Unacceptable conduct may subject the offender to disciplinary action, up to and including discharge, in the Company's sole discretion. The following are examples of some, but not all, conduct which can be considered unacceptable:

- Violation of safety rules and policies.
- Violation of ABC Trucking's Drug and Alcohol-Free Workplace Policy.
- Fighting, threatening, or disrupting the work of others or other violations of ABC Trucking’s Workplace Violence Policy.
- Failure to follow lawful instructions of a supervisor/manager.
- Failure to perform assigned job duties.

Handbook Policy Language

Obviously, not every type of misconduct can be listed. Note that all team members are employed at-will, and ABC Trucking reserves the right to impose whatever discipline it chooses, or none at all, in a particular instance. ABC Trucking will deal with each situation individually and nothing in this handbook should be construed as a promise of specific treatment in a given situation. However, ABC Trucking will endeavor to utilize progressive discipline but reserves the right in its sole discretion to terminate the team member at any time for any reason.

The observance of these rules will help to ensure that our workplace remains a safe and desirable place to work. These rules are not intended to interfere with, restrain, or coerce employees in their exercise of Section 7 rights. If any of these rules could be interpreted as restricting your Section 7 rights, the rule is meant to be applied in a way that respects these rights.

Develop Discipline Procedure

Should an employee's performance, work habits, overall attitude, conduct or demeanor become unsatisfactory based on violations either of the above or of any other company policies, rules or regulations, the employee will be subject to disciplinary action, up to and including termination.

Before or during imposition of any discipline, employees may be given an opportunity to relate their version of the incident or problem at issue and provide any explanation or justification they consider relevant.

Progressive Discipline?

Where appropriate, a policy of progressive employee discipline will be followed by supervisors. Major elements of this policy include:

1. Verbal Warning.
2. Written Warning.
3. Suspension.
4. Termination.

The Company reserves the right to administer discipline in such a manner as it deems appropriate to the circumstances, and may, in its sole discretion, eliminate any or all of the steps in the progressive discipline procedure.

Develop Form for Providing Discipline

- Name of Supervisor
- Name of Employee
- Conduct Giving Rise to Discipline
- Policy Provision Violation
- Identify Correction Required
- Identify Step in the Process (i.e., verbal warning, written warning, etc.)
- Signatures (Supervisor, Employee, Witness to Discipline Meeting)

Follow Your Established Procedure

- Educate your Supervisors on all aspects of the Policy and Discipline Procedure
- Do Not Ignore Violations of the Policy
- Gather all relevant information, including witnesses, documents, and any other evidence
- Interview involved employee
- Be Fair – Follow Procedure
- Document, Document, Document
- Complete Discipline Form

Meet with Employee

- Meet with Employee to communicate discipline decision
- Follow progressive discipline unless circumstances require more
- Explain the decision honestly and succinctly
- Give the employee a chance to respond
- Present Discipline Form to employee
- Attempt to obtain employee signature
- Take notes – include in personnel file

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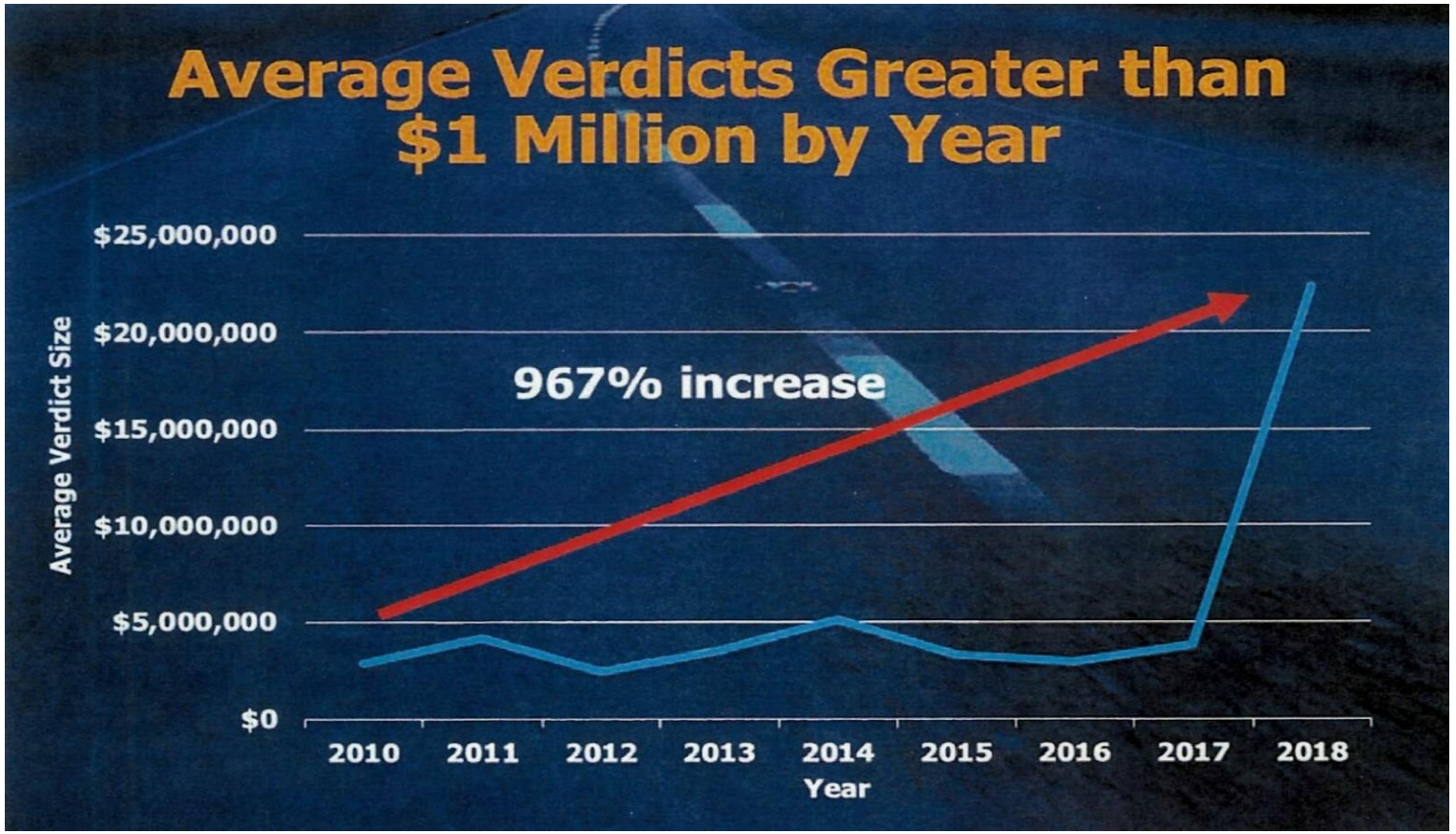
Defending and Preventing Negligent Selection, Retention and Training Claims

Setting the Stage: The Plot Thickens – In a Bad Way!

Understanding the Impact of Nuclear Verdicts on the Trucking Industry – American Transportation Research Institute (2020 and 2021)

- ATRI defines Nuclear Verdicts as those $10M or higher
- Between 2006 and 2011, cases involving trucks with verdicts exceeding $1M increased by over 250%
- From 2010 to 2018 average size of verdict really increased from $2.3M to $22.2M
- From 2010 to 2018 mean verdict awards increased 51.7%


Average Verdicts Greater than $1 Million by Year
$25,000,000
$20,000,000
$15,000,000
$10,000,000
$5,000,000
$0
Average Verdict Size
967% increase
2010
2011
2012
2013
2014
2015
2016
2017
2018
Year

Straight from the Horse's Mouth: Use of FMCSA Regulations by Plaintiffs

Direct Quotes

- "Pay especially close attention to regulations that deal with FMCSA safety reporting, pre-employment screening, the use of electronic on-board recorders, and changes to the new-entrant program for commercial carriers."
- "Keep in mind that each carrier is evaluated by its own individual Department of Transportation number, and this number can change when a carrier changes hands. In your pending cases, find out if the carrier's fleet was recently purchased or merged with another and if the new company dropped the old number, which would eliminate data from the carrier's safety profile."
- Careful of safety information on parent corp.'s website
- *Specific Plaintiff Seminars on Corporate Veil Piercing.*

More From Plaintiffs' Counsels' Playbook!

- Some of the materials provided by the plaintiffs' bar as to how to increase verdicts in trucking
  - “trucking companies notoriously cut corners and do the absolute minimum required by federal and state law when they do background checks on new drivers and train new drivers.”
  - “The defense intends to focus on the 30 seconds before the crash. And when I handle a case, I look long before that. I look at how he was hired, how he was trained, and how he was supervised...”
  - “The FMCSRs are only minimum standards, and trucking companies should do much more.”

Negligent Supervision/Training/Retention The Plaintiffs' Springboard

- Era of Reptile Theory/Nuclear Verdicts
- Aggressive organized, well-funded plaintiffs' bar
- In many cases proximate cause/fault becomes secondary and tail begins to wag the dog
- Tail wagging includes spoliation claims, but also broad and invasive discovery into hiring/retention/training practices
- Some states are curtailing these practices legislatively (Texas)

Combating Negligent Direct Negligent Claims

- Outside counsel: Battle at every opportunity – No light of day!
- As importantly, having good internal programs – prevents tail from wagging the dog – and prevents claims themselves!
- Have updated, comprehensive training and safety protocols, *comply with them (*the worst scenario!) and document that compliance (on individual basis)

Ouch: More Specific Nuclear Verdicts! (Direct Motor Carrier Negligence)

- Consider the following: $89,700,000 in Texas, $165,000,000 in New Mexico, $101,000,000 in Texas,$280,000,000 in Georgia, and $260,000,000 in Texas.
- These astronomical verdicts against motor carriers have something in common: direct liability against trucking company for claims such as negligent hiring, training, supervision, retention, and/or entrustment

Beware: The Smoke and Mirrors Effect!

- Direct negligence claims pose unique dangers to the trucking industry.
- Survival of direct negligence actions allows plaintiff to focus case on inflammatory evidence unrelated to the underlying accident, *i.e.* company safety policies or driver's motor vehicle record, that would otherwise be inadmissible in simple negligent operation cases.
- Smoke and mirrors created by this evidence results in disproportionally large verdicts based on passion and emotion of the jury, rather than material facts about the actual MVA.

To Admit, Or Not To Admit?

- One of few litigation strategies available to motor carriers to defeat these direct negligence claims is to admit that driver was acting in course and scope of his/her employment at time of accident.
- By admitting agency, *i.e.,* that driver was acting in course and scope of his/her employment, motor carrier accepts vicarious liability for its employee's actions if employee is found to have been negligent in causing accident.
- In a majority of jurisdictions, once defendant motor carrier admits agency, plaintiff is prohibited from proceeding on any other theories of liability against motor carrier.
- This bars negligent hiring, training, supervision, retention, and/or entrustment claims.

To Admit, Or Not To Admit?

- In jurisdictions following majority rule, when trucking company admits vicarious liability for employee's negligence, any direct negligence claims against company should be dismissed.
- Benefit: Once agency is admitted, evidence such as motor carrier's hiring policies, motor carrier's safety policies, and employee's driving record becomes irrelevant and inadmissible because issue in case is focused solely on determining whether employee driver was acting negligently *at time of the accident*.
- In states taking majority approach, direct negligence claims are deemed to be purely derivative of underlying negligent conduct of the employee
- If driver is not found liable, then motor carrier cannot be held liable.
- These states consider vicarious liability claims and direct negligence claims as alternative means for imposing liability on an employer motor carrier for an injury caused by its employee driver.

To Liability Admission – and Beyond!

- Once agency is admitted, liability based on direct negligence of the employer motor carrier becomes unnecessary and redundant because these claims add no additional liability beyond what is already admitted.
- Recognized exception for cases where plaintiff claims that conduct of motor carrier was so egregious that it justifies award of punitive damages.
- Jurisdictions justifying this exception hold that these direct claims against employers are not merely duplicative of the vicarious liability claims because of their egregious nature.
- In these situations, admitting agency will *not* result in dismissal of direct negligence claims against an employer.
- Given high bar for imposition of punitive damages, this exception reserved for most extraordinary cases.

The Minority View

- Minority of states allow plaintiffs to pursue direct negligence claims against motor carriers even when companies admit they are vicariously liable for negligence of their employees.
- These courts reason that direct negligence claims are independent causes of action that require proof of motor carrier's negligence in a manner different from that of employee involved in MVA.
- This focus on direct negligence claims in minority jurisdictions plays perfectly into reptile strategy.
- In simple negligence case, when direct negligence claims are allowed to survive, primary focus becomes how defendant motor carrier created unnecessary danger for plaintiff and the community as a whole by violating "safety" rules.

Lessons From the Case Law: *Short v. Marvin Keller Trucking, Inc.*, 570 F.Supp.3d 459 (E.D. Ky. 2021)

- Decedent, Joy Short, involved in fatal accident with tractor trailer owned by Marvin Keller Trucking and operated by John Wells.
- Cause of accident disputed by parties; but agreed that Wells lost control of tractor trailer and crossed interstate median.
- After accident, Short's estate asserted, among other things, claims of negligent retention, supervision, and training against Keller.
- More specifically, plaintiff alleged that Keller should have terminated Wells, because of his driving record and health history.
- Wells' driving history revealed two citations related to "hard braking" and "distracted driving" which resulted in company citations and demanded mandatory attendance at distracted driver course.
- Plaintiff also claimed that Keller subject to liability under these direct liability claims because the driver's known medical condition may have impacted his driving at time of accident.

Lessons From the Case Law: *Short v. Marvin Keller Trucking*

- When reviewing plaintiff's allegations, Court noted "these claims of [negligent retention, supervision, and training] focus on direct negligence of employer which permitted an otherwise avoidable circumstance to occur."
- Court noted that, "elements of torts of negligent hiring and retention and distinguishable from elements of negligent retention, supervision, and training; but, both torts require that the employer's failure to exercise ordinary care in managing the employee create a foreseeable risk of harm to plaintiff."

Lessons From the Case Law: *Short v. Marvin Keller Trucking*

- Court granted summary judgment on negligent retention, supervision, and training claims against Keller.
- “Courts have generally been unwilling to find that there were genuine issues of material fact ... so long as the employer complied with the hiring practices prescribed by the Federal Motor Carrier Safety Administration."
- Since defendants complied with all federal regulations and background checks, even at time of accident, there was no suggestion that Wells was unable/unfit to do his job.
- Court thus unwilling to find motor carrier at fault.

Lessons From the Case Law: *Johnson v. Cox*, 2024 WL 331631 (N.D. Tex. 2024)

- Dispute arose out of MVA caused by tractor trailer driven by Rueben Cox.
- Plaintiff asserted claims of negligent qualifying, hiring, training, retaining, and/or supervising against motor carriers TAK Trucking and Victory Transportation for their employment of the driver.
- No evidence of prior incidents involving Cox as a commercial driver.

Lessons From the Case Law: *Johnson v. Cox*

- TAK and Victory investigated Cox before hiring him by, *inter alia*, confirming Cox had a commercial driver's license, performing a background check, confirming his insurance was approved, performing safety test with Cox, and reviewing Cox's driving history (motor vehicle record).
- Also significant evidence that driver was adequately trained and had long history of safe driving-even though Cox allegedly performed poorly in a TAK safety exam.

Lessons From the Case Law: *Johnson v. Cox*

- Court granted summary judgment on plaintiffs negligent training and supervision claims because no evidence that motor carriers knew of any "lack of fitness or dangerous tendencies."
- Summary judgment also granted on Plaintiff's negligent retention claim because no evidence "that TAK or Victory knew Cox to be incompetent as a commercial driver" and "the record [was] devoid of evidence that Cox was incompetent or unfit."
- Plaintiffs negligent hiring claim dismissed because record did not suggest any prior incidents of Cox as a commercial driver.
- Court extensively considered whether driver complied with necessary federal and company training, and whether he was competent to perform job.
- Cox's *personal* driving record not relevant to the Court's analysis.

Lessons From the Case Law: *Evans v. Slezak*, 2018 WL 5045361 (M.D. Ala. 2018)

- Lawsuit arose from MVA involving tractor trailer driven by Thomas Slezak and owned by Marten Transport.
- Injured plaintiffs filed, among other things, claims of negligent and wanton hiring, training, retention, and supervision against Marten.
- Marten later filed partial motion for summary judgment on these direct negligence claims.

Lessons From the Case Law: *Evans v. Slezak*

- Court noted that "implicit in torts of negligent hiring, retention, training, and supervision is the concept that, as a consequence of the employee's incompetence, the employee committed some sort of act, wrongdoing, or tort that caused the plaintiff's injury."
- However, Court careful to note that question of incompetence applies to negligent supervision, training, and retention-not negligent hiring.
- Court readily acknowledged that "pre-hire citations and even minor vehicle accident[s]" on Mr. Slezak's personal driving record related to expired tags, failing to set parking brake, and speeding did not suggest "incompetence“ to support negligent hiring claim. Contrarily, Court found these citations "relatively minor in nature."
- Court granted summary judgment with regard to negligent hiring.

Lessons From the Case Law: *Evans v. Slezak*

- Court denied summary judgment on Defendant's negligent supervision, training, and retention claims because material facts existed as to whether:
  1. Marten Transport overlooked evidence that Slezak' s driving logs were heavily edited, which was sign of driving in violation of FMCSR's; and
  2. Marten did not give Slezak training on how to maintain his driving logs after violating driving limits-both of which would have given rise to negligent supervision, training, and retention claims.

Lessons From the Case Law: *Estate of Fields by Fields v. Shaw*, 954 N.W.2d 451 (Iowa Ct. App. 2020)

- Landus engaged Shaw Trucking as grain hauler.
- Shaw Trucking agreed to work for Landus under an "Independent Contractor Agreement."
- Troy was one of Shaw's drivers that transported cargo for Landus.
- While transporting load of grain, Troy crashed into farm tractor driven by Patrick Fields, causing Fields's death.
- Field's estate filed lawsuit against Landus asserting claims of vicarious liability and direct liability for negligently hiring Troy.
- Landus later moved for summary judgment on negligent hiring claim, contending that it had no duty to evaluate the qualifications of its independent contractor.
- District court denied Landus' motion and held that Landus knew Troy had history of drug use, and may have had duty to investigate his qualifications in light of such knowledge.

Lessons From the Case Law: *Estate of Fields by Fields v. Shaw*

- On interlocutory appeal, court acknowledged that Landus may have been subject to liability for Troy's conduct if harm arose out of breach of Landus's duty in hiring Shaw Trucking.
- Landus defended against these allegations, contending that FMCSR's are controlling, and under those regulations Shaw Trucking, not Landus, was required to vet, qualify, and drug-screen its employees.

Lessons From the Case Law: *Estate of Fields by Fields v. Shaw*

- Nevertheless, court ultimately reversed trial court's decision finding that it misapplied the law when denying Landus's motion for summary judgment on claim of direct liability for negligent hiring.
- Court held that record showed no genuine issue of material fact that Landus independently or separately hired or retained Troy.
- No authority for extending an employer's direct liability to the conduct of its independent contractor’s employee.

If It's Broke – Fix It!: Negligent Maintenance Claims; *Dennis Edwards Rayner, et al. v. Ronnie Clayton, et al.* 659 S.W.3d 223 (Tex. Ct. App. 2022)

- MVA in Austin, Texas truck driver, Dennis Rayner, transporting oversized load on special route selected by Texas DOT.
- Rayner took wrong turn and collided with overpass
- As a result, part of load struck Plaintiffs' nearby car and caused various injuries.
- Plaintiffs later filed a lawsuit against Rayner, his employer, Even Better, LLC, and a 50% owner of the motor carrier company.
- Evidence of a several out-of-service violations on the truck related to faulty brakes; trial court found all three defendants negligent and grossly negligent for Plaintiffs' injuries.

If It's Broke – Fix It!: Negligent Maintenance Claims

- Defendants appealed to Eighth Court of Appeals
- Court of Appeals reversed trial court's ruling in its entirety.
- Plaintiffs' claims against the company's owner were reversed upon finding that company's owner could not be personally liable under theory of negligent supervision, training, or hiring, because Rayner was an employee of Even Better, LLC—not owner personally.
- Plaintiffs' negligent entrustment, hiring, training, and supervision claims against Even Better, LLC also reversed because no indication that company failed to adequately train Rayner, or that he was incompetent to perform the job.

If It's Broke – Fix It!: Negligent Maintenance Claims

- Appellate court reviewed Plaintiffs' negligent maintenance claim against Even Better.
- "Motor carriers, such as [Even Better, LLC], are required to maintain their vehicles in safe and proper operating conditions[,] and drivers must be satisfied that the motor vehicle is in safe operating condition."
- Nevertheless, the Court of Appeals held that Plaintiffs' negligent maintenance claim against Even Better, was insufficient because it did not establish but-for causation.
- The Court noted that for, "braking violations to be a cause of the incident, evidence that a timely, proper application of the brakes would have avoided the collision would be required."
- Such a determination requires expert opinion, not lay witness testimony.
- Plaintiffs' failure to produce expert testimony establishing that collision would not have occurred had trailer been properly maintained was fatal to negligent maintenance allegation.

Handling The Driver Post-Accident

- Try to be with him or her at all times
- No conversation other than responses to public authorities on the scene
- Conduct drug/alcohol testing
- Drivers Health: Physical and Mental
- Decision as to termination/suspension
- Possible criminal counsel

Handling The Driver Post-Accident

- Driver should ensure that he/she is safe and out of danger and risk; actions which could include extraction from truck, and standing clear of accident scene.
- In quick sequence, the driver should notify dispatcher or similar personnel at carrier, so *that* person can set other actions in motion, such as contacting outside counsel, contacting insurers, contacting accident reconstruction experts.
- Driver should also very quickly ensure that other involved motorists, pedestrians, or cyclists/motorcyclists are not in danger. These actions need only be taken in the moments *before* any first responders arrive at the scene. Several states, such as California, have "duty to render aid" statues that require such conduct by the driver.
- Once the public authorities, *i.e.,* police, fire department, EMS, and other investigating authorities arrive, driver should let those personnel take the lead in any rendering of aid to any injured parties.
- Driver should only make telephonic or electronic contact with the dispatcher or similarly situated person, and, of course, any of his/her family members as necessary. He/she should limit other telephonic and electronic contact at the scene.

Handling The Driver Post-Accident

- At scene, driver should only speak with law enforcement personnel to extent required by them to do so. Other than common courtesies such as “how are you doing” or similar health related inquiries to injured parties, driver should not have discussions with any other person on scene, other than law enforcement personnel.
- He/she should never admit fault to anyone at scene (for example: “I’m sorry you are injured” instead of “I’m sorry”). Fault in these situations is often not determined for many months or years, and involves many other legal factors that come into play.
- When communicating with law enforcement authorities, driver should merely respond to their inquires, and should not unnecessarily elaborate. Again, he/she should not admit fault, but should merely relay the factual aspects of what happened. (It is better to say “our vehicles collided” then to say “I hit her,” for example).
- Dispatcher or similarly situated personnel should ensure that driver has transportation away from the accident scene (unless he/she transported to local hospital by public authorities/EMS).

Heads Up! Do Not Be Struthian!

Touché! Litigation Tips For Pushing FMCSA Safety Practices and Policies Back!

- Defense attorneys work to prevent discovery of irrelevant, burdensome and prejudicial – and non-probative – evidence.
- Best defense: often a good offense.
- From *outset* of litigation – and sometimes even before—defense counsel, and clients, should have crystallized strategy regarding internal data.
- Including affirmatively using *positive* internal data, safety information, awards, to advantage.
- *Push back* during the discovery process, and beyond.
- Present affirmatively positive picture of true safety practices of motor carrier.

Touché! Litigation Tips For Pushing Back!

1. Overwhelm any negatives with positives
   a) Safety Programs
   b) Awards
   c) Best Practices
   d) Safe Miles Driven
2. Push out the positives
   a) Briefs and Motions (Protective Order Motions for Specific Reptile Tactics at 30(B)(6) depositions)
   b) Pretrial Conferences
   c) Trials
   d) Motions in *Limine* …

Touché! Litigation Tips For Pushing Back!

2. Request for Admissions regarding *positive* BASIC scores and safe driving history
   a) Also for terms of AEMCA settlement
   b) i.e. unless rated unsatisfactory motor carrier authorized and qualified to operate on public highways (also helpful in negligent selection actions)
3. Possible basis for admission of *Plaintiff's* prior traffic citations and poor driving history

NASTC Settlement Website Language

- "The data in the **Safety Measurement System (SMS)** is performance data used by the Agency and enforcement community. A ⚠ symbol, based on that data, indicates that FMCSA may prioritize a motor carrier for further monitoring. The ⚠ symbol is not intended to imply any federal safety rating of the carrier pursuant to 49 USC 31144. Unless a motor carrier in the SMS has received an UNSATISFACTORY safety rating pursuant to 49 CFR Part 385, or has otherwise been ordered to discontinue operations by the FMCSA, it is authorized to operate on the nation's roadways. Motor carrier safety ratings are available at **http://safer.fmcsa.dot.gov** and motor carrier licensing and insurance status are available at **http://li-public.fmcsa.dot.gov**."

Touché! Litigation Tips For Pushing Back!

4. Positive discovery responses and *affirmative* trial presentations on:
   a. Pay raises/bonuses for good safety performance
   b. Tractor/trailer, new and/or well maintained equipment
   c. Hair follicle drug testing
   d. Simulation based training
   e. Quarterly sustainment training
   f. Fatigue management programs
   g. Sleep disorder treatment programs
   h. Disseminate awards for good safety performance
   i. Drivers Skills Improvement Tests
   j. Have PSP policy (it's voluntary) and document it and comply with it
   k. These also *prevent* accidents! They should be well documented.

Touché! Litigation Tips For Pushing Back!

5. If Plaintiff succeeds in broadening relevancy beyond causally related documents. Respond in kind—Both for your good information, and Plaintiff's negative data.
6. Expand scope to personalize driver (and Company); Driver pool not perfect, but many good drivers.
   - Photos
   - Family
   - Training
   - Awards

Touché! A Dozen Litigation Tips For Pushing Back!

7. Reverse spoliation—Don't let the tail wag the dog! Deny and Blast back! Preservation demands:
   - Social Media/Background Searches – discovery recently broadened by Courts
   - GPS
   - Cell phone/text
   - Vehicle and its data

   And, be vigilant as to your own preservation and retention.
8. Outsourcing Compliance functions (driver file maintenance, drug and alcohol management, vehicle maintenance) – Shifts blame and contribution/indemnity.

"We hired the best in the business"

Touché! Litigation Tips For Pushing Back!

9. The end of “No comment”: Push out good publicity in press releases, both company specific, and industry:
   - TCA Highway Angel Program.
   - 80% drop in accident rate since 1979.
   - “The Industry is relentless” in pursuit of safety.
   - Violations small percentage of overall fleet.
   - 6.9% decline in large truck fatalities in 2020 and many at fault passenger vehicles

   And respond to media inquiries as to subject accident.

   Jurors have wider band-width—use it.

Touché! Litigation Tips For Pushing Back!

10. Monitor your own data metronomically and fight hard on inaccurate data.
    - Closely monitor (and maybe contest): overweight tickets, spreading tickets, log violations, maintenance issues.
    - Careful of scores hurt by owner operators no longer under authority.
    - Chronicle, document, and retain!
    - Careful of Preventability Determinations. (Some say to stop doing them!) Non-preventable determinations noted in driver's PSP.
    - Thoroughly retain and document the Company's "culture of safety"

Touché! Litigation Tips For Pushing CSA/FMCSA Back!

FMCSA's Disclaimer Added to SMS

"A crash preventability determination does not assign fault or legal liability for the crash. These determinations are made on the basis of information available to FMCSA by persons with no personal knowledge of the crash and are not reliable evidence in a civil or criminal action. Under 49 U.S.C. § 504(f), these determinations are not admissible in a civil action for damages. The absence of a not preventable determination does not indicate that a crash was preventable."

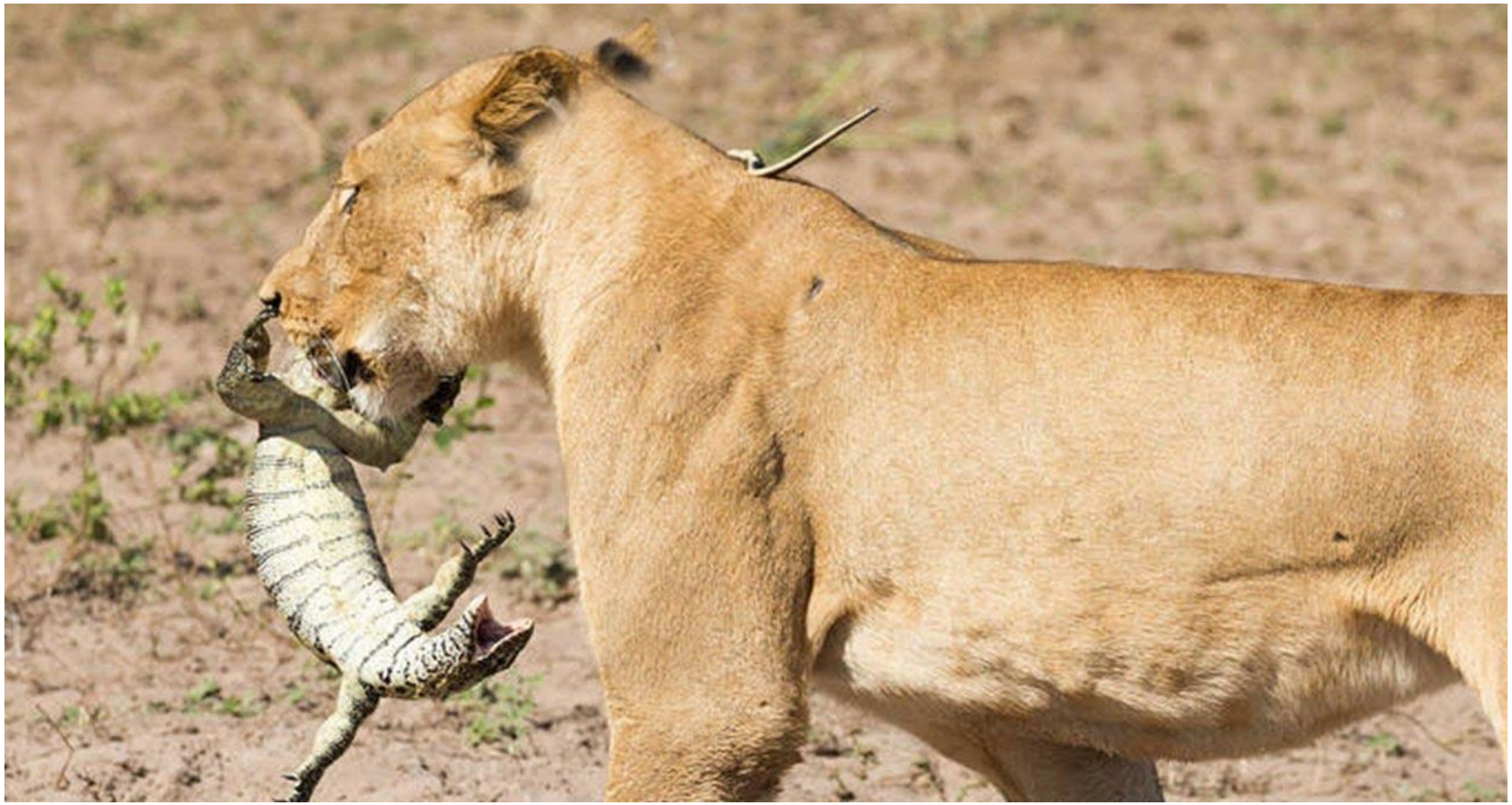
Prelitigation Prevention. The Calm Before the Storm: Use It!

- Operational Considerations
  - Stay versed in FMCSA regulations and updates and Traffic Codes
  - Know Your Equipment, Technology and Policies
  - Be Familiar with Driver Responsibilities
  - Train Drivers to Immediately Report Accidents (Process in Place)
  - Comprehensive maintenance of documents and records – Driver qualification file, HOS records, pre-trip inspections

Nuclear Verdict Disarmament Spreads in State Legislatures; Reining in the Reptile: A Lone Star Template

- Most Comprehensive: Texas House Bill 19. (*See* Civ. Prac & Remedies Code, TEX. STAT. tit. 4 § 72.002-003.)
- Splits trial into two phases. First phase deals only with motor carrier's driver's fault and liability, and excludes unrelated allegations of unsafe motor carrier safety practices.
- Second phase allows Plaintiffs to sue carrier itself, but only *after* motor carrier's *driver's* liability has been determined (*if* it is determined).
- Limits admissibility of evidence of failure to comply with non-pertinent FMCSA regulations.

Example of Successful Anti-Reptile Strategy!



Questions and Answers

Eric L. Zalud
Benesch, Friedlander, Coplan & Aronoff, LLP
127 Public Square, Suite 4900
Cleveland, Ohio 44114
(216)363-4500
ezalud@beneschlaw.com

What, Me Worry ? Canadian Views on Defending and Preventing Wrongful Termination Claims and Driver Discipline Issues

- Canada…. At 10,000 feet
- Intra-Canada operation context
- Cross-border between Canada and the United States
- Need to comply with Canadian laws and regulations as applicable

What, Me Worry ? Canadian Views on Defending and Preventing Wrongful Termination Claims and Driver Discipline Issues

Statutory Regime

- *Canada Labour Code* RSC 1985 c.L-2
- **Part III** of the *Canada Labour Code* (the Code) establishes and protects the rights of workers in federally regulated industries and workplaces to fair and equitable conditions of employment. The provisions of the Code set basic employment conditions in federally regulated workplaces. They also offer a way for employees to recover unpaid wages and ensure other labour standards protections are upheld in their workplace.

What, Me Worry ? Canadian Views on Defending and Preventing Wrongful Termination Claims and Driver Discipline Issues

- What is a **federally regulated workplace**?
- Federal Works, Undertakings or Businesses:

  Only the activities of certain businesses fall under the jurisdiction of the federal government, and therefore the Canada Industrial Relations Board, for the purposes of the *Canada Labour Cod*e and the *Status of the Artist Act*. Among others, they include the following sectors:

  …

  - transportation, interprovincial or international (by road, railway, ferry or pipeline)

What, Me Worry ? Canadian Views on Defending and Preventing Wrongful Termination Claims and Driver Discipline Issues

Statutory Regime

- *Canada Labour Code* RSC 1985 c.L-2

  For **federally regulated organizations**, if an **(non-managerial) employee not covered by a collective agreement** has worked for the organization for **12 or more continuous months**, then the employer must have **just cause** to terminate the employment relationship. Just cause can occur through a series of inappropriate behaviour on behalf of an employee or a serious incident that is so egregious it irreparably harms the employment relationship. Just cause is a **high threshold** which can be difficult to prove. Typically, employers need to have properly applied progressive discipline to prove just cause. If an employee feels that their employment has ended improperly, they may make a complaint of unjust dismissal under the Canada Labour Code (section 240).

What, Me Worry ? Canadian Views on Defending and Preventing Wrongful Termination Claims and Driver Discipline Issues

Statutory Regime

- *Canada Labour Code* RSC 1985 c.L-2
- In order to claim that it was a lack of work or discontinuance of a function it cannot be an after thought once the employee contest the termination.
- This means that the employer will have the onus to show that the dismissal was genuine by establishing that there is a valid economic justification for the termination and that there is a genuine reason for that specific employee to be terminated or laid off.
- An employer must be prepared to open its books to prove this. An employer cannot simply terminate an employee and claim a lack of work or discontinuance of a function, they must genuinely prove that the job they held can no longer exist for economic reasons
- An employer cannot hire another employee to fill the role or just remove a job title.

What, Me Worry ? Canadian Views on Defending and Preventing Wrongful Termination Claims and Driver Discipline Issues

Statutory Regime

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But what about circumstances where an employee has not done anything wrong but the employer needs to end the employment relationship? There are very limited circumstances where a federally regulated employer can terminate the employment relationship without just cause. Under the Canada Labour Code there is an exception that has been termed **"lack of work"** or **"discontinuance of a function"** (section 242 (3.1) (a)).

The Supreme Court of Canada established that a discontinuance of a function is defined when a *"set of activities which form an office is no longer carried out as a result of a decision of an employer acting in good faith."* (*Flieger v. New Brunswick* [1993] 2 S.C.R. 651).

What, Me Worry ? Canadian Views on Defending and Preventing Wrongful Termination Claims and Driver Discipline Issues

- Structure and mechanism for filing of complaints against an employer including
  - Monetary complaints for unpaid wages or other amounts owed
  - Non-monetary complaints
  - Unjust dismissal complaints (*to the Canadian Labour Relations Tribunal*) – 90 day deadline
  - The Canada Industrial Relations Board is an independent administrative tribunal. The Board's job is Board hear and decides complaints, applications and appeals related to the *Canada Labour Code and certain other statutes.*

What, Me Worry ? Canadian Views on Defending and Preventing Wrongful Termination Claims and Driver Discipline Issues

- In turn, provincially regulated employers have comparatively more freedom and flexibility when it comes to choosing to end an employment relationship
- Contractual grounds for dismissal
- Handbook infractions as incorporated into the contract of employment framework

Duty to Accommodate

- Federal and Provincial Human Right Code Legislation
  - up to the point of “undue hardship” on employer (very high standard)
  - *“can’t you offer parallel or similar / valuable employment in the office if they cannot drive a vehicle”*
- Wide sweeping capture of conditions – “disabilities”
- Substance abuse issues can = a disability

Risk Identification and Management – Employee Handbooks

- Must stipulate the federal vs. provincial regime governing the operation
- Must have a workplace harassment and workplace violence policy – setting out nontolerated behaviours, reporting and investigation mechanisms
- Otherwise, general "freedom to draft"
- Typically, and best practices: (no doubt, a "Canadianization" of best U.S. practices)
  - "Our Philosophy"
  - "Employment / Definitions"
  - Compensation
  - Benefits and Leaves
  - General Expectations (Discrimination protections and principles; Accommodation; Medical, Privacy) *[silent on grounds for dismissal as they are "contextual"]*
  - Safety and Security (Health and Safety, right to search, drug-free workplace and related accommodations policy, Workplace Harassment and Violence policy setting out full details and Company responsibilities; complaint procedures, resolution process

What, Me Worry ? Canadian Views on Defending and Prevent Negligent Selection, Retention and Training Claims

- In Canada, we say “sorry” in addition to “worrying”.
- There might be karma with being so contrite
- Many of our laws are the same on point, but there are some differences that might make life a bit easier for the Motor Carrier implicated in a casualty tort claim
- Canada…. At 10,000 feet (and why Canadian law might be relevant)

Advising or Representing a Canadian based carrier… or any carrier that is alleged to have been negligent while operating in Canada

- Intra-Canada operation context
- Cross-border between Canada and the United States
- The application of Canadian laws and regulations may inform a carrier's duty of care
- Are the practices that Don Vogel talked about applicable?
- Are the concepts that Eric Zalud talked about applicable?
- Or can they be "distinguished" should the application of Canadian law be more advantageous to your client's interest?

Canadian Liability Law “101”: the Casualty scenario

- *Vicarious Liability*:

  Operation of, or Consent in the Third-Party use of a Vehicle

- Ontario *Highway Traffic Act* RSO 1990 c. H-8

  s.192 (1) The driver of a motor vehicle or street car is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle or street car on a highway.

  (2) The owner of a motor vehicle or street car is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle or street car on a highway, unless the motor vehicle or street car was without the owner’s consent in the possession of some person other than the owner or the owner’s chauffeur.

Canadian Liability Law “101”: the Casualty scenario

Vicarious Liability - Employer and Employee

The presence of an employment relationship limits the employer’s vicarious liability by confining it to the duration of the employment relationship. This prevents the employer from being liable for employee actions committed prior to entering into the employment relationship, as well as for any actions committed once the employment relationship has ended. Furthermore, an employer is only liable for those actions which occur while the employee is acting in the course of their employment.

671122 Ontario Ltd. v. Sagaz Industries Canada Inc., [2001] 2 S.C.R. 983, 2001 SCC 59:

Although the categories of relationships in law that attract vicarious liability are neither exhaustively defined nor closed, the most common one to give rise to vicarious liability is the relationship between master and servant, now more commonly called employer and employee This is distinguished from the relationship of an employer and independent contractor which, subject to certain limited exceptions, typically does not give rise to a claim for vicarious liability.

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There is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. What must always occur is a search for the total relationship of the parties. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker’s activities will always be a factor.

Canadian Liability Law “101”: the Casualty scenario

Vicarious Liability - Independent Contractors

- Generally, a person who hires an independent contractor will not be liable for their negligence (Sagaz)
- But is there a non-delegable duty: *Weston v. TD Bank* 2019 BCPC 147
- See also *Wilby v. Savage*: inherent risk? [1954] SCR 376
- *Sikel Estate v. Gordy* 2008 SKCA 100
  - Essentially: was there a special and foreseeable danger in the work and were special precautions not taken?

Vicarious Liability versus "Negligent Selection, Retention and Training" Claims: Is there a Boogeyman in Canada?

- *No.* They are relevant in informing tort liability but tend to be captured by, or derivative in vicarious liability claims in the operation of a vehicle.
- However, where there is no tort liability these other tort "causes of action" (read: "a specific variety of negligence") if established can in certain cases be critical and problematic
  - Damages exposure
  - Insurance ("auto" vs. "general"): which policy insures, is there a duty to defend / gaps or underinsurance issues
  - Ontario OAP 1 auto policy insuring liability *"as a result of owning, leasing or operating an automobile…."*

Vicarious Liability versus "Negligent Selection, Retention and Training" Claims: is there a Boogeyman in Canada?

- Is the established tort "proximately" arising from the "*ownership, use or operation of a motor vehicle*", or is it a stand-alone ground for recovery by the plaintiffs?
- "*While allegations of negligent training, supervision and entrustment might be germane to whether M and/or R were negligent in the ownership, use or operation of a motor vehicle, they did not provide a stand alone ground for recovery by the plaintiffs".* ***Unger v. Unger*** 2003 CanLII 57446 (ON CA)

Vicarious Liability versus “Negligent Selection, Retention and Training” Claims”: is there a Boogeyman in Canada?

***Certain Underwriters at Lloyd’s v. The Insurance Company of the State of Pennsylvania,* 2016 BCSC 178 (CanLII)**

- 7 Applying this test, in our view the alleged 'non-automobile' claims in the underlying action are in fact caught by the exclusion in Aviva's policy. The precipitating and most important cause of the plaintiff's injuries was the delivery driver's alleged negligence, not the negligence of Pizza Pizza in its corporate policies. The "30 minutes or free" policy exists and is not actionable by the world at large unless there is negligent driving by a delivery driver causing personal injury or property damage. In other words, the alleged non-automobile claims are derived from, not independent of, the automobile claim. As expressed by Doherty J.A. in a case very similar to this appeal, *Unger v. Unger* (2003), 2003 CanLII 57446 (ON CA), 68 O.R. (3d) 257 at para. 20:
    - The mere description of some of the acts of negligence as 'negligent business practices' does not create a separate and discrete cause of action. Those allegations could assist the Ungers in establishing their claim only to the extent that they helped them demonstrate that the vehicle was being used or operated in a negligent fashion when the accident in which the Ungers were injured occurred.

Canadian survey of "Phrases Judicially Considered"

- *"Negligent selection"* = products liability and the occasional driver case
- *"Negligent retention"* = nothing on point
- *"Negligent training"* = fact specific, there are cases not limited to transport casualty cases
- *"Negligent entrustment"* = has seen activity, as a stand-alone cause of action (the "tort of negligent entrustment") in driver cases – automobiles and motorcycles….. and the possession of handguns

“Negligent Entrustment”

Cases of negligent entrustment usually arise, as in this case, out of the entrustment of an automobile. In such cases, the judicial authorities suggest that all of the following five elements must be established for liability:

1) An entrustment of the chattel by its owner to the entrustee;
2) The entrustee was incompetent, inexperienced or reckless;
3) The entruster knew or ought to have known of the entrustee’s condition or proclivities;
4) The entrustment created an appreciable risk of harm to the plaintiff and a coincident relational duty of care on the part of the defendant/entruster; and
5) The entrustee’s negligence was the proximate or legal cause of the damages suffered by the plaintiff.

See: ***Schulz v. Leeside Developments Ltd.***, 1978 CanLII 1976 (BC CA) at para. 22-23

So, What is the Bottom Line Comparison Between Canada and the United States?

(or Why do American Attorneys Drive Nicer Cars that Canadian Lawyers?)

While the laws of negligence are essentially the same between Canada and the United States there are some key differences in terms of liability exposure:

1. The Concept of Compensation for the Victim, not bad conduct deterrence for future "tortfeasors
2. Deposition Rules and Practice
3. The Recovery of Attorney's fees in Canada
4. While Punitive or Exemplary Damages have been awarded, this is has rarely been the case and are limited to specific fact patterns

The Concept of Compensation for the Victim, not bad conduct deterrence for future “tortfeasors”

- *SCC Trilogy and General Damages*

Canadian courts compensate personal injury victims for their losses through damages. These damages are either classified as pecuniary or non-pecuniary damages. Pecuniary losses are those tangible losses that are more easily measured in terms of money, like loss of income and out of pocket expenses. Non-Pecuniary losses are those intangible losses which are not readily quantifiable in terms of money, like pain and suffering, loss of amenities, and loss of enjoyment and expectation of life.

Courts in quantifying damage awards are guided by two distinct but similar compensatory principles. For pecuniary losses, the principle is that the plaintiff should **receive full compensation** for pecuniary loss past and future. For non-pecuniary losses, the principle is that damages should be **fair and reasonable**. As with all tort claims, the end goal is for the Courts to restore the plaintiff, as well as money can provide, to its pre-accident position.

The Concept of Compensation for the Victim, not bad conduct deterrence for future “tortfeasors”

The Court settled on a ‘cap’ for non-pecuniary damages in the amount of $100,000 in 1978 dollars, save for “exceptional circumstances”. Adjusting for inflation, and depending upon which province you live, the current non-pecuniary damages limit is roughly CAN $480,000 for pain and suffering

Following several challenges, the Supreme Court in *Neuzen v Korn*, [1995] 3 SCR 674, reaffirmed that the trilogy cap applies to all personal injury cases claims and that is to be applied as a **rule of law**. In this case, a jury had awarded the catastrophically injured plaintiff $460,000 in non-pecuniary damages and on appeal the Supreme Court ended up reducing the jury award to the level of the cap.

As it currently stands, catastrophic claims are still subject to the non-pecuniary cap laid out in the trilogy cases. However, due to the significant impact these rulings have had on catastrophically injured plaintiffs, legal challenges continue to be made and it remains to be seen whether the Supreme Court of Canada will continue its steadfast approach in the years to come

The Concept of Compensation for the Victim, not bad conduct deterrence for future “tortfeasors”

This clear expression of Canadian damages principles was articulated in *Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229. This case was one of the three prominent 1978 Supreme Court of Canada cases on damages, often described as the trilogy on damages. All three of the trilogy cases involved catastrophically injured youths and the Court was grappling with the proper quantification of their non-pecuniary or pain and suffering damages.

The Court’s departure from the full compensation principle insofar as pain and suffering damages were concerned was based on several competing policies and principles of restitution, including that there is no medium of exchange for happiness or market for expectation of life but that restitution must be monetarily based and quantified in such a way that monetary awards from court to court are reasonably analogous, guided by early jurisprudence, and non-arbitrary. The Court also recognized the fact that no money can provide true restitution and, in that sense, pain and suffering damages are not truly functionally compensatory.

Specific Heads of Damages Claims Under Canadian Law

- Damages for Pain and Suffering
- “Family Law Act” claims
- Cost of future care
- Future economic losses

** Canada generally does not see nuclear verdicts. They can be very significant (7 or very low 8 figure cases) built on cost of future care and future economic loss principles only*

Other Unique Canadian features

1. Depositions rules in the common law provinces: “one witness kick at the can for depositions”. Hard to get discovery of non party witnesses. In Ontario, discovery generally limited to one day evidence per party.

2. Litigation trial “chill”: the general rule in Canada is that the successful party gets 70% of their attorney’s fees. The provinces have interesting “legal poker” offers of judgment” rules that work in significant risk in any party going to trial.

3. Punitive Damages

Punitive Damages in Canada

In Ontario, punitive damages are awarded only when a defendant's conduct has been so malicious, oppressive, and high-handed that it offends the court's sense of decency. This is a high bar to meet, requiring clear evidence that the defendant acted with a level of intent or recklessness that goes beyond ordinary negligence

Also known as exemplary damages. The amount of money awarded to the claimant in civil litigation to punish the wrongdoer and to deter the wrongdoer and others from engaging in unlawful conduct in the future. Punitive damages must bear a reasonable relationship to the harm caused by the wrongdoer's actions, and are reserved only for situations in which the wrongdoer acted intentionally, recklessly, or with gross negligence in causing the claimant's harm. Courts award punitive damages to a claimant in addition to **compensatory damages**. A party generally may not recover punitive damages for a breach of contract. Some employment statutes cap the amount of punitive damages a plaintiff can recover.

Typically, in insurance coverage disputes, employment disputes (where the facts establish horrible exploitation of uneven bargaining power and in cases involving a reckless disregard for consumer safety.

Back to the “Conflicts of Law”

- Forum Shopping
- Governing Law Shopping
- What law applies? Are you in a Canadian courtroom, or an American courtroom? What conflicts of law rules apply? What are the “rules” of the court seized of the case?
- In Canada, the rule has historically been “*lex loci delicti*”: the law of the place where the negligence occurred governs.
- There is some indication that this may shift to the “*jurisdiction with the most substantial connection*” test applying.

Some Statistics: *Today's Trucking: trucknews.com*

Canadian Roadcheck inspections ground one in five vehicles – July 2023

- Canadian enforcement teams placed **20.5% of inspected vehicles out of service** during the international Roadcheck blitz that was conducted May 16-18, compared to a 19.3% out-of-service rate in the U.S.

- Teams completed **4,247 Level I, II and III Inspections on this side of the border, placing 1,453 vehicles and 260 drivers out of service,** the Commercial Vehicle Safety Alliance (CVSA) reports. **In the U.S., there were 53,847 inspections, with 15,932 vehicles and 5,020 drivers placed out of service.**

[Level 1 inspections involve 37 steps and include vehicles and drivers]

- A special focus was on anti-lock braking systems (ABS) and cargo securement across North America. **Brake systems topped the out of service violations at 25.2%, while cargo securement %, defective service brakes at 14.1%, and lights at 11.5%.**

- In Canada and the U.S., **Hours of Service** clearly dominated **driver-related violations**, at **41.1% of the total**. Trailing behind that were **false logs (26.4% of the total), other (9.2%), cancelled/revoked licence (7.9%),** and **no medical card (4.6%)**

Some Statistics: *Today's Trucking: trucknews.com*

Canada's Top 5 vehicle OOS violations

- Brake systems – 342 – 23.5%
- Defective service brakes – 222 – 15.3%
- Lights – 199 – 13.7%
- Cargo securement – 198 – 13.6%
- Tires – 164 – 11.3%

Some Statistics: *Today's Trucking: trucknews.com*

Canada's Top 5 Driver OOS violations

- Hours of service – 193 – 74.2%
- False logs – 18 – 6.9%
- Wrong class licence – 14 – 5.4%
- Other – 11 – 4.2%
- Drugs – 8 – 3.1%

Some Statistics: *Today's Trucking: trucknews.com*

Canada's Top 5 Dangerous Goods violations

- Training – 11 – 36.7%
- Shipping papers (tied) – 6 – 20%
  Placards (tied) 6 – 20%
- Loading – 4 – 13.3%
- Package integrity – 2 – 6.7%
- Bulk package (tied) – 1 – 3.3%
  Markings (tied) – 1- 3.3%

Effective Civil Claim Risk Management: Allianz Commercial – avoiding nuclear verdicts

Adopt everything Eric Zalud told you (*or almost everything*) about risk and claim management and prevention and litigation management, which despite the foregoing still basically apply measure for measure in Canada.

Thank you

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Gordon Hearn
Gardiner Roberts LLP
22 Adelaide Street West,
Bay Adelaide Centre Suite 3600
Toronto, Ontario M5H 4E3
(416) 203-9503
ghearn@grllp.com