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The "Rules of the Road" Approach -- An Examination of a Plaintiff's Strategy for Proving Liability in Trucking Cases

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Staying abreast of plaintiff lawyers' strategies has become almost as important as knowing the FMCSA regulations. Several "trial guide" books have been published over the last few years, including: DAVID BALL ON DAMAGES, THE ESSENTIAL UPDATE, A PLAINTIFF'S ATTORNEY'S GUIDE FOR PERSONAL INJURY AND WRONGFUL DEATH CASES (2d ed. 2005); David Ball and Don Keenan, THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION (2009); and RULES OF THE ROAD – A PLAINTIFF'S LAWYER'S GUIDE TO PROVING LIABILITY (2d ed. 2010). Many of the authors of these books explain why they are willing to share their "top secret" advice. For instance, Dr. Ball, in DAMAGES, writes:

> This book is for Plaintiff's attorneys. Defense attorneys will be wise to eavesdrop.

The RULES OF THE ROAD authors are a bit more arrogant; they write:

> A final word: some have asked why write a book and possibly reveal these secrets to the defense bar. We believe there is no effective defense to this technique. (Pg. 5)

This article summarizes the "Rules of the Road" technique and hopefully suggests some strategies when confronted with plaintiff lawyers who use the method.

The "RULES" book presents a method of proving liability in all types of cases, not just auto cases. The title, "RULES OF THE ROAD," is meant to illustrate the need for the method. Most jurors know traffic rules, *i.e.*, the "rules of the road." The book uses that example to point out, that unlike driving a car, most jurors have no sense of the "rules" for common carriers, insurance companies, physicians, product manufacturers, and the like.

In a nutshell, the method attempts to put "meat on the bones" of what the authors deem esoteric legal terminology. In fact, the authors argue that the defense wields three weapons to defeat plaintiffs' cases that should be won -- complexity, confusion, and ambiguity. The reasoning is that if a jury is left wondering or undecided, the jury will tend not to find for a plaintiff. In fact, the authors even go so far to say that sometimes complexity, confusion, and ambiguity are part of a conscious defense strategy. (Pg. 2)

The avowed purpose of the book reads: "Ultimately, this book is about how to breathe life into ambiguous legal standards and create an indisputable standard for everyone – judges, juries, and defendants – to see. The standard must be as clear as a double yellow line on a highway." (Pg. 3)

What Are "Rules"?

The authors suggest that plaintiffs strategize by defining "rules" for proving their case. These "rules" are to be used in all facets of the case, including discovery, opening statement, and closing argument. The authors declare:

A Rule of the Road should be:

1. A requirement that the defendant do, or not do, something.

2. Easy for the jury to understand.

3. A requirement the defense cannot credibly dispute.

4. A requirement the defendant has violated.

5. Important enough in the context of the case that proof of its violation will significantly increase the chance of a plaintiff's verdict. (Pg. 22)

The theme provided by a "rule" is woven into written discovery, depositions, opening statement, direct and cross examinations, and summation. The "rule" is designed so that the company must concede the "rule" or look foolish for not conceding. When the concession is made with the testimony of a company representative, a plaintiff's lawyer can then argue that the company's safety director and executives will tell you they agree, for example, that drivers must not drive tired. They then argue the principle was violated. The authors boast:

> If everyone agrees with these standards, and if we can prove these standards were violated, it will be very hard for the defense to convince the jury there was a reasonable basis for its actions. Stated another way, these principles define "reasonableness" for the jury. We no longer have a single ambiguous, amorphous standard; we have a number of specific concrete standards - ones we know we can prove were violated. (Pg. 18)

Where Do "Rules" Come From?

The "rules" are gleaned from FMCSA regulations, statutes, codes of state regulations, other codes of federal regulations, textbooks, treatises, pamphlets, articles, bulletins, authoritative sources, a defendant's web site, a defendant's marketing materials, a defendant's company manual, and the like. Also, the source of a "rule" can be good old fashioned "common sense." The point is that the "rule" is expressed in such a way to make it uncomfortable for the defendant to deny it.

How are the "Rules" Used?

The rationale for the use of the "rule" is that it puts "meat on the bones" of what are sometimes considered abstract legal concepts that find their way into jury instructions. The argument is that when jurors are asked to apply an ambiguous standard, they are either confused or invent their own definition for the standard. If that happens, the authors feel that the defense wins. The thought is that psychologically, when faced with a decision about something you don't feel comfortable that you understand, you will hesitate to make a decision. The authors assert that this uncertainty is of a huge advantage for the defense. This may be true, especially in light of standard defense arguments that emphasize the burden of proof.

The "rules" are meant to flesh out what might be considered an abstract jury charge. A typical jury instruction in a Missouri rear-end accident case might include these ultimate facts:

> Defendant's tractor trailer came into collision with the rear of plaintiff's automobile;
>
> and/or
>
> Defendant drove at a speed which made it impossible for him to stop within the range of his visibility;
>
> and/or
>
> Defendant failed to keep a careful lookout.

Claim professionals and safety directors have a good understanding of what these instructions mean from the hundreds and possibly thousands of real-life examples they have had to litigate. But what do those submissions mean to a juror who has no day-to-day experience with them?

A plaintiff's lawyer using the RULES method might develop the following "rules":

A. Applied to a safety director of a trucking company:

   1. A company must ensure that its drivers do not drive while tired.

   2. Talking on a cell phone while driving can cause drivers to violate other important driving safety rules.

   3. At the time of this wreck Danny Driver was driving using a cell phone; that is a formula for an accident.

B. Applied to a driver in a rear-end collision:

   1. While driving my truck, it is my responsibility to monitor the road 15 seconds ahead of me.

2. I know that if I drive without scanning the roadway for hazards ahead, I am putting the lives and safety of other motorists in jeopardy.

3. I know that if I do not monitor and scan the road 15 seconds ahead of me, I am putting the lives of other motorists in jeopardy.

4. When I drive at night, I am required to drive at a speed and in a manner that allows me to stop within the distance illuminated by my head lights.

5. I know that if I drive at night in such a manner that I am unable to stop within the distance illuminated by my lights, I am putting the lives and safety of other motorists in jeopardy.

6. If I drive while fatigued, I know I am putting the safety and lives of other drivers in jeopardy.

7. It is my responsibility to stop driving if I am fatigued.

8. It is my responsibility not to start driving if I am fatigued or tired.

The above "rules" are invoked throughout the case, but the most crucial times are during the video deposition and trial cross examination of the driver and safety director. Typically, the "rules" are placed on a poster board exhibit for the jurors to read, while the plaintiff's lawyer asks the safety director or driver to agree or disagree with each. When a safety director or driver is faced with these "rules," they must admit them. They look foolish denying them. Once they make the admission, the lawyer, or the witness himself, takes a marker and marks the "rule," signifying their agreement.

Now the lawyer has a compelling exhibit to use for the rest of trial -- especially in closing argument. The lawyer displays the "rules" exhibit next to the jury instruction and explains how the defendant's violation of the "rules" means the plaintiff should recover.

Combating the "Rules" Approach

You can sometimes see a "Rules" approach coming. The best way is to learn the plaintiff's counsel's reputation and try to secure other depositions in trucking cases that the plaintiff's lawyer has taken.

Also, you should carefully examine the nature of the discovery served. Typically, interrogatories and requests for production will very specifically ask about the defendant's protocols, guidelines, rules, regulations, standards, policies, and/or practices. They will also ask specifically about authoritative sources, text books, and training manuals and procedures used at a company. You should be able to discern, rather quickly, if a "Rules" approach is going to be taken.

There are some strategies for depositions and trial testimony. The first and foremost is to be able to identify the "rules" that are going to be thrown at you. They need to be written out and reviewed. For any authoritative sources that are disclosed in discovery, the witness needs to be prepared to discuss the "rule" found in that document.

Also, a very clear explanation needs to be developed as to whether or not the "rule" is applicable. If a "rule" is not applicable, the reasoning for its non-applicability must be clearly in hand.

Beware of manipulation. A witness can be manipulated by asking about his familiarity with "rules." Remember, familiarity does not mean that the "rule" governs. Often, plaintiff's counsel makes the leap that familiarity equals authoritativeness. That may not be the case. The witness has to be patient and consistently explain that a "rule" was not followed because it was not applicable.

Another potential response is that the "rule" was, in fact, followed. Of course, plaintiff's counsel will want to see substantiation of that compliance.

Finally, if you are faced with a situation where it appears a "rule" was broken, you may be able to explain why breaking the "rule" does not make a difference in the case.

The "Rules of The Road" method is becoming more and more prevalent in litigation. Like most things, being forewarned is forearmed. Developing an understanding, early on, of the applicable "rules" and how they should be addressed will allow you to effectively combat the "rules" stratagem.