

KEY ASPECTS OF LITIGATING A MOTOR VEHICLE COLLISION INVOLVING A  
TRACTOR-TRAILER

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Litigating a tractor-trailer case can be extremely stimulating to the trial lawyer.

The same is as difficult and complex as trying a medical malpractice case. Case development, except in emergency time frames, should be thought through with development of the case for potential industry standard violations, hiring violations statutory and regulatory violations, and with the thought of developing a claim for punitive damages.

**A. INITIAL DEVELOPMENT OF CASE**

When you first meet with a potential tractor-trailer litigant it is highly likely that the client will not have a broad understanding of the necessary facts for the development of your case. You must start your initial discovery through an open records request.

You should first write to the Department of Transportation and the Federal Motor Highway Carrier Safety Administration. You can make an open records request to them. Their address is, U.S. Department of Transportation, 400 Seventh Street, SW, Attn: FOIA Team, Washington, D. C., 20590. You need to do this in order to determine what regulatory violations have been committed by the motor carrier. The process of obtaining this information will take several months.

The second step in developing your case should be to immediately place the motor carrier on notice of the potential claim and request that they not commit any acts of spoliation of evidence. Many tractor-trailers have computer storage devices similar to black boxes in airplanes, which store data in the event of a collision. These devices will immediately be accessed by the defense attorneys and insurance companies representing the trucking company. If you do not get to this information in a prompt manner and request that the same not be destroyed, you will risk the chance of having the information deleted from the device. Once the information has been downloaded it will be difficult, if not impossible, to obtain this information.

Your next strategic move in a tractor-trailer case will be to obtain an accident reconstruction expert to evaluate the scene. Quality reconstruction experts in commercial carrier cases are few and far between. Recent developments have allowed experts to use a laser scanning device to recreate the entire location through laser plotting. These devices cost in excess of \$100,000.00. The process itself is lengthy. The information can be utilized to do an actual computer reanimation that will survive a Daubert or Kumho Tire Challenge.

You need to perform the reconstruction immediately. Time, of course, makes the opinions of the expert subject to more challenge by opposing counsel. Days, weeks, or months can eliminate tire tracks, skid marks, and the gouge marks in the roadway. You will need to retain safety experts. You may need to retain fatigue experts and animators.

If at all possible, you should visit the accident site to make your own notes, measurements, and photographs.

Next, you need to interview prospective witnesses. Taking statements of the trucking company employees will be improbable due to instruction of defense counsel and potential ethical considerations in speaking with management from another party. The defendant driver will most likely not speak with your detectives because of instruction from the motor carrier. The carrier will train them to refuse to speak with anyone other than law enforcement. This leaves potential investigation up to fact witnesses who may have observed the facts of the occurrence in your particular case.

This initial development stage for building a trucking case will cost between \$25,000.00 to \$50,000.00 if done properly. The initial stage of case development will control the outcome of your case.

## **B. FILING SUIT**

The first and most important determination for the lawyer handling a tractor-trailer case is to determine whether or not to file the case in State Court or Federal Court. A sub-issue within this thought process is the determination of whether or not to file your particular case in the State where the accident happened or in a State where the trucking company is incorporated and/or where the driver resides. You have potential jurisdiction for the case in the State where the company is incorporated and has its principal place of business.

Cases can be filed where the driver resides. Cases may also be filed where the driver has actually been trained, hired, qualified, supervised and/or dispatched. Many large trucking companies are regionalized with several regions in the United States. The different regions provide potential multi-state jurisdiction since the motor carrier may

supervise and dispatch drivers from many different regional offices as the driver travels across the U.S.

An example of jurisdiction selection is helpful. A tractor-trailer accident with a well-known national carrier occurred near Garden City. The truck driver was hired in Dallas, Texas. The truck driver was supervised by regional fleet managers in the State of Texas. He was dispatched from Dallas, Texas. The company was based outside of Kansas and Texas.

Because the Defendant was an illegal alien it was believed that a jurisdiction more favorable to Hispanics would bring out a better result for the Plaintiff. The case was filed in Dallas, Texas. After substantial litigation, a ruling was obtained that Texas substantive law applied. The value of the case rose substantially once the \$250,000.00 cap from Kansas was eliminated.

Many lawyers may not choose to seek jurisdiction in other States because of the potential cost of hiring counsel. This is a decision that must be made on a case-by-case basis depending upon the size and merit of the particular case that you have. The next necessary decision is to determine whether or not to seek Federal jurisdiction. In the usual case, you will not have a Federal question and must seek Federal jurisdiction under diversity of citizenship pursuant to 28 U.S.C. Section 1332(a).

There are many considerations to filing a case in State Court versus Federal Court. The workload of filing a case in Federal Court will be significantly more time consuming than in State Court. This author, however, has found that the Federal Judges

and Magistrates are extremely fair to litigants. The benefits of filing in Federal Court, even though more burdensome, may be higher to the plaintiff litigant than in State Court.

Obtaining Federal jurisdiction in a diversity case may present a problem if you have a local driver with an out-of-State company. Procedurally, a decision can be made not to include the driver as a named party defendant to obtain complete diversity.

When drafting your Petition or Complaint remember that even though Kansas is a notice pleading State you must have Court permission to add certain types of claims. It is better to include all potential claims from the start rather than asking for judicial permission to add a claim. In other words, it is easier to defend a Summary Judgment Motion than it is to convince the Court that you have substantial evidence to bring the claim which you seek to amend.

In writing and drafting your Petition and/or Complaint, you should have draft different types of allegations. Drafting the correct Petition or Complaint with the proper allegations will take significant time. You first seek redress for the Plaintiff by using ordinary negligence claims. Then you must draft the more difficult allegations by adding in most, if not all, of the following types of claims which may be applicable to your case:

1. State law ordinary negligence claims;
2. Respondeat Superior claims;
3. Hiring related claims including negligent hiring, qualification, training, supervision, and retention;
4. Applicable regulatory violations of the Federal Motor Carrier Safety Regulations (FMCSR) under 49 C.F.R. Sections 381-399;
5. State law violations of safety regulations pursuant to K.S.A. 66-1,129 and K.A.R. 82-4-3;
6. Regulatory allegations regarding the motor carrier's status;
7. Allegations of negligence per se and alternatively claiming that the FMCSR provide the applicable minimum standard of care;

8. Allegations related to fatigue of the driver;
9. Maximum hours violations pursuant to State and Federal regulations;
10. Allegations in regard to safety protocols.

When drafting your Petition or Complaint you need to consider the prospect of a claim for punitive damages. While punitive damages are difficult to obtain in Kansas, they are obtainable. Under State law, you cannot file the claim for punitive damages until you seek the appropriate approval of the Court. To the contrary, in Federal Court, you may seek a claim for punitive damages under Federal diversity cases based upon the case of Oleson v. K-Mart 185 F.R.D. 631 (D. Kan. 1999). The State procedural rule is avoided in Federal diversity cases.

The punitive damage consideration of the case will be based upon either wanton, willful, or malicious behavior of the truck driver and trucking company. This will most normally be in regard to the trucking company forcing its drivers to violate maximum hours rules of the FMCSR and/or the truck driver driving in a fatigued state to comply with motor carrier delivery scheduling. Many truck drivers are forced to exceed the seventy (70) hour rule to meet preset delivery times.

### **C. DISCOVERY**

Winning your case is contingent upon obtaining useful discovery. Many defense lawyers will construe the written discovery strictly, thereby leading to a need for Motions to Compel. The necessary information sought cannot always be obtained prior to a deposition being taken. In most cases, if you do not get your initial discovery responded to properly, then immediate deposition of the appropriate business management personnel will be necessary.

Remember that in Federal Court in the Wichita district, there is a local rule, which requires you to attempt to confer. The rule prohibits obtaining discovery if you do not act within a certain period of time from the discovery pleading filing. The rule under D.

Kan. Rule 37.1(b) states:

Any motion to compel discovery in compliance with D. Kan. Rule 7.1 and 37.2 shall be filed and served within 30 days of the default or service of the response, answer or objection which is the subject of the motion, unless the time for filing or such motion is extended for good cause shown. Otherwise the objection to the default, response, answer, or objection shall be waived.

The rule is intended to promote cooperation of the parties. However, if a lawyer is lax on docketing and calendaring the necessary expiration date of the discovery requests, then the discovery may not be obtained. This rule is one that needs to be observed by the attorney and their paralegal with scrutiny.

In some cases it may be justifiable to actually take a deposition prior to submission of written discovery. This is because of the fact that many times a witness will answer a question under oath and divulge information which otherwise would not be obtainable by written discovery without motions to compel.

Any discovery sought should include requests for safety audits. Safety audits and reviews contain extremely useful information against the trucking company. The safety audits and reviews are based upon insurance company evaluation of the safety practices of the trucking company. Safety audits and reviews can be named many different synonyms that do not utilize the words “safety review” or “safety audit.” Defense counsel may fail to identify a document that would be a “safety review” or “safety audit” type document because it is named appropriately in the discovery request. Safety audits

and reviews evaluate the safety practices of the trucking company and then make safety recommendations and/or requirements for a change of the company practices. Many motor carriers will ignore the recommendations and/or requirements of the safety auditor. Discovery of these audits will provide a significant base of evidence to establish negligence and to make a claim for punitive damages.

In many cases, the deposition testimony of a manager of the company will lead to evidence that a safety audit or review exists and will confirm whether the same is maintained in the course of business. Discovery of safety audits is one of the most useful evidentiary tools available in litigating a trucking case.

Discovery by depositions should be obtained from the following management personnel:

1. Safety Director;
2. Risk Management Director;
3. Fleet Manager;
4. Operations Manager;
5. Hiring manager and training manager.

Another area of discovery which needs to be touched upon is the company's dealings with regulatory agencies such as the Federal D.O.T. and with State regulatory agencies like the Kansas Department of Transportation. Interrogatories and Requests for Production of Documents may be narrowly and strictly construed by defense counsel leading to a poor result in discovery. The discovery requests need to be specifically crafted to lead to non-objectionable evidence.

Interrogatories and Requests for Production of Documents need to be drafted specifically to obtain information regarding the following:

1. Trip and operational documents;
2. Hours of service records;
3. Maintenance files and records;
4. Policy procedure manuals used to hire, qualify, supervise and train drivers;
5. Copies of citations or violations a company has had for violation of state and federal laws relating to the FMCSR;
6. Copies of insurance company audits, safety reviews, safety studies and other evaluations on the company;
7. Instructional and training materials for all drivers;
8. Citation department records for all trucks the company runs in its fleet;
9. Trip expense information for the driver and the particular case being litigated;
10. Cargo pickup and delivery documents;
11. Bills of lading and/or cargo manifest documents;
12. Dispatch and operational records;
13. Call-in records;
14. Trip check-in or financial settlement sheets.

#### **D. TRIAL**

The trial of your case must be meticulously planned and implemented. Pretrial motions, including Motions in Limine and Daubert/Kumho Tire Motions will define the scope of your trial.

One of the most important considerations for the trial of your case will be the preparation of your jury instructions. Jury instructions will help convince the jury of what law or regulation has been violated. You should seek jury instructions on each and every violation of ordinary negligence that applies, but more importantly, you should seek jury instructions on all Federal Motor Carrier Safety Administrations regulations which have been violated. The jury instructions sought should be prepared prior to the commencement of trial.

Review and critique all deposition testimony. Video deposition testimony is far more useful than a normal written transcript. During discovery, if you can obtain an admission against interest or an acknowledgement by a company manager that the truck

driver has violated some safety rule of either the Federal Motor Carrier Safety Regulations or a safety protocol of the company, then this particular piece of evidence can be played before the jury during examination of the witness and again in closing argument. Many trials are won or lost over a few words of a managerial witness admitting some safety violation of the company or its driver.

The analysis of the company's own safety manuals, protocols, training documents, and employee reviews is critical to winning your case. A thorough study should be made of the company's own safety related documents so that demonstrative exhibits may be made of all incriminating safety evidence.

Voir Dire must be drafted to inquire into the mind and heart of each and every prospective juror to determine their thoughts, philosophies, and self-learned teachings in regard to safety practices. Every attorney performing the jury selection process should inquire of jurors individually and not by panel questions. Many legal seminars teach attorneys to ask general panel questions with a showing of hands for all jurors in regard to a particular question. The inherent problem with questioning in this manner is that most of the jurors are shy and will refrain from actually responding appropriately to a given question. Thus, it is absolutely necessary that you question each and every juror for a moment of time independently of all other jurors on a particular subject. For example, you may ask an open ended question about whether or not the jurors have a particular thought against awarding pain and suffering. The usual panel response will be a lack of response from all jurors. Upon individual questioning, it is highly likely that you will find many strong personal opinions by individual jurors. While Mr. Jones may

fail to respond to an open ended panel question about his thoughts about pain and suffering, upon further individual questioning he may inform you that he has a personal philosophy and thought process which prevents him from awarding pain and suffering.

To obtain a proper perspective of each juror you must talk to him or her individually and openly. You need to inquire about all of their biases and prejudices because people do not admit that they are biased or prejudiced until you reach a nerve through a specific question to that particular juror. Your case and its final outcome will hinge upon your ability to select the appropriate jurors for your case.

The overall process of trying a trucking case will be lengthy and involved. Of necessity, you will be required to put on evidence of the regulatory violations. The first several days of trial will be devoted to proving liability and establishing violations of the regulatory framework of the Federal Motor Carrier Safety Regulations. It will require the use of experts to teach to the jury how the particular regulations have been violated. Defense counsel will retain experts who will testify that the regulations have been complied with while Plaintiff's counsel will testify how the regulations have been violated.

Experts in the trucking industry are in great demand by both sides and are extremely costly to both sides in the litigation process. Both sides may choose to utilize accident reconstruction experts plus a safety expert and/or regulatory expert. The cost of putting these experts on can be overwhelming to the normal lawyer. In a proper case, you should be prepared to spend at least \$50,000.00 to try your case from start to finish. The cost could easily exceed \$100,000.00 if done appropriately.

While many lawyers disagree on whether the opening or closing is the most important aspect of the case, it is quite certain that jurors remember the first and last things they hear. This does not mean that they do not listen to and focus on evidence in between, but psychological studies indicate the human beings retain the very first thought that comes into their review. Psychological studies establish that human beings and jurors will remember a fact more readily if they have a visual cue with the presentation of the evidence because visual evidence is remembered at a much greater rate than auditory evidence. Thus, the lawyer will want to prepare both the visual and auditory presentation prior to commencement of trial so that their combined effect is realized before presentation.

Your closing argument will result in the culmination of your efforts. Remember that evidence in your case may be overwhelming due to its size and complexity. Find the most important evidence. Magnify and explain it for the jury. Utilize your discovery to convince the jury you have been honest and forthright in the presentation of your case. Use your discovery to show them why you should win. If you have been successful in obtaining a managerial admission against interest plan it in closing for the jury.

As a final thought, address each and every fact for and against your client. Failure to address a relevant fact that could cause you to lose your entire case. One caveat to this rule is to not be led astray by opposing counsel's case.

Argue your position with zealous candor. Be certain you are right and your conviction will be heard.

