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EXPOSING THE TRUTH

LITIGATION TESTING IN THE COMMERCIAL VEHICLE CASE

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I spend a great deal of my practice handling product liability claims against automobile manufacturers. I have learned that litigation testing is a necessary fact of life for the product lawyer. A thorough understanding of how testing can be offered at trial is critical in these cases. The car companies certify their vehicles to Federal Motor Vehicle Safety Standards through crash testing and heavily rely on that testing in litigation to defend the product. These well-funded defenses routinely run litigation testing to counter plaintiff's expert's positions and we do the same to attack the defense positions. Moreover, even when attacking the credibility of the other side isn't the purpose of the testing, *Daubert* concerns about the admissibility of expert opinions many times require the experts on both sides of the case to support their positions at trial through litigation testing.

A few years ago, I found myself handling an increasing number of commercial vehicle cases, especially those involving tractor trailer trucking wrecks. Without fail, at some point in the case, the defendant tractor trailer driver comes up with some ridiculous excuse as to why the accident occurred. Sometimes the positions raise their ugly heads during interrogatory responses, but mostly, the truck driver offers them for the first time at deposition. I always wonder if this is planned out or off-the-cuff excuses for a horrible tragedy.

A thorough understanding of how testing can be offered at trial is critical in these cases.

The first time I faced this was in a case where the defendant driver made a left hand turn from the center lane of travel and hit my client who was also to his left. He claimed my client was speeding in the lane to his left and that the lane would have been clear but for my allegedly speeding client. The logical question I asked at deposition was, "Why were you turning from the center lane?" The driver's response was unexpected.

This defendant truck driver explained that it was impossible to make the turn in his truck from the left lane. He further went on to lecture me that not only did he always make the turn from the center lane, but that every truck driver who took that route did the same thing. To finally drive the nail in my coffin, Mr. Driver then tells me that the police in this small town allow these turns from the center lane to assist the drivers in this impossible task of making the left turn.

I left the deposition realizing that I had a serious issue that needed to be addressed. Even though this case was pending in Alabama where such turns

are statutorily prohibited, the driver's turn was not negligence per se. Even worse, I could see a conservative jury buying this argument. My instincts kicked in, and I immediately began devising ways to disprove this position. Surely, it wasn't impossible I thought.

I hired a commercial motor vehicle expert who had a commercial license and could operate a tractor trailer. We rented an exact truck, and by exact, I mean the same year, make, and model. I then took a video camera and set out to film my expert make the turn the defendant driver had said was impossible. It turns out the "impossible turn" defense was a complete fabrication. We made the turn multiple times with no problem. The driver really did me a favor by throwing in that all the other drivers made that left turn the same way he did. While we were videoing our expert, we were fortunate enough to video several other drivers make the same turn from the left lane with no problem. Even though the other drivers were driving different trucks and carrying different loads, it was relevant to counter the defense's assertion that everyone did the same thing.

Producing this video tape at my expert's deposition was the end of the case. The defendant driver lost all credibility, and since I had also gotten the trucking company's safety director to agree with the impossible left turn defense, the defense was left with zero credible witnesses and no solid theory to rebut our allegations. The litigation testing I conducted in that case disproved the defendant driver's ridiculous excuse and resulted favorably for my client.

The success I had with litigation testing in that case led me to use litigation testing in almost all of the trucking cases I have handled since that time. The key to litigation testing is finding the issue. I recently heard that every case is about something. Our job as lawyer is to find out what that something is and then take hold of that issue for your client. I've learned that litigation testing in a tractor trailer case can do just that under the right conditions.

It is often difficult to have litigation testing admitted into evidence. To comply with the evidentiary hurdles, a product lawyer must first decide what the litigation testing is trying to accomplish. Then, the lawyer must devise a plan for the litigation testing that anticipates any problems with admissibility. In my case above, it wasn't enough to have a truck make the turn. I needed the same truck, with the same load, traveling at the same speed, and under the same driving conditions. Obtaining that information takes planning through discovery.

A product lawyer can offer litigation tests for multiple purposes. A lawyer can use litigation testing to recreate the event or to illustrate physical principles in play. The evidentiary standards are different. This is an oversimplification, but a recreation usually is attempting to show the full event of what happened. An illustration is a small piece of the puzzle.

Recreation Testing

The evidentiary burden is raised if the purpose of the test is to recreate the accident or some aspect of the accident. The most important hurdle when doing this type of litigation testing is making sure what you are showing in your test is substantially similar to the actual events. It is well established that "[a] test is not admissible unless the test conditions are so nearly the same in substantial particulars (as those involved in the episode in litigation) as to afford a fair comparison in respect to the particular issue to which the test is directed.[1]"

In *Gladhill v. General Motors Corp.*, 743 F.2d 1049 (4th Cir. 1984), the District Court allowed GM to show the jury a videotape of a braking test that GM had conducted. The jury's verdict was for GM. On appeal, the plaintiffs argued that the District Court had erred because "the conditions of the re-enactment were not substantially similar to the incident as alleged in the complaint.[2]" GM responded that "similar circumstances [were] unnecessary because the test was not a re-enactment of the accident but rather a 'demonstration of certain operating characteristics of the vehicle in question.'[3]" *Id.*

In reversing the District Court's admission of the videotape, the Fourth Circuit stated in part as follows:

> [T]he tances of the accident, as alleged, are so different from this test as to make the results largely irrelevant if not misleading. It is elementary physics that automobiles traveling downhill with their front wheels turned do not behave the same way with their brakes locked as those traveling on a flat surface with their front wheels straight. Thus, we are persuaded that evidence of this test should be excluded entirely on retrial.[4]

The United States Court of Appeals for the District of Columbia issued an opinion on "test evidence" in *Hall v. General Motors Corp.*, 647 F.2d 175 (2nd Cir.1980). In *Hall*, GM conducted a series of tests "[a]s part of its massive effort to disprove" plaintiff's theory.[5] In excluding GM's testing, the Court noted:

> Judge Green's central concern, in ruling on GM's tests, was to keep from the jury experiments conducted under conditions not sufficiently similar to the circumstances surrounding the accident. **A test is not admissible unless the test conditions are 'so nearly the same in substantial particulars (as those involved in the episode in litigation) as to afford a fair comparison in respect to the particular issue to which the test is directed.'[6]**

The Fourth Circuit Court of Appeals has also upheld the exclusion of tests where the conditions at the scene of the accident were vastly different from any test performed by the parties' experts.[7] The Circuit's analysis was quite straightforward:

In the case before us, the Chase car was going downhill, the test cars were on a flat surface; the Chase car was on a road covered with ice and snow, the test cars were on roads either dry or merely wet or damp; the Chase car was turning slightly to the left at the time the brakes were applied, the test cars were steered in a straight line; the Chase accident occurred in subfreezing temperature, the temperature at the tests was not subfreezing; and Chase applied the brakes instinctively to stop as quick as he could, the drivers of the test cars applied measured force to the brakes. Thus, the conditions of the tests performed ... were so dissimilar to the conditions existing at the time of the accident "... in such fundamental and important respects that the risk of prejudice ... outweighed the probative value of the evidence.[8]

Making sure that what your test depicts is substantially similar to the actual event is of critical importance. That is not to say that the testing must be exactly similar, substantial similarity by definition is not exactly the same. The jury must be able to compare what is shown in the test and then make a fair judgment as to the actual incident.

We recently handled a case where our client was a truck driver who started out as a defendant. Another trucker had hit him from behind while our client's tractor trailer

was stopped in the roadway. The impact killed our client so we were never able to ask him what had happened. Our client had put out two of the required warning triangles prior to his death. We initially believed our client's vehicle was disabled since his vehicle was stopped in the middle of the roadway, but mechanical inspections failed to reveal anything wrong with the tractor trailer. This case posed a serious problem. Our client was in violation of the law in several aspects, including blocking the roadway and failing to appropriately warn oncoming traffic.

We decided to conduct litigation testing to show that the tractor trailer that hit our client from behind should have been able to see his disabled vehicle and avoid the crash. The collision occurred on the interstate so getting access to the interstate was a problem. This was necessary to satisfy the substantial similarity doctrine. Fortunately, the state highway patrol agreed to shut down the roadway so that we could conduct our litigation testing.

We then rented two exact tractor trailers and hired two truck drivers. We placed our client's tractor trailer in the roadway with two emergency triangles. We then took the second tractor trailer and made the approach. We made sure the lighting conditions were the same with regard to known surrounding traffic as well as natural lighting from the moon and stars. We approached the parked tractor trailer at the same speed that was shown on the electronic control module. Our testing revealed that an alert truck driver would have seen and avoided the stopped tractor trailer in the roadway. That testing turned the outcome of that case.

Underlying Principles of an Expert's Opinion

It isn't always necessary to show substantial similarity. Litigation testing is often used to support or discredit an expert's opinion. Usually, this happens when experts disagree on an issue. For example, one expert might say the brakes react in a certain way and the other expert disagrees. One expert might say the driver had time to avoid the crash and the other disagrees. Testing to prove or disprove principles underlying an expert's opinion need not meet the substantial similarity test.[9] However, when this type of testing is admitted into evidence, it should "be made clear to the jury that even though there is not similarity to the events of the accident that the information is received on a theoretical basis for the limited purpose for which it is offered.[10]"Hankins v. Ford Motor Co., 437 F.2d 276 (3rd Cir. 1970); Miller's National Insurance Co. v. Wichita Flour Mills Co., 257 F.2d 93 (10th Cir. 1958). Even though illustrative testing is not held to the substantial similarity standard, it is scrutinized beyond a mere relevance standard due to the highly persuasive nature of films.[11]

We have run tests to show the time, distance, and space needed to change lanes in a particular truck. We didn't feel we needed to do it on the same road, but a similar road sufficed. We did use the same vehicle. We have run tests to determine the stopping distance of a particular vehicle. In those cases, the vehicle and roadway should be similar. It probably isn't as important that the lighting or traffic conditions be the same.

I once had an expert who opined about that a truck could come to stop in a certain, but relative short, distance. The defense expert disputed our opinions on the distance it required for this truck to stop and we ran a rebuttal test to counter his opinions. In that case, there were some similarities we needed to the actual incident but others were less important. It was important that the truck was the same and that the load was the same. The type and grade of the roadway needed to be the same. Things like lighting and traffic conditions were not as important simply to determine what certain types of brake marks looked like on the road.

I've found that credibility is critical in every trial. The role of the impartial jury is to listen to both sides, apply the law, and determine which side should win. I've seen testing in commercial vehicle cases prove the other side wrong and sometimes, reveal the other side's untruthfulness. When testing is done correctly, it can make or break your case by building the credibility of one witness and tearing apart the credibility of the other witness.

(Endnotes)

1 *Hall v. General Motors Corp.*, 647 F.2d 175, 180 (D.C. Cir.1980); quoting *Illinois Central Gulf R.R. v. Ishee*, 317 So.2d 923, 926 (Miss. 1975); *See also Barnes v. General Motors Corp.*, 547 F.2d 275, 277 (5th Cir. 1977).

2 *Gladhill v. General Motors Corp.*, 743 F.2d 1049, 1051 (4th Cir. 1984).

3 *Id.*

4 *Id.* at 1051-52.

5 647 F.2d at 180.

6 *Id.*; quoting *Illinois Central Gulf R.R. v. Ishee*, 317 So.2d 923, 926 (Miss.1975), quoted with approval in *Barnes v. General Motors Corp.*, 547 F.2d 275, 277 (5th Cir. 1977).

7 *Chase v. General Motors Corp.*, 856 F.2d 17 (4th Cir. 1988).

8 *Id.* at 19-20.

9 *See Hinkle v. City of Clarksburg*, 81 F.3d 416 (4th Cir.1996); *Brandt v. French*, 638 F.2d 209, 212 (10th Cir. 1981).

10 *Brandt*, 638 F.2d at 212 (citing *Hankins v. Ford Motor Co.*, 437 F.2d 276 (3rd Cir. 1970); *Miller's National Insurance Co. v. Wichita Flour Mills Co.*, 257 F.2d 93 (10th Cir. 1958)).

11 *Id.* (citing *Sanchez v. Denver and Rio Grand W. RR. Co.*, 538 F.2d 304 (10th Cir. 1976), cert. denied, 429 U.S. 1042, 97 S.Ct. 742, 50 L.Ed.2d 754 (1977)).

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Chris is a Shareholder with the Beasley, Allen law firm in Montgomery, Alabama. He has dedicated his practice to protecting the rights of victims and survivors of catastrophic personal injury and wrongful death. An AV Preeminent Lawyer, he has represented injured individuals and their families in a wide range of serious injury and death claims, including those that were the result of commercial trucks, defective products, and aviation accidents. Chris has been chosen for membership in Alabama's Superlawyers magazine as a Rising Star for the last four years. Chris graduated from Cumberland School of Law and his law firm, Beasley, Allen, recognized him as the 2011 and 2013 Product Liability Lawyer of the Year.

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