Litigation Tactics – Pre Trial: The Defense Perspective

Jay Barry Harris, Esquire

Diane Bernoff Sher, Esquire

I. Investigation

The initial investigation immediately following a catastrophic motor vehicle accident is critical to the outcome of any ensuing litigation. Much of the immediate investigation is likely to be conducted by investigators hired by the trucking company; however, in an major case defense counsel may become involved early on. Important issues from the defense perspective include the following:

A. Witnesses and statements

Identification of witnesses is probably one of the most important aspects of the initial investigation. The police report often serves as the primary source to identify people who actually saw the accident take place. It is important to make early contact with any identified witnesses to learn their version of what occurred.

Much thought should be given as to whether a statement should be taken from any witnesses. Any such statements will obviously be have to be produced during discovery, as will any notes of conversations taken by investigators. However, a statement from a favorable witness taken shortly after the accident took place can be a very powerful tool to the defense.

A key issue is whether the trucking company should take a statement from its own driver. In our experience, there is usually no reason to take a formal written statement from a company's own employee, although obviously at the appropriate time the driver must be interviewed and his version of the accident ascertained. Issues to consider here include who should conduct the interview; whether notes should be kept of the interview; who should be present during the interview. In

the event a criminal investigation is commenced following the accident, a criminal defense attorney as opposed to an insurance and/or civil defense attorney should be consulted and be present during any police interrogation.

B. Preservation of evidence

The obligation to preserve evidence following a loss goes well beyond the obvious physical evidence of the motor vehicles themselves. The trucking company may be asked to produce any paper logs, electronic data including paperless logs and telemetry and global positioning unit data concerning the movements of the truck and any electronic messages sent and/or received from the vehicle within a period of time before and after the accident. Since such electronic data may not be kept by the company indefinitely, defense counsel may have to alert the personnel who maintain the company's computer data to take the necessary steps to preserve such data or risk a potential expoliation of evidence charge.

Plaintiff's counsel may serve a written notice to the trucking company following a catastrophic loss asking the company to preserve relevant physical evidence and data. It would be wise for defense counsel to review any such request and take steps to advise the company of the scope of information that may be covered by such a request. For example, a telematic system used by the company to send and receive messages from its fleet may only provide for retention of data for a specified period of time before the data is automatically destroyed. In such a system it would be easy to inadvertently lose data which may prove critical to the defense of the case. The preservation of such computer data may not be obvious in the aftermath of a motor vehicle accident, but the company should be advised as to the scope of information that needs to be preserved.

At the same time, defense counsel may want to consider asking plaintiff's counsel to preserve such items as the plaintiff's cell phone and related records.

C. Identify early on issues that may relate to punitive damages claims

Employers can be held liable for punitive damages under two separate theories:
(1) vicarious liability under the doctrine of respondeat superior for the wrongful conduct of an employee and
(2) direct liability because of the employers independent gross negligence, recklessness, wantonness or willfulness.

(1) Was the employee acting within the scope of his employment?

To determine the possibility of respondeat superior liability, it is necessary that the employee was acting within the scope of his employment. Some issues to identify early on include:

- Is the activity of the kind the employee is hired to perform;
- Did the activity occur substantially within the authorized time and space limit;
- Was the activity actuated at least in part by a purpose to serve the master.

Smithy v Hansberger, 189 Ariz. 103, 938 P.2d 498 (1996)

Generally, whether an employee is acting within the scope of employment when he commits intentional torts or engages in criminal conduct is a jury question. One court has identified factors that may come into play in deciding this issue as follows:

- Where an employee commits an intentional tort, the behavior giving rise to the tort must be calculated to facilitate or promote the employer's business before the conduct will be deemed to fall within the scope of his employment;
- An employer is not liable for independent self-serving acts of its employees which in no way facilitate or promote its business;
- The willful and malicious character of an employee's act does not always, as a matter of law, place it outside the scope of employment unless the act is so divergent that its very character may be deemed to separate it from the employment relationship.

Stephens v A-Able Rents Company, 101 Ohio. App. 3d 20, 654 N.E. 2d 1315, 1321 - 22 (1995)

(a) Whether an employee is acting within the scope of his employment when he violates company policy is generally a question of fact for the jury. For example, in Williams v Hughs, 578 So. 2d 1281, 1991 Ala. LEXIS 403 (1991) a third party was injured when a warehouseman/dispatcher drove a company truck to his house, in violation of company policy, and parked it so that it rolled down the driveway into the highway, striking another vehicle. The appellate court reversed a directed verdict in favor of the owner of the trucking company, holding that the employee's violation of company policy was not conclusive as to the question of his status at the time of the accident. The court noted that:

- An employer will be liable for the torts of its employees committed while acting within the scope of employment;
- The employer will be liable even if it did not authorize the acts;
- The employer will be liable even if it did not ratify the acts;
- The employer can be liable even if it expressly forbade the acts;
- A finding of fault by the employer is not necessary for vicarious liability under the doctrine of respondeat superior;
- If there is any evidence tending to show directly, or by reasonable inference, that the tortuous conduct of the employee was committed while performing duties assigned to him, it becomes a jury question whether he was acting from personal motives having no relation to the business of the employer;
- The court also found a rebuttable presumption which arises from the ownership of a vehicle under which an employee will be presumed to be acting within the line and scope of his employment or authority as the owner's agent or servant when driving a vehicle owned by the employer;
- Applying this presumption, the court found that the employee's conduct of taking the vehicle home, in violation of company

policy, does not rebut the presumption that the employee was acting within the course and scope of his employment because (1) the contravention of policy is not determinative of the employee's status at the time of the incident and (2) the employer in the past had not enforced the policy against this particular employee.

Therefore, in the event of an accident which takes place when the employee was apparently in violation of company policy, the initial investigation must go beyond the immediate facts and consider whether the violation of company policy was previously known to the employer; whether any disciplinary action had ever been taken by the employer, whether the employer in any way tacitly condoned the conduct of the employee in question.

(b) Does the jurisdiction require fault on the part of the employer before imposing punitive damages?

In determining liability of the employer for punitive damages, courts sometimes find liability even where there is no fault by the employer; other courts do require some degree of fault; some courts go further and require a showing of the employer's complicity and/or a specific type of fault.

(c) Some jurisdictions do not require fault by the employer

For example, in J.B. Hunt Transport, Inc. v Doss, 320 Ark. 660, 899 S.W.2d 464 (1995), the court applied the "scope of employment/no fault required rule" and awarded punitive damages against the employer under the doctrine of respondeat superior. The following facts determined the outcome of the case:

- Was the employee engaged in an employer-approved assignment, and did the employer entrust the details of its execution to the employee's discretion?
- The driver was found to be acting within the scope of his employment despite the fact that at the time of the accident he

was (1) on his way to "check with a buddy" at a truck stop and (2) he had been drinking in violation of company policy;

- The driver was found to be acting within the scope of his employment because he was wearing a company uniform and was planning to spend the night at the truck stop before embarking on a 12-hour drive to make a delivery.
- Vicarious liability did not require any fault on the part of the employer.

(d) Some jurisdictions require some employer fault

If you are in a jurisdiction which requires some element of employer fault, the following are some common factors which should be considered in the investigation of any accident where there may be a punitive damages claim:

- Is there any evidence of negligent hiring?
- Is there any evidence of negligent supervision?
- Is there any evidence of negligent entrustment?

For example, Florida law provides that in the absence of some fault on the part of the employer, the employer will not be liable to pay punitive damages awarded because of the willful and wanton conduct of its employees. In Alexander v Alterman Transport Lines, Inc., 387 So. 2d 422, 1980 Fla. App. LEXIS 17526 (1980), Penley, the driver of the tractor trailer owned by Alterman Transport Lines, Inc. collided with another vehicle, killing the other driver. The court upheld an award of punitive damages against the company under the doctrine of respondeat superior based on the following principles:

- An employer may not be vicariously liable to pay punitive damages awarded because of the employee's wrongful conduct unless the employer evinced some degree of fault;
- The employer's degree of fault need not rise t the level of being willful, wanton or outrageous;

- The driver's conduct did meet the standard required to impose punitive damages because he was visibly intoxicated at the time of the accident and the voluntary act of driving while intoxicated evinces a sufficiently reckless attitude;
- It was reasonable for the jury to find the trucking company was also at fault because the evidence showed that when the driver appeared at the terminal on the morning of the accident, the trucking company knew or should have known that Penley was drunk;
- The issue of the trucking company's vicarious liability to pay punitive damages is q jury question.

(e) Some jurisdictions require complicity/specific type of fault

Complicity is a subcategory of the "required fault" position and requires that the employer evince a specific type of fault. Under the complicity rule, punitive damages may be awarded against the employer because of the conduct of its employee only where:

- The principal authorized the doing and the manner of the act; or
- The agent was unfit and the principal was reckless in employing him; or
- The agent was employed in a managerial capacity and was acting in the scope of employment; or
- The principal or the managerial agent of the principal ratifies or approved the act.

Briner v Hyslop, 337 N.W. 2d 858, 861, 1983 Iowa Supp. LEXIS 1655 (1983) citing Restatement (Second) of Agency and Section 909 of the Restatement (Second) of Torts.

In Briner, the employee driver consumed several double scotches and fell asleep at the wheel, crossed the center line and collided with an oncoming automobile, killing the driver. The driver had just completed a trip from Colorado to Iowa when the employer directed the driver to proceed to a different destination. Among the factors the court considered in finding the requisite degree of fault under the complicity rule were:

- The employer was aware of its employees' driving and sleeping habits but failed to properly supervise or alter such habits;
- The employer should have known of the employees' sleeping habits because of their phone calls and gas and motel slips;
- The employer failed to set guidelines for its drivers;
- The employer gave the employees financial incentives to work long hours without sufficient sleep;
- There was no established time for reviewing the drivers' logs and 120 days could pass before the logs were reviewed.

II. Discovery and Discovery Motions

The discovery process is going to determine the outcome of most cases, and trucking accident litigation is no different. Some discovery issues which relate particularly to trucking cases are as follows:

A. How to prevent fishing expeditions

Given the volume of information that may exist concerning a trucking company's policies, procedures, internal investigations and personnel issues,

plaintiff's counsel is likely to request information that goes well beyond the immediate facts of the accident in question. Attempts to limit broad fishing expeditions can be challenging in view of the liberal attitudes of most courts concerning the scope of discovery. In a recent discovery motion seeking to limit the amount of information to be produced, we successfully argued as follows:

> "Our courts do draw a line and limit plaintiff's unfettered discovery into other accidents involving a defendant. For example, if a defendant owns property where an accident took place, a court would probably require the defendant to identify other accidents which took place at the same location, but would draw the line at requiring defendant to produce records relating to every other accident which took place on defendant's premises at other locations. See *Battuello v. Camelback Ski Corp.*, 17 Pa. D & C 4th 362 (1992), where the plaintiff sought copies of any and all documents including reports of incidents occurring anywhere along a certain ski trail including the names of injured parties and witnesses. The Court found the request to be overbroad and limited the request to accidents which occurred at the site of plaintiff's fall; furthermore, the Court held that defendant should redact the names of injured parties and witnesses. In reaching its decision, the Court stated:
>
> > "To allow otherwise would give the court's approval to a fishing expedition into the defendant's records. While we note that discovery, by its nature, may be somewhat inconvenient and intrusive, we still express our concurrence with Judge McDevitt who, writing for the Court of Common Pleas of Philadelphia County, observed as follows:
> >
> > 'Legitimate discovery procedures often are, and sometimes must be fishing expeditions. What we condemn is the attempt to fish with a net rather than

a hook or a harpoon.' Brownstein v. Philadelphia Transportation Co., 46 D & C 463, 464 (1969)."

17 Pa. D & C 4th at 369 – 370."

It is extremely difficult to convince a court to make plaintiff fish with a harpoon rather than a net. We have found the following practices to be helpful in keeping a lid on unlimited production of often irrelevant information:

1. **Assert privileges only where applicable.** For example, plaintiff's counsel in a recent matter tried to force production of the litigation manual of the trucking company's corporate counsel. Plaintiff argued that it was relevant on the issue of the internal investigation practices of the company, particularly on the topic of preservation of evidence. We successfully convinced the court that the manual constituted the attorney's mental impressions and strategies as to how the company should handle matters already in litigation, and thus was not discoverable under Pennsylvania Rules of Procedure. We relied upon the corporate counsel's deposition testimony that he had indeed created a manual, but it was used to guide his claims staff on matters already in suit, and was thus not an "investigative manual" of the company.

2. **Try and obtain court orders limiting the scope and duration of depositions**. Some state courts may be receptive to arguments that depositions of company personnel should not be permitted to proceed indefinitely and to cover matters with no apparent relationship to the accident at issue. In one recent case, plaintiff wished to depose general counsel and the company's inhouse litigation counsel. We were able to convince the court to enter an order limiting the scope of the depositions to certain narrowly defined issues. In motions seeking to limit the amount of time depositions of other company personnel should take, we presented to the court the amount of time earlier depositions had taken and the excessive number of pages of testimony; however, the state court judge was not willing to follow the federal court example and impose limits on the durations of

depositions. Other judges may rule differently and we believe such motions should be filed to prevent abuse of the discovery process.

3. **If you can show a pattern of requests for irrelevant material, point it out to the court.** While discovery rules are liberally construed, some information sought is so overbroad that a court can be persuaded to deny the requests. In one recent case, plaintiff tried to argue that the company's catastrophic loss team (the "CAT Team") had taken a written statement from the company's driver and then destroyed it; the company argued it never took written statements from its own drivers. Plaintiff's counsel asked for the entire investigative materials of every investigation the CAT team had conducted over a number of years in an attempt to establish that the CAT team did in fact take written statements. Since we had recently convinced the court to rule that some of plaintiff's other discovery requests were unreasonably overbroad, we were successful in convincing the court that this set of requests was unreasonable as well.

4. Support your objections to discovery with appropriate affidavits. In the event a discovery request is so overbroad and burdensome that compliance would be a true hardship to the company, a knowledgeable individual from the company should submit an affidavit outlining the number of hours it would take to research and compile the information sought. In the event the court still orders production of the data, you will have a solid basis for asking for the necessary time to produce the requested materials.

5. Consult with your expert during the discovery process. In many catastrophic accident cases, sophisticated plaintiff's counsel will seek a vast amount of data related to the trucking company's computer system to explore issues such as the company's practices in monitoring its drivers' habits, whether employee violations of company policies are properly disciplined or whether the company only gives lip service to its rules, and, in the event of various telematic equipment that may be in the vehicles, whether the drivers are using the

equipment in a safe manner. If you need to retain the services of an expert to address these issues at trial, you probably will need to consult with the expert during the discovery process as well. Early use of the correct expert can help you persuade the court to limit overbroad and irrelevant fishing expeditions.

Although the plaintiff's may have an advantage under liberal discovery rules, a clear understanding of the issues in your case from the beginning can help you convince the court to allow only reasonably necessary discovery.

Litigation Tactics at Trial – The Defense Perspective

The trial of a catastrophic trucking accident requires special consideration to overcome the plaintiff's ability to inflame the public's and the jury's fears of sharing the highways with tractor-trailers. Each case obviously has its own unique issues, but some general considerations are as follows:

- Probably the most important task of defense counsel in defending a large trucking company is to humanize the defendant for the jury. While plaintiff's counsel can be expected to argue that the defendant is a "big dollar hungry corporation," defense counsel should point to all of the policies and procedures the corporation has implemented to safeguard the public. This can turn the tables on the plaintiff by emphasizing how the defendant utilizes its technology to make the roads safer.
- If your defendant driver is a sympathetic witness, allow the jury to identify with him to humanize the defendant trucking company. When the accident is caused by the negligence of the other driver, the jury should see the contest as being between the reckless plaintiff and the diligent tractor trailer operator, and not between an innocent plaintiff and a faceless corporation.
- If you are defending a case where the liability of the trucking company is clear, consider stipulating to liability at trial. This has the advantage of excluding damaging and sometimes inflammatory evidence from the trial

and causing the jury to focus instead on the question of damages. Some experienced defense counsel believe the verdicts are higher when the jury has reason to get angry at the defendant, even when punitive damages per se are not an issue. An admission of liability can prevent this scenario from happening to you and your client.

- In a case where liability is admitted, or even in a fully contested matter, consider alternative dispute resolution (ADR). A properly conducted ADR can help reduce the costs of proceeding to trial and should avoid the risk of an excessive jury verdict against a target defendant.
- Use motions in limine or motions for partial summary judgment to preclude irrelevant and prejudicial testimony. For example, in a wrongful death case, certain claims for loss of consortium may not be permissible under the state law, i.e. the claims of parents for emancipated, single adult children who die as a result of a car accident. If this is the law in your jurisdiction, the tearful testimony of the parents of the decedent should not be allowed.
- If the driver's alleged use of telematic equipment is an issue in your case, certain special evidentiary issue may apply. Accidents involving telematic devices present certain evidentiary issues which counsel should consider. First and foremost, the issue of causation cannot be overlooked. Under traditional negligence analysis, plaintiffs have to establish that defendant breached a duty to plaintiff, and that the breach of the duty was the proximate cause of the injury. The mere fact that a telematic device, such as a cell phone or other unit, was operating does not necessarily establish that the use of the equipment was the proximate cause of the accident. As one commentator has noted, "Under (tort) analysis, it makes no difference whether a driver fails to exercise reasonable care because she was using a cell phone, eating a hamburger, downloading e-mail, or entering coordinates on a route navigation system Drivers have a duty to exercise reasonable care when operating their vehicle." "The Trouble With Telematics," *supra*, 69 UMKC L.Rev. at 868.

- The admissibility of circumstantial evidence that a cell phone or other device was, in fact, being used at the time of the accident is sometimes at issue. In *Hiscott v. Peters*, 324 Ill. App.3d 114, 754 N.E.2d 839 (2001), the court considered whether the trial court erred in excluding circumstantial evidence that one of the defendant drivers was using his cellular telephone immediately before the accident. Defendant Peters denied that he used his cell phone and the jury was instructed to disregard the testimony. Counsel for the co-defendant made an offer of proof of Cellular One billing records to show that Peters used his cell phone for one minute between 1:14 p.m. and 1:15 p.m., and that he made a two-minute call to the same number at 1:29 p.m. The record indicated that the accident was reported to police at 1:20 p.m. The trial court excluded the evidence on the ground that there was no direct evidence Peters was using his cell phone at the time of the accident. This ruling was reversed on appeal.

  The appellate court in *Hiscott* reasoned: "We are mindful that all clocks are not synchronized, and that it may have taken five minutes for the accident to be reported. Additionally, (a witness) testified that it appeared Peters had only one hand on the steering wheel. On the basis of the record, the evidence of Peters's use of his cellular telephone was not so remote as to require its exclusion." 754 N.E.2d at 849. The court held that the weight and value of the evidence should have been left to the jury. However, by the same token, where evidence of the use of telematic equipment is truly remote, counsel should argue that its prejudicial effect would outweigh its probative value and should seek to have the evidence excluded.