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How to Effectively Refute Damages in Trucking Cases

I. Liability Defenses to Minimize Damage Exposure

With the exception of four states [Alabama, Maryland, North Carolina, Virginia] and the District of Columbia, each state employs some type of comparative fault system [pure or modified] which permits a reduction of damages based on the negligence of the plaintiff. (*See e.g.*, Fla. Stat. Section 768.81(3), "In a negligence action, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.") Certain states also permit the jury to apportion fault to a non-party tort-feasor. (*See e.g.*, Fla. Stat. Section 768.81(3)(a).)

In light of the potential applicability of comparative fault or ability to apportion fault to a non-party, the prospect of reducing damage exposure in trucking accident cases should be considered when asserting and establishing liability defenses at the outset of the litigation and/or exploring liability defenses during any pre-suit investigation. Therefore, specific focus should be employed to determine whether the plaintiff (or any non-party) may have been at fault for the subject accident. For example, this would include a finding that the plaintiff was not operating his/her vehicle properly or if the plaintiff's vehicle contained any type of equipment malfunction such as non-functioning brake lights. To the extent a state permits apportionment of fault to a non-party, investigation should also be focused on whether fault can be apportioned to any other individuals or entities who may have contributed to an accident. This possibility frequently exists when there is an accident involving multiple vehicles and one of the drivers, who is not a party, may have initiated the accident (e.g. non-party driver stopping short or cutting off plaintiff's vehicle which caused the truck operator to impact the plaintiff's vehicle).

Attention should also be focused on whether the plaintiff was under the influence of alcohol, illegal drugs, or medications at the time of the accident which can be used to either apportion fault or bar a plaintiff's recovery. For example, under Florida's "Alcohol or drug defense" [Fla. Stat. Section 768.36(2)], a plaintiff "may not recover any damages for loss or injury to his or her person or property if the trier of fact finds that, at the time the plaintiff was injured: (a) The plaintiff was under the influence of any alcoholic beverage or drug to the extent that the plaintiff's normal faculties were impaired or the plaintiff had a blood alcohol or breath

alcohol level of 0.08 percent and higher; and (b) As a result of the influence of such alcoholic beverage or drug the plaintiff was more than 50 percent at fault for his or her own harm."

Another avenue for exploring potential comparative fault is whether the plaintiff was wearing a seat belt at the time of the accident. Fifteen (15) states have some mechanism in place which could result in reduction of plaintiff's damages for not having a seat belt on at the time of an accident. [Alaska, Arizona, California, Colorado, Florida, Georgia, Iowa, Michigan, Missouri, New Jersey, New York, Ohio, Oregon, West Virginia, and Wisconsin]. These states have adopted a "seat belt defense" either by common law or, specifically by statute, which permits the introduction of evidence that the plaintiff was not wearing a seat belt in order to allocate fault by the jury. (*See e.g.*, Fla. Stat. Section 316.614(10) stating that evidence that one failed to wear a seatbelt "may be considered as evidence of comparative negligence, in any civil action"; *see also* Cal. Vehicle Code Section 27315(i), providing that "In a civil action, a violation of [the seat belt use law] does not establish negligence as a matter of law or negligence per se for comparative fault purposes, but negligence may be proven as fact without regard to the violation.")

Another factor to consider when defending liability in a trucking accident case, which may ultimately impact potential damages exposure, is ensuring that the truck operator is not held to a professional standard or to a higher duty of care than the law provides. A truck driver should not be confused with a "professional" such as a medical doctor, attorney, or accountant, which would be subject to that degree of care measured by other such professionals. Rather, truck operators should be held to an ordinary negligence standard of care. For example, in Florida, reasonable care is that degree of care, which a reasonably careful person would use under like circumstances. Negligence may consist either in *doing something* that a reasonably careful person would not do under similar circumstances or *in failing to do something* that a reasonably careful person would do under similar circumstances. (*See* Florida Standard Jury Instructions (Civil) Section 4.1.)

II. Obtaining Information Before Conducting Plaintiff's Deposition to Challenge Claimed Damages

Serve Targeted Written Discovery Before Plaintiff's Deposition

There is no question that conducting the plaintiff's deposition is one of the most important moments during the pretrial discovery phase in a trucking accident case. It is the one opportunity defense counsel gets to learn (and challenge) plaintiff's "story" as to how the subject accident allegedly occurred and to discover plaintiff's claimed damages. However, before conducting the plaintiff's deposition one should already be armed with sufficient information regarding plaintiff's claimed damages in order to ask the right questions. Therefore, it is paramount that defense counsel had already served targeted written discovery to the plaintiff concerning claimed damages prior to the deposition (and to also have received sufficient responses to the written discovery.)

Pursuant to the Federal Rules of Civil Procedure and most state civil procedural rules, a party has thirty (30) days to respond to written interrogatories and requests for production (*See e.g.*, Fed. R. Civ. P. 33 and 34). As such, defense counsel should serve targeted written discovery

to the plaintiff as soon as permissible to allow sufficient time to obtain plaintiff's responses and to take follow up action before conducting the plaintiff's deposition (e.g. moving to compel better answers).

Although defense counsel may have a general sense of what a plaintiff's claimed damages are before conducting any formal discovery upon receipt of the client's claim file, which can include a settlement demand letter and certain medical records, it is imperative that defense counsel propound interrogatories that specifically ask the plaintiff to list all claimed injuries and damages under oath. In this regard, interrogatories should specifically request the plaintiff to list each and every injury being claimed in the case and also to list each and every medical provider who has examined or treated plaintiff for the claimed injuries. Similarly, interrogatories should be issued requesting the plaintiff to itemize all claimed medical bills and out of pocket expenses, and to identify any asserted liens and their amounts.

Interrogatories should also be served requesting the plaintiff to list all medical providers who have examined or treated them for at least ten (10) years prior to the subject accident and the reason for same. From a damages perspective, many cases will come down to whether the subject accident caused or aggravated the claimed injury or if the claimed injury is pre-existing in nature. For example, did the accident cause the plaintiff's claimed lumbar disc herniation and back pain or was the disc herniation and back pain pre-existing? Obtaining the plaintiff's pre-accident medical records will assist in answering these questions and therefore a complete list of plaintiff's pre-accident medical providers needs to be obtained in order to issue subpoenas or medical authorizations to obtain these records. Particular attention should also be focused on identifying plaintiff's primary care physician (and obtaining his/her records) as this gatekeeping physician likely will have a complete chronology of any pre-accident injuries or health concerns and also the identity of any referrals (e.g. referrals to an orthopedist or spine specialist). Similarly, an interrogatory should be issued requesting the plaintiff to identify any health insurers so that a subpoena can be issued to the insurer to cross-reference whether the plaintiff has completely disclosed all medical providers.

To the extent a plaintiff is asserting a claim for past lost wages and loss of earning capacity, specific interrogatories should be propounded to require plaintiff to list his/her complete employment and earnings history and to also request that plaintiff quantify how they are calculating any lost wages.

Serve Targeted Requests for Production and Subpoenas Before Plaintiff's Deposition

Now that you have a complete list of plaintiff's treating physicians, pre-accident healthcare providers, and employment history, subpoenas should be issued to obtain all of plaintiff's medical and employment records before plaintiff's deposition. A medical chronology should also be created and updated upon receipt of all the medical records. A review of the medical records will provide the information needed to probe the plaintiff at his/her deposition to determine if the claimed injuries were causally related to the accident or pre-existing in nature. Arguably, many cases are won or lost upon finding the "needle in the haystack" buried in voluminous medical records. Additionally, a complete and thorough review of Plaintiff's pre-accident health history may also be relevant to determine life expectancy.

Focus should also be given to plaintiff's employment records to verify plaintiff's employment and the earnings information provided in answers to interrogatories. Likewise, defense counsel should obtain plaintiff's tax returns, W2's and 1099's for at least five (5) years before the subject accident. While the plaintiff may claim that the accident has caused him/her to be unable to work (or earn less money), a review of their prior tax returns will establish whether the plaintiff has been gainfully (and consistently) employed over the years and/or whether their yearly income has previously fluctuated. If so, plaintiff's claimed loss of earning capacity may simply be a result of the nature of his/her job as opposed to any alleged loss of income due to a physical injury or impairment.

Social Media Searches

Another way to obtain information to refute plaintiff's claimed damages is to conduct a detailed search of his/her social media accounts (Facebook, Twitter, Instagram, etc.) To the extent a plaintiff's social media accounts are "locked", request the court to order plaintiff to unlock it so that a complete search of same can be conducted. A review of plaintiff's social media accounts may show plaintiff being physically active after the subject accident notwithstanding his/her claim that the accident has prevented them from engaging in such activities. As they say, "a picture is worth a thousand words."

While social media information that reflects a person's physical condition, activity level, and emotional state is a particularly valuable source of discovery in trucking accident cases, defense counsel must take great care to collect that information ethically. In this regard, while ethical rules vary by state, defense counsel should not attempt to "friend" the plaintiff or otherwise communicate directly with a plaintiff represented by counsel. (*See e.g.*, ABA Model Rule 4.2, prohibiting communication with person represented by counsel.)

In addition to traditional social media accounts, defense counsel should also explore plaintiff's Fitbit and other wearables to refute damages of the injured party showing their activity, lifestyle before and after the accident.

III Conducting an Effective Deposition of Plaintiff

Typically, the deposition of the plaintiff is defense counsel's only opportunity to directly question the plaintiff prior to trial. If targeted written discovery and document requests were previously served as noted above, defense counsel should already be in possession of information necessary to prepare an outline of questions to ask the plaintiff concerning his/her claimed damages.

Get specifics on Plaintiff's Pre-Accident Medical History and Injuries

A good portion of the allotted time for the deposition should be spent inquiring about plaintiff's pre-accident medical history and injuries. A good way to start off the inquiry is to ask the plaintiff whether he/she has been involved in any prior accidents that resulted in injury. Has the plaintiff been involved in any prior motor vehicle accidents, slip and falls, or any workplace accidents? If so, get as many specific details about these prior accidents as possible. For example, if the plaintiff was involved in a prior motor vehicle accident, find out what model

vehicles were involved in the accident; the speeds of the vehicles; the damage the vehicles sustained; and whether plaintiff's airbag deployed. Also determine if EMS came to the scene to treat the plaintiff and whether plaintiff sought treatment at an emergency room or urgent care center. Questions should also be asked regarding whether plaintiff sought subsequent medical treatment. Did the plaintiff disclose these prior injuries and medical providers in his/her answers to interrogatories? If not, press the plaintiff as to why they were not disclosed.

The plaintiff should also be asked whether he/she has ever submitted any prior claims for personal injury or been a party in any other personal injury lawsuits.

Pin the Plaintiff Down on His/Her Claimed Injuries and Damages

The plaintiff should also be questioned as to what they are specifically alleging are their claimed injuries and damages in the case and what they allegedly cannot do now versus prior to the accident. Pinning the plaintiff down as to their claimed limitations will permit you the option of subsequently retaining an investigator to conduct video surveillance to potentially impeach the plaintiff at trial.

Determine if Plaintiff has been Involved in any Subsequent Accidents or has Failed to Mitigate Damages

In addition to obtaining information regarding a plaintiff's pre-accident injury and medical history, questions should also be asked concerning whether the plaintiff has been involved in any subsequent accidents. To the extent a plaintiff was involved in a subsequent accident, there may be a viable causation and/or intervening/superseding cause defense. Further, questions should be asked as to whether the plaintiff followed the advice of their treating doctors to potentially establish a failure to mitigate damages defense. Did the plaintiff complete all of the physical therapy recommended by his/her doctor? Did the plaintiff engage in any strenuous activities prior to when their doctor permitted same? Did the plaintiff use the recommended orthopedic device as recommended by their doctor?

IV Retaining Appropriate Experts

Care should be given to retaining the most qualified and appropriate damages experts tailored to the case. For example, if the plaintiff is claiming that the subject accident caused a lumbar disc herniation that will require a lumbar fusion surgery, a spine specialist should be retained to conduct an Independent Medical Examination as opposed to a general orthopedic surgeon. If a plaintiff is claiming a traumatic brain injury resulted from the accident, a neurologist and neuropsychologist should be retained to evaluate the plaintiff with the neuropsychologist administering neuropsychological testing.

In addition to medical experts, retention of a biomechanical engineer should be considered to discuss whether the force of impact in the accident could have caused plaintiff's claimed injuries. This is especially true when the evidence reveals minimal damage to the vehicles involved in the accident.

If the plaintiff is claiming significant injuries have resulted in the inability to work, consideration should be given to retaining a vocational rehabilitation expert to rebut any such claim. Additionally, retention of an economist should be considered to rebut the plaintiff's economist or provide guidance in cross-examining plaintiff's expert economist.

V. Mediation

Are Truckers still viewed as heroes of the road? Assuming they are not, mediation should be considered

As any seasoned trial attorney can attest, no case is perfect and juries are always unpredictable. It is therefore not surprising that most civil cases resolve before trial. (*See* "Study Finds Settling is Better Than Going to Trial", *New York Times*, Aug. 7, 2008, Jonathan D. Glater.) In this regard, defense counsel should also be cognizant of how truckers are viewed by the public (and ultimately a jury). Are truckers still viewed as heroes of the road? Assuming they are not (in addition to the other risks associated with proceeding to trial), mediation should be considered.

In addition to cash, resolution at mediation can also be accomplished with the use of structured settlements, and in wrongful death cases, naming a perpetual scholarship in the name of the deceased. Additionally, the use of anchoring offers based upon actual damages, medical bills, earning capacity and future care should be considered.