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Negligent Entrustment

by Paul Farrell

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Author's Note: Disclaimer—The author is not an attorney, and the information contained in this article is not to be considered legal or professional advice.

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The pursuit of negligent entrustment verdicts in the aftermath of commercial auto claims is unsettling for policyholders and defending insurers. Settlements are often large, and judgments can often include punitive damages. In effect, the pursuit of a negligent entrustment verdict is a second claim for the same collision event—the first claim is that of negligence on the part of the driver, but the second is against the management team for having entrusted the vehicle to the driver. Fortunately, there are basic steps that management teams can take to guard against the allegation of negligent entrustment.

What Does Negligent Entrustment Mean?

In simple terms, negligent entrustment means to charge someone with a trust or duty in an inattentive or careless fashion or without completing required process steps.

In commercial vehicle operations, a case of "negligent entrustment" may arise when someone allows another person to use a vehicle knowing, or having reason to know, that the use of the vehicle by such person creates a risk of harm to others.

There are two other theories of employer liability that are closely related to negligent entrustment: *respondeat superior* and *negligent hiring*.

Simply stated, *respondeat superior* holds an employer responsible for the conduct of an employee while the employee is acting within the scope of his or her employment.

Negligent hiring holds an employer responsible for the conduct of an employee if the employer failed to use due care in hiring and retaining such employee. An example of a circumstance involving negligent hiring would be the employer's failure to check a driver applicant's driving record where it would have revealed a poor driving history.

In the case of commercial vehicle operations, charges of negligent entrustment often arise after a collision where the employee or contractor was dispatched on a run without due regard for his or her qualification/ability to safely operate the vehicle.

Although the driver's own negligence in causing the accident is usually the primary issue, the two main focuses of investigation of a negligent entrustment charge are your company's policies and practices. Basic questions are asked: Did your company have a policy regarding driver selection and training? Did your management team actually adhere to the terms and conditions of that policy?

What Elements "Make Up" Negligent Entrustment?

There are several issues that are examined in a case or claim alleging negligent entrustment:

- The driver must be incompetent.
- The employer knew or should have known of this incompetence.
- The employer must have entrusted the vehicle to the driver.
- The driver was negligent on the occasion in question.
- The driver's negligence proximately caused the crash.

Let's examine each of these five issues in more detail.

How Can It Be Shown that the Driver Is Incompetent?

Cases in many jurisdictions have focused on establishing the minimum

Continued on page 2

Negligent Entrustment

Continued from page 1

competency of drivers by using the Federal Motor Carrier Safety Regulations (FMCSR) as a reference. In simple terms, these regulations require that a driver:

- be of legal driving age for the state where his or her license was issued
- be able to read and speak the English language
- by reason of experience or training, be able to safely operate the vehicle
- by reason of experience or training, be able to determine whether the cargo is securely loaded
- be physically qualified to operate the vehicle
- hold a valid driver's license
- complete an application form for employment
- complete a driving test in the type of vehicle the applicant is expected to operate and be deemed qualified to operate the vehicle (have not committed a criminal offense)

A complete review of the FMCSR is beyond the scope of this document.

Although enacted to govern companies that are under the authority of the Department of Transportation (DOT), the Federal Motor Carrier Safety Regulations are increasingly being referenced as a benchmark to measure the qualifications of a "professional driver" (a person with driving as a regular part of his or her job duties). When allowed as evidence in cases involving companies who are not under the authority of the DOT, this principle can make a big impact on the outcome of a court decision.

Of course, the easiest method of demonstrating a driver's incompetence is a long history of traffic violations and/or collisions.

How Can It Be Shown that the Employer Knew or Should Have Known of the Driver's Incompetence?

Typically, all pertinent employment records of the driver will be reviewed by the plaintiff's counsel. They will also do a thorough investigation of the driver's background, including his or her driving record. If the employment records do not contain an accurate and complete driving history of that employee, then the plaintiff's attorney will assert that the employer "knew" or should have known of the incompetence. If the plaintiff's counsel independently discovers records indicating incompetency, then the employer should have been able to discover the same knowledge.

How Can It Be Shown that the Employer Entrusted the Vehicle to the Driver?

If the driver is performing within the scope of his or her job duties and the vehicle was not taken without permission, the vehicle has presumably been entrusted to the driver by the employer.

How Can It Be Shown that the Driver was Negligent on the Occasion in Question?

An investigation of the accident scene, interviews with the parties involved and witnesses, and other evidence, such as a citation issued to the driver, can be used to prove a finding of negligence.

How Can It Be Shown that the Driver's Negligence Proximately Caused the Crash?

There are several ways that this may be established, often involving investigations by "expert witnesses," but a simple test is to determine whether the driver was issued a citation, was criminally charged, or otherwise ruled to have been "at-fault" after a presentation of evidence.

What Can My Company Do to Reduce Our Exposure?

There are several areas of a human resources and safety program that should be examined:

- driver recruiting and selection practices
- new hire evaluation and orientation
- ongoing driver review and training
- post-accident reviews and training

Driver Recruiting and Selection Practices

How your company attracts and then selects drivers is very important. Regardless of negligent entrustment allegations, it just makes good business sense to attract and hire the very best candidates for the job.

When recruiting drivers, you should make it clear in the advertisement that the position requires driving, and that candidates, in order to be qualified, should possess certain qualifications. These qualifications should be spelled out in detail to avoid interviewing unqualified prospects. These qualifications will vary from job to job, but examples could include:

- Possess a valid drivers license.
- Possess a specific type of license (i.e., commercial license with applicable endorsements).
- Have a clear Motor Vehicle Record.
- Have experience operating a vehicle similar to the one that they will use on the job.

Some companies may need to focus on selecting people for their technical skills or sales skills as a first priority, and then consider their driving ability. In this situation, the company should set and follow certain standards for driving ability: if the person can not meet those standards, he or she will not drive. If he or she meets the minimum standards, but is considered "conditional" (i.e., the candidate could fall below the standard with one new violation or accident), then a training and monitoring plan should

be enacted to enhance driving skills and to watch for inappropriate risk-taking behaviors that could endanger the driver or the public.

Companies with multiple locations that do not have centralized control of recruiting and hiring need to conduct audits to be sure that corporate guidelines are being carried out at every location. Exceptions to existing guidelines should not be tolerated.

Management teams should review their driver recruiting and selection practices annually to be sure that they continue to attract a suitably qualified driver for each position. The review should also note any changes in position descriptions, especially if driving time increases or is added to a position's responsibilities. Changes in state or federal regulations affecting the position should also be reviewed and incorporated into company policy as needed.

The "bottom line" is this: job requirements need to be clearly communicated, and only qualified candidates should be placed in those jobs.

New Hire Evaluation and Orientation

Once an employee has been hired, additional verification of qualifications may be necessary. Medical reviews, drug and alcohol screening, road testing, and other types of required evaluations may need to be completed in order to meet state or federal regulations. Any newly discovered shortcomings should be documented and addressed. For example, a driver who demonstrates inappropriate behaviors during a road test should receive documented training aimed at improving those demonstrated behaviors. If a driver has serious problems in this phase, he or she should not drive until the issues have been fully rectified.

Management also has an opportunity to provide some type of indoctrination to the duties and expectations that come with the job. This may be accomplished in a number of ways:

- deliver a "driver handbook"
- deliver an "employee manual"
- provide classroom instruction

If delivering written materials, the employer should have the employee sign an acknowledgment that he or she has received the manual and is required to read it. It may also be necessary to follow up with each employee at a later time to verify that the manual has, indeed, been read.

Management should monitor their driver orientation, testing, and training programs to be sure that poor driving behaviors are discovered and addressed promptly. Periodic review of the effectiveness of the programs will ensure that programs that are becoming outdated can be replaced.

For a multi-location company, periodic reviews of each location should occur to make sure company evaluation and orientation standards are followed consistently.

Ongoing Driver Review and Training

It is not prudent to qualify a driver only once, at the time of hire, and then never revalidate his or her qualifications. People change over time, and so do their habits. Drivers who are subject to the Federal Motor Carrier Safety Regulations need to participate in an annual review of their performance conducted by their employer. This often includes obtaining an up-to-date motor vehicle record (MVR) from the driver's state of license.

Companies that are not subject to the authority of the DOT should carefully consider implementing some form of annual review. This may be as simple as obtaining an updated MVR on each driver or as extensive as holding a formal performance review that includes annual road tests designed to validate behind-the-wheel performance.

Ongoing training is also helpful in maintaining safety awareness among drivers. Training can take on many forms:

- skill training delivered via audio cassette (while operating the vehicle)
- video training programs (classroom)
- self-led training programs (at home)
- oral presentations by management or technical expert (classroom)

Other awareness-building opportunities exist via safety posters, newsletters to drivers, and safety announcements in payroll checks.

Training shows a commitment to safety by management, but should be carefully documented to verify, precisely, which drivers actually attended and/or completed the coursework.

Post-Accident Reviews and Training

Most companies have established specific accident reporting procedures. Typically, a driver completes a recordkeeping kit at the scene of the collision, and then reports the details of the crash to a supervisor at his or her home terminal/location. Follow-up investigations may be completed by special teams, committees, specially trained managers, or experts.

Although the purpose of these investigations is not to establish blame or fault, the records associated with the investigation may appear to do so. These records could become evidence especially if the driver in question has had multiple accidents that have been investigated.

The process is important to improving safety by understanding why accidents happen. The investigations should not be abandoned simply because the report may be discoverable. Investigators should exhibit care when documenting their case to avoid humorous remarks that could be misinterpreted, and they should keep the file and its contents confidential.

Continued on page 4

Negligent Entrustment

Continued from page 3

Additionally, when it becomes clear that a lawsuit is being filed, the records should be secured to ensure their availability.

The results of any investigation should be carefully considered by management. If a gap in safety procedures is found, an action plan to correct the deficiency should be made and carried out. Ignoring the report's conclusions invites trouble by potentially painting a picture of management as indifferent toward safety results.

If the driver was responsible for the accident and specific behaviors or a lack of knowledge/ability was involved, plan and enact a driver-specific action plan. This might include driver training or coaching by a supervisor. Again, to ignore skill or knowledge gaps may reflect poorly on management's commitment to safety.

What About Contracted Employees or Loans of Vehicles to Non-Employees?

Contracted employees who operate company-owned/leased vehicles could expose your company to allegations of negligent entrustment. Examples of this type of situation could include:

- a contracted security guard who uses a company pool car for patrols
- a temporary employee (from an employment service) who takes a car to the post office
- a temporary employee (from an employment service) who makes deliveries
- a maintenance contractor who needs to run out for a part or another location to do work
- transportation operations who contract with owner operators or run on other companies' DOT rights
- trip leasing

If this exposure exists, qualify the operators of the vehicles, or avoid the risk.

Similarly, providing company vehicles to non-employees represents a risk to your company. Although the entrusted person is not acting within the scope of employment for your firm, your company's vehicle has been made available for their use, and their qualifications should be evaluated.

What was perceived as a harmless use of the vehicle can be potentially damaging, e.g., loaning a delivery vehicle on the weekend to accomplish a household move to a new residence.

Another potential exposure comes from permitting spousal use of company cars without attempting to qualify their driving ability/history. If you haven't seen the benefit of a corporate vehicle use policy until now, there is no better justification than the issue of negligent entrustment!

Summary

Negligent entrustment and its associated theories of liability can lead to costly litigation. Effective safety and qualification programs are critical to avoiding these types of litigation, and top management's commitment to make these programs produce results; your firm may be able to avoid unfortunate outcomes.

Additional resources and information are available through your insurance carrier, trade associations, and specialty firms that provide products and service to the fleet industry. ■

"No Injury" Class Actions

by Kenneth Ross and Patrick L. Arneson

Editor's Note: This article "'No Injury' Class Actions" by Kenneth Ross and Patrick L. Arneson originally appeared in the December 2005 issue of *Risk Management Magazine*. This article is reprinted with permission from *Risk Management Magazine*.

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When many people think of lawyers, ambulance-chasing plaintiffs attorneys' often come to mind. But potential defendants have perhaps more to fear from attorneys who marshal millions of consumers into massive lawsuits where there are no ambulances—and no injuries.

Business entities have not always had to contend with such claims. Product liability and tort litigation have traditionally been based on one or a few consumers or bystanders suffering injury or damage.

Decades ago, however, the concept of mass tort litigation evolved. Mass actions usually involve many plaintiffs who were injured in the same event by the same product (e.g., an airplane crash).

Over the years, class actions were created to allow multiple plaintiffs who were not injured in the same event by the same product to nevertheless band together in a singular lawsuit to sue the manufacturer and other liable parties—essentially allowing one plaintiff to sue on behalf of everyone who was injured. To further cash in on this concept, creative plaintiffs' attorneys began to file class actions where no one was actually injured or damaged. This has become the "no injury" class-action phenomenon.

Plaintiffs who have filed no injury class actions have generally done so under one of the following theories:

1. The possibility that a hidden defect will eventually manifest itself lowers the current value of the product, causing economic injury.

2. The possibility that the product will injure the consumer makes the consumer worried, causing emotional distress.

3. The manufacturer breaches its warranties, or acts fraudulently or unfairly, by promising a nondefective product but delivering a defective one.

4. Exposure to a hazardous substance (e.g., asbestos) causes injury at the microscopic level, even when the plaintiff has not yet suffered any observable effects.

In other words, no injury plaintiffs generally allege that some type of financial, emotional, or physical damage has or might occur, even if the product has not yet displayed any obvious defects, and even if the plaintiffs have not yet suffered any observable injuries or damages.

Many courts have rejected such arguments. For example, in *Wallis v Ford Motor Co.*, the plaintiffs alleged that their sport utility vehicles were diminished in value because they were prone to rolling over, but none of their vehicles had actually rolled over. The court dismissed the case. Similarly, in *Tietsworth v Harley-Davidson, Inc.*, the plaintiffs claimed that their motorcycles were diminished in value because the engines had the propensity for premature failure, but none of the engines had actually malfunctioned. The court dismissed the case.

On the other hand, some courts have allowed no injury class actions to proceed. In *Sutton v St. Jude Medical S.C., Inc.*, the plaintiffs claimed that a device connected to their hearts could fail. The court held that the increased risk from the device was an "injury in fact," even if the device had not yet failed. And in *DaimlerChrysler Corp. v Inman*, the court held that loss of value from purchasing a vehicle with defective seat belts constituted an actual injury, even though the seat belts had never caused any physical injury or property damage.

Because at least some plaintiffs have a chance of getting no injury class actions to a jury, and because such actions can be notoriously expensive to litigate and catastrophic for defendants to lose, some corporations have paid millions of dollars to settle lawsuits that they would probably win. In 1999, for example, Toshiba paid over $1 billion to settle a class action concerning an allegedly defective computer floppy drive that could, but had yet to, destroy data. These payouts are typically diluted among thousands or millions of class members, with each "injured" person receiving a small amount of money or noncash benefits such as repairs or discounts. Plaintiffs' attorneys, in contrast, collect millions of dollars in fees. As a result, settling no injury class actions often gives plaintiffs' attorneys, as opposed to class members, exactly what they want and encourages other attorneys to follow suit.

Defendants faced with no injury class actions can remove state lawsuits to federal courts in appropriate cases, oppose certification of the class, and move to dismiss. If the court certifies the class, the defendant may be able to appeal that decision before the case gets to trial. No injury class actions offer plaintiffs' attorneys the opportunity for lucrative fees without the work of chasing an ambulance. ■

Protecting Your Interests Following a Crash: Record Retention and Spoliation of Evidence

by Paul Farrell

Summary

Why is record retention an important or relevant issue to safety professionals and risk managers? A growing trend in lawsuit tactics focuses on "missing or lost evidence."

If your firm is sued for negligence in a vehicle collision and you can not produce the requested documents, physical evidence, or data files, some attorneys may raise the question **"why was the evidence not preserved to be presented?"**

This question, if not adequately addressed, could cast doubt on whether the evidence was purposely destroyed or "lost" to avoid placing a negative spin on your defense—even if there was no intention to hide or destroy evidence as part of a cover up.

Various fleet safety records (i.e. driver qualification files, maintenance records, log books, toll receipts, crash investigation reports) maintenance records, and physical evidence (i.e. broken brake lights, turn signals, headlamps, and brake system components) are typically cataloged, filed, and set aside when there is notice that a lawsuit is pending or likely some items may have already been discarded during routine document purging.

Many companies have determined that record retention policies are an important mechanism to protect the organization's rights in the event of a lawsuit related to a crash event, but are these policies up to date on "electronic data" sources and non-regulated documents such as toll receipts (often used to corroborate driver's log books, etc.)?

One of the factors, we believe, in the increased scrutiny of evidence is the ongoing introduction of onboard recorders and GPS units—rich sources of performance data that might prove or exonerate a case of negligence. Another possible factor is the widely published reports of various scandals related to destroying potentially damaging evidence.

This article, while not providing a complete review of many complex safety, risk management, legal, and human resource issues, is intended to raise your awareness of the need to periodically review your evidence preservation actions, record, and data retention policies. Of course, you should seek the advice of your organization's attorneys who can properly and more completely address specific recommendations that would benefit your company's processes and preparations for potential litigation. *(In plain English—"hey, we're* ***not*** *attorneys—we just thought you might want to get an introduction to these concepts.")*

Litigation Overview

What are the odds of your company becoming involved in a lawsuit over a crash? It's impossible to accurately predict the likelihood of your firm's potential involvement in litigation over a crash event, but there are some curious trends being reported that indicate that all motor transport firms may see more litigation in the coming years.

First of all, despite crash "rates" per million miles traveled being reported widely as coming down, the total number of fatalities and serious injury-related crashes remains very high. So long as there are tragic crashes, there is an ongoing supply of potential plaintiffs.

According to the most recent National Safety Council data, during 2003, motor vehicle collisions resulted in:

- 44,800 deaths
- 2.4 million nonfatal injuries

Interestingly, a report from the Bureau of Justice Statistics[1] suggests that at least some of these motor vehicle collisions are being translated into litigation events:

- The annual number of "tort cases" (tort cases involve plaintiffs claiming injury, loss, or damage resulting from a defendant's negligent or intentional acts) handled by U.S. district courts has averaged about 44,770 per year.
- Of these cases, roughly 20 percent have been related to motor vehicle collisions.
- Although plaintiffs prevailed in nearly half (48 percent) of the tort cases completed by trial in 2002–2003, as many as 98 percent of all tort cases were settled out of court.

A trend in litigation has been seen in data compiled by the Public Policy Institute of New York State:[2]

- The number of motor vehicle tort filings in state Supreme Court increased from 22,108 in 1988 to 41,668 in 1996—an **88 percent** jump. Motor vehicle cases rose every year and accounted for nearly two-thirds of the increase in all tort filings in New York during that period.
- These increases would be understandable if matched by some equivalent increase in car crashes—or, at the very least, in car accidents involving personal injuries. Instead, motor vehicle accident and tort filing rates have moved in precisely opposite directions, with fewer accidents but *more* lawsuits.

Based on this type of trend toward more litigation, the odds are increasing that your firm may eventually become involved in litigation in the future.

The old adage, "an ounce of prevention is worth a pound of cure," remains valid—taking steps to reduce the risk of collisions occurring is critical, but preparing to deal with the aftermath of such a collision is also worthwhile.

Retention of Documents versus "Spoliation"

How long does your firm retain basic documents that might have a potential bearing on a court case related to a collision?

If your fleet is subject to Federal Motor Carrier Safety Regulations (FMCSRs), there are specific retention periods for some common documents.

For example, "Hours of Service" records need to be retained for six months, and then may be destroyed or discarded based on the regulations. While this helps keep the amount of documents manageable for the purposes of audits and management oversight of driver activities, it also balances the need for "housekeeping" by allowing the records to be purged.

Many firms have formal practices and policies dealing with document retention and purging. This housekeeping process can really help to keep file size manageable, especially for larger firms.

However, there are two concerns that many firms need to address:

1. Does the formal retention program extend to all types of documents or only certain types (ie documents required by regulation).

2. Does the program have a built-in exception process to "set aside" records as soon as the potential of litigation (related to a specific driver and his or her vehicle) is recognized by the management team? That is to say, are the documents dealing with the crash isolated into a "do not purge" file once it is clear that a lawsuit is being pursued?

Some firms may immediately "freeze" all documents related to an affected driver and his or her vehicle following a crash if it:

- was judged to be a DOT reportable crash
- involved a fatality or serious bodily injury
- had other special circumstances (as defined by each company)

Some firms may wait to "freeze" information only when notice of a legal action has been received. Perhaps there are management teams that take an aggressive stance—"let's get rid of this in case it might hurt us"—as soon as a crash has been reported to their insurer.

According to Merriam-Webster's Dictionary of Law, **"spoliation"** ['spo-le-'a-shen] is:

1. the destruction, alteration, or mutilation of evidence especially by a party for whom the evidence is damaging

2. alteration or mutilation of an instrument (as a will) by one who is not a party to the instrument

We can't tell you what your company should do to avoid allegations of spoliation (remember we're not attorneys), but we are interested in motivating you to look at your current practices and consider talking with your counselor proactively.

Also, we are interested in examining what could possibly be included as "evidence."

Physical Evidence

Besides paper records, what happens to damaged parts after they've been replaced? Are they retained or discarded? Are photos kept of the vehicle's appearance prior to repairs being started?

We're not sure what the "right" answer is for your firm, but are you asking these questions of your management team, and considering how you'd answer a plaintiff's attorney if he or she asks you why you can't produce these items for examination by reconstruction experts, etc.?

In-Vehicle Technology

Many forms of in-vehicle technology are being widely adopted to address safety, dispatch, or efficiency issues. Examples include: GPS tracking systems; computers in engines to monitor performance; onboard data recorders that track speed, sudden brake applications, etc., and even "camera-in-cab" systems that are specifically designed to capture video footage of crash events and "poor driving habits."

The introduction of new technologies is really just beginning.

Consider fatigued or drowsy driving—a highly dangerous situation that some researchers are trying to detect through onboard systems (to alert the driver to wake up and pull over to get some needed rest, etc.).

According to a recent report,[3] at least one research center is working on a drowsy-driver detection system that promises to "detect the differences between drowsy driver behaviors versus non-drowsy with 90 percent accuracy." That could be great news for tired drivers, but what happens when the data recorder says "yup, your driver dozed off right before he or she ran into the tour bus loaded with kids and senior citizens?"

Technology is great when it saves lives, and that cannot be overstated, but it may also paint a tough scenario to defend in court.

There are many compelling reasons to embrace these technologies, but the data records produced by these systems could be considered evidence.

It is possible that some of these systems automatically purge data when older files are "overwritten" or dumped to make room for new data files.

Again, the question of when to "freeze" data records (permanently save them to a special location to avoid purging) is one that requires special advice and a lot of thought.

While it's relatively easy to gauge how much space a set of paper files takes up a in a drawer, defining how much space a series of GPS recordings occupy on your hard drive may be a bit more tricky. In fact, some of the video files from "camera-in-cab" systems can be measured in multiple

Continued on page 8

Protecting Your Interests Following a Crash: Record Retention and Spoliation of Evidence

Continued from page 7

megabytes per individual event recording. (They could fill up your typical desktop computer quickly depending on what files you choose to retain, or you may need IT resources to share space on a network server, etc.)

Other technical questions can arise too. Can you retrieve all the data? Does your maintenance team have the tools to obtain the needed data and store it in a way so that it can be displayed on a standard computer? Is the computer where you store the data protected from viruses, and if the data is stored on media (ie CD-ROM, diskette, etc.) is it safely secured so that it is not lost or damaged?

What Now?—Form a Plan to Take Action

As we stated at the beginning, we can't possibly tell you what's best for your company, but we wanted to help you get thinking about these issues before you are in the middle of litigation and feeling overwhelmed.

There is a lot of information available (see below, with the usual disclaimers!) and remember that your best bet is to talk to your attorney that would likely handle your case (should one arise).

There are specialists who handle the defense of companies whose drivers were involved in collisions, and they can help you devise a strategy that is both up to date and appropriate for your company. ■

Endnotes

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