Best's Insurance Law Podcast

Emerging Litigation Trends in Trucking and Transportation - Episode #176

Posted: Tues., February 9, 2021

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Guest Attorneys: Leonard Leicht and Harold Moroknek of Marshall Dennehey Warner Coleman & Goggin

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John Czuba: Welcome to "Best's Insurance Law Podcast," the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of *Best's Insurance Professional Resources.*

We're pleased to have with us today two highly accomplished attorneys from the New York and New Jersey offices of the civil defense litigation firm Marshall Dennehey Warner Coleman & Goggin.

Leonard Leicht and Harold Moroknek lead Marshall Dennehey's Trucking & Transportation litigation practice group. Both men are tremendously experienced in the field.

Leonard has been in private practice for 35 years and is among the two percent of attorneys in New Jersey who are certified civil trial attorneys before the New Jersey Supreme Court. He has achieved over 100 verdicts on trucking cases and handles all aspects of litigation from Carmack, or cargo loss claims, to motor vehicle litigation.

Harold Moroknek is located in the firm's Westchester County, New York, office. He has over 33 years of private practice and is AV rated by Martindale Hubbell, the highest rating for an attorney's professional competence.

He has litigated hundreds of trucking and transportation matters, achieving numerous and significant defense verdicts. A former New York State prosecutor Harold has handled countless motor vehicle accident related investigations, prosecutions and defenses.

Gentlemen, we're very pleased to have you with us today.

Leonard Leicht: Thanks, John. We're happy to be here.

Harold Moroknek: Thanks, John. Thanks for having us.

John: Today's topic of discussion is confronting the creative plaintiff in trucking and transportation litigation. Harold, today we're going to start the questioning with you. Can you identify any emerging trends that you have been seeing in your cases?

Harold: Indeed we can, John, I'm glad you asked. It seems, more and more, claims attorneys are creating, or attempting to create, what we call reptile type claims. We're seeing an increasing number of attorneys attempt to set up such a narrative, separate and apart from the accident itself.

The narrative they try to focus on involves the rules, defendants' rules, the regulations, their policies, and their procedures, and, of course, violations of those very same rules.

John: You mentioned the reptile theory, Harold. Can you tell our audience what exactly that is?

Harold: Sure can. In a nutshell, John, it was introduced approximately a decade ago. Two guys, David Ball and Don Keenan, came out with their how to book in 2009 called "Reptile The 2009 Manual of the Plaintiff's Revolution." Frankly, the book started a craze. The plaintiffs' attorneys were talking about it. It morphed into seminars, CLEs, conferences, articles, meetings. It was all aimed at spreading the word about how to tap into a juror's reptile brain.

The focus was on emotion. They sought to remove logic entirely from the case. The reptile theory itself asks the jury to focus on safety and security issues or rules. The idea is to encourage jurors to envision themselves in the same position as a plaintiff, which we all know, as a general rule, is not allowable.

The strategy relies on an attempt to attack what's been known and called the reptilian brain, or the fight or flight survival reaction portion of the brain, engaging the most primal part of a juror's mind.

What happens John, is counsel seeks to actually provoke the feeling that if a defendant's actions are allowed to continue, then the community and even the jury itself may be in danger, again invoking the idea of emotion over logic.

Before the reptile theory, plaintiffs' attorneys had to be careful to avoid invoking this golden rule when addressing the jury. Their arguments had to rely on the evidence presented. They could not push jurors to reach a verdict based on jurors putting themselves in the shoes of the plaintiff or based on how those jurors wish to be treated.

The reptile theory allows or sets the foundation for plaintiffs' attorneys to ignore this golden rule, while at the same time making a similar impression on jurors. The attorneys frankly start by establishing safety rules. They try and show how a defendant's unreasonable actions violated the rules to put a plaintiff in danger. They set the bar at that standard and not at the standard we'd hope the court would instruct.

Listen, Len and I have spent a good deal of time, in fact, we spend most of our time defending transportation cases. We deal every day with the inherent bias towards truckers and bus drivers and commercial transportation folks.

We know that plaintiffs in these Reptile cases attempt to appeal to the core belief that people want themselves and their families to be safe. They use the fact that most people do not like trucks or large commercial vehicles to begin with, and most have had bad experiences at some point in their lives with trucks or large commercial vehicles on the road.

With this inherent bias and the reptile theory on top of that, it certainly makes things interesting. That is why we work so hard to see to it that these cases are controlled from the start.

One of the things I will tell you parenthetically is that .Ball and Keenan, the authors of the reptile Bible, have reported that plaintiff's attorneys who successfully use the tactic have returned over seven billion dollars in verdicts and settlements. As expected, defense attorneys have responded quickly to develop strategies that defeat reptile tactics.

That's a brief idea in answer to your question, John.

John: You talked a bit about the bias against truck drivers, which is an interesting concept. Leonard, what can you do when the plaintiff's attorney applies the reptile theory approach and tries to capitalize on the jury sentiment in the courtroom?

Leonard: John, I think the first thing you have to do is, as Harold indicated, recognize that that bias exists out there. Presumably, in your jury screening, you'll have screened out any potential jurors who have been involved personally in any accidents, or had a family member involved in an accident involving a large commercial vehicle, or any commercial vehicle for that matter.

Don't kid yourself. Everybody who's a motorist and has been on the road at some time in their adult life has seen trucks on the road and potentially seen the truck driver do something silly. They're also behind the truck on the road, and they get scared. They get nervous that they can't see beyond the truck. What's this driver going to do? Frankly, it terrifies them.

That's what the reptile theory is playing towards. In terms of confronting it in the courtroom, John, the first thing you have to do is see it before it bites you, pardon the pun. How do you do that? There's some pretty obvious tells in the pleadings and in the manner in which a plaintiff conducts his discovery.

If you have pleadings where the plaintiff is asking you for information, such as, "Give me all information as to your safety rules and regulations, violations of safety rules and regulations," ask questions about unnecessarily endangering the public, these will all prove to you that this plaintiff has either done this before, has read the literature, or is trying to exploit the reptile theory, as Harold just explained to you.

How do you confront it in the courtroom? Once you've gotten to the courtroom, you've gotten past the discovery stage of the case. You've tried to resolve it in one way, shape, or form, or maybe tried to motion it out, and were unsuccessful.

The reptile theory says throw logic out and appeal to this base core notion of safety. I try to bring it back to rational thought. I tell the jurors, when we start the case, "You've just taken an oath, and that oath is really important."

John, I'll say it to you, I'll say it to everybody, how many times in your life are you actually going to take an oath? It's a pretty solemn thing. Perhaps becoming a citizen of this country. Maybe when you pass the bar exam and get admitted, military service. An oath is a big deal. It's a big thing. I tell the jurors that right from the get go.

I try to set it up that plaintiff doesn't want you to follow this oath. That plaintiff doesn't want logic to prevail on this case. You, as jurors, you took an oath. That oath was to be fair, not just to the plaintiff who claims to have been injured, but also to the truck driver and the company that employed the truck driver.

You have to get that in their heads right from the get go. Then at the end of the case, when you have your chance to speak to the jury after all the evidence is presented, and we can talk in some detail about what the presentation is like and what plaintiffs often will try to do during the course of the trial, but I do try to circle back at that time, John.

I try to remind the jurors at the end of the case, "Hey, remember I told you about that oath at the beginning? Now you see why it was so important." You try to bring up an example where a plaintiff tried to appeal to your reptilian brain.

In fact, I know lawyers who actually show the book that Harold described to the jurors in their closing, because no juror likes to feel that they were manipulated. No juror likes to feel that a lawyer especially was trying to put one over on them.

To the extent you can position the case that way, and explain to the jurors that when they apply logic, when they apply their oath, you're going to come to a different conclusion, I find that to be very successful.

John: Thank you, Leonard. Harold, we're going to switch back to you. What about the trucking or transportation company itself? Is there anything that they could do internally? Are there any rules or recommendations that you could provide to your clients?

Harold: There sure are, John. I'm glad you asked that question. Generally speaking, there are themes or ideas defense can utilize to help spoil or dismantle plaintiff's attorney's reptile theory. If your witness and safety director sticks to them, look, the best defense is to work closely with the witness. Take the time you need to prepare the witness.

Try to avoid allowing plaintiff to make a record he can use at trial. Have the client designate a safety or corporate witness to use on all cases for consistency. Work with the client and prepare him or her for what to expect. Of course, explain plaintiff's goals to them.

There are a number of themes or ideas that we use when preparing our witness for deposition, and of course, trial. The first is to avoid giving "yes" as an answer. Reptile theory questions are actually designed to allow a plaintiff's attorney to testify or provide a narrative.

Plaintiffs will try on every question to get the defense witness to respond with a "yes" in response to all these questions. Plaintiff's attorney wants to get into a rhythm, a cadence, and provoke "yes" answers to the questions to establish a pattern.

Much like the defense cross examination in a criminal case, it's very effective. Simply put, the defense witness should try to not get caught up in the plaintiff's attorney's cadence or rhythm, and avoid giving yes answers in every occasion.

If there is no choice but to agree with the question that's been asked, the witness might offer a complete sentence response that at least restates the question. If a plaintiff's attorney insists on a yes or no answer, there are certainly alternatives to providing an answer.

Such as, you could say, "Well, it depends," or, "I don't think that I could answer that particular question yes or no. Would you like me to explain why?" Here's one that we find in almost every one of these cases, when a plaintiff's attorney asks, "Would you agree there's nothing more important than safety?"

A good answer to that question is, "Not necessarily. Safety is of course important. There are many important functions we provide. We do not rank them, but obviously, we prefer there were never accidents or injuries." That's a look at the first theme.

The second idea or theme is that the safety rule is never simple. Plaintiff's attorneys want to ask simple questions to show that a safety rule is simple. The entire reptile theory depends on a simple safety rule and a violation or a claimed violation. But almost no rule is simple, or absolute, for that matter.

With few exceptions, each decision that a person makes involves some safety risk, and almost every rule has an exception. The defense attempts to block the overly simplistic safety rule idea, and in doing so, thwarts the reptile approach. No rule can fully prevent danger. Safety concerns, we stress, must be measured in the context of real life issues.

For example, surgery is dangerous, but sometimes necessary. Our trucks and cars driven on the open road are not made of or wrapped in rubber. Knives are sharp, but we need to cut our food. Take the

common question that we talked about before. Safety is a top priority. It's hard to say that it's not. A witness directed to answer yes or no will likely say yes.

The witness needs to consider what that question really means, especially because the reptile safety question lacks specificity and context. Responses to those types of questions, such as, "Not always," or, "It depends on the context and circumstances," and, "I need you to be more specific with that question," are valid and appropriate.

For example, question, "Safety is always a top priority, right?" Answer, "Well, that's a very broad question, so I guess that I'd have to say it depends. Firefighters risk their own safety all the time. Police officers speeding to get to the scene of the crime put other people's safety at risk.

"People driving to work at rush hour creating a safety risk. Heck, chopping vegetables for dinner is a safety risk." Every decision is a calculation. So that's another examination or another topic or issue that we look at with witnesses going into deposition.

There are a couple of others that I'd like to address. The next or the third is my personal favorite, which is the defendant's conduct was reasonable. What do we mean by that? The priority of an attorney using the reptile theory cares less about the facts and details of the accident, and more about creating his narrative about a safety rule.

By asking hypothetical questions, the plaintiff's attorney, remember, seeks to create a simple "yes" cadence to help create his narrative. In doing so, he or she also gives up some control over the testimony and expects a "yes" response to every question.

If a witness can avoid that trap, the questions create a great opportunity to lay out the message the defense wants to get across in its defense case. This is a hugely valuable opportunity in a deposition and at trial. In that a particular message, the defense message, can be broadcast throughout the case, and frankly, will always involve the position that the defendant acted reasonably. Remember, never let your adversary define the parameters of the argument.

In negligence cases, a jury's supposed to decide if a defendant acted reasonably. A plaintiff's attorney will attempt to replace the vague reasonableness standard with a clear and simple safety rule. Anytime that safety rule could be undercut, we try to do that. Know your message and use that message in every answer where it might fit.

John, the last idea or rule is probably the simplest of all the rules. That is do not answer damages questions. A plaintiff's attorney will almost certainly ask a question about whether a person who causes damage should pay for that damage.

It's hard to say no to that question. Instead, a defense witness should let the lawyer know that the question sounds like one that should be answered by the lawyer, or perhaps, ultimately, the jury. This is a great opportunity for the attorney to voice objection, which under the circumstances, seems a reasonable approach.

To sum up these ideas. We have to keep in mind that at every step of the litigation, from the very beginning to the very end, the purpose or idea of the reptile theory is to promote fear and danger.

In response, the defense must provide a coherent theme that gets the jury to focus on the good company reasonable story. This is in an effort to remove the focus from the reptile.

John: Thanks so much, Harold. Leonard, we'll close out the questions today with you. Do you see any other trends or theories being pursued in litigated cases?

Leonard: John, there are two trends or two theories that I see being advanced more and more that I wanted to touch on today. One is claims based on theories of negligent hiring, retention, training, or supervision of drivers.

Think about the typical truck accident. You have a truck driver. That truck driver may be an owner operator, he may work for a company, or he may be leased to a company. Usually, there are two defendants in the case. One being the driver, and the other being the company that employs the driver.

What we see plaintiffs doing more and more now are attempting to have alternate theories of liability. Their first theory is that, hey, look, the driver was negligent. That driver's negligence caused the accident. Therefore, I should be compensated.

The way the theory goes is that the employer of that driver, under an agency theory or a respondeat superior theory, would be responsible for the conduct of the driver, and be responsible to make the payments if the driver could not make the payments on a damages award. What plaintiffs are now also doing is trying to assert a separate cause of action or a separate theory against the employer of the driver.

By that, they're saying, "Hey, mister employer, we know that the driver was negligent, or we believe the driver was negligent. Irrespective of that, you also bear independent and direct negligence because of the manner in which you hired, retained, or supervised the driver in these cases."

I think these cases are very defensible. In fact, I've been very successful in getting a lot of them knocked out on motions, although some judges are more resistant to dismissing theories than others. The first thing I tell anybody to do is if the facts support it, admit agency.

If there's no basis to deny the fact that this driver wasn't your employee, just acknowledge it and admit it. You're going to lose the motion. You're going to lose the argument anyway, ultimately. If you admit agency, you can say to the judge that, "Hey, look, Judge, I'm responsible for the driver's accident, as long as the plaintiff is successful in proving negligence against the driver."

For argument's sake, if the driver's 100 percent at fault, I'd be responsible as the employer for compensating the plaintiff. If the driver were 50 percent at fault, and the plaintiff were 50 percent at fault, there's only 50 percent of damages to be apportioned anyway.

There would never really be a basis for an independent claim or an independent theory for negligence against the owner of the company when the owner admits that that driver was acting as their employee or their servant at the time of the accident.

The other thing I would tell you, John, is that forgetting the legal argument of it, trucking and transportation are heavily regulated. There's a Federal Motor Carrier Safety Act, and there's regulations that have been enacted over the course of many, many years. They're very, very well set forth. They really never change from year to year.

With regard to hiring a driver, the actual technical term is called qualifying a driver, the owner of a trucking or transportation company qualifies a driver. There are specific standards and rules that that company must follow.

The first thing you have to do is make sure that your driver is properly licensed as a CDL from the state in which he resides. That's really 90 percent of the battle, John, because if the driver is properly licensed, he's already qualified to drive a truck.

He's already been found to have the sufficient training, he's passed the test. The licensing authority has already indicated to the world that this driver's qualified to drive a truck. The next thing you have to do as a company is get a written application. There are many companies, John, that outsource this. There are countless Internet companies that do this application process for you.

The applications are done online, they're reviewed, they're either approved or rejected. A trucking company, before qualifying a driver, would have to check references. If after doing all that, they feel they want to go forward with this particular applicant, give them a drug test and obtain a motor vehicle abstract.

John, assuming that the employing company does all those things, they've complied with the Federal Motor Carrier Safety Act. They were not negligent. To the extent a plaintiff will argue, "Well, you could have done more," as Harold says, "Isn't safety important? Couldn't you have done more than the federal government requires you to do?"

The answer to that is, you could always do more. There's no limit to what you can do. The question is, what are you required to do? What does the standard of care say you have to do? If you meet all the requirements that I just set forth, you've done what the standard of care requires.

I suggest to anybody that has one of these cases that if there's an expert out there that says, "I believe, as an employer, as a trucking company, you should have done more than what the Federal Motor Carrier Safety Act requires," I challenge that expert. Take his deposition. Find out the basis for his claims.

I think what you're going to find out once you push on that, it's nothing more than an opinion and an expert trying to make a case for a plaintiff. The second hot topic, if you will, that we see a lot going on with are broker claims. Brokers are not transportation companies, but they're rather companies that facilitate transportation.

They're the middleman between the shipper, somebody sending goods in commerce, between them and the company that actually transports the goods.

Plaintiffs now, if there's a situation where for whatever reason, they don't feel they can make a proper Carmack complaint, which is a claim for lost property or goods damaged in transit, where they feel that the trucking company is not financially responsible and can't make a payment that they're seeking, they'll try to hook the broker into the case.

The very first thing, and almost an important rule I would tell anybody out there defending broker claims, is get the case into federal court. Federal court, federal court, federal court. If there's a Carmack, C A R M A C K, count in the complaint, you have a federal question. If there's diversity, you have diversity. Get into federal court.

The cases, for the most part, that touch on these issues are all decided out of federal courts. The judges have heard all these arguments before, they've seen these cases before, they have more time to spend with you. If you can get the case into federal court, get it there.

If you get a case against a freight broker, remember one thing. That's preemption. There's something called the FAAAA, which is an acronym for the Federal Aviation and Administration Authorization Act of 1994. You can see why people call it the FAAAA.

This is a Reagan-era statute that involved the deregulation of the airline industry, but it also covers trucking and transportation. The key to the FAAAA is what I called earlier preemption. What the FAAAA says is that states can't interfere with interstate commerce.

They can't pass their own laws that affect interstate commerce because this is something that we want universal amongst all 50 states. If you get a claim alleging that a broker committed malpractice and was negligent, they were the agent of the trucking company, remember, federal court, one, and FAAAA preemption, two.

What you can do if you get one of these cases is you can file a motion to dismiss on the pleadings. If plaintiff is alleging that the broker was negligent in selecting the carrier, that's out because that's a state law. If they're saying there's some fraud or some sort of consumer fraud, that kind of violation, you can knock those cases out on a motion. At the end of the day, the only case, the only count you would see left is a pure breach of contract case.

I can assure you that in most of these cases, there's nothing in a contract between a shipper and a broker which in any way says that the broker is responsible for damages caused as a result of motor carrier negligence. Again, two things. Federal court, FAAAA preemption.

John: Leonard and Harold, thanks so much for your insights on these topics. Thank you both very much for joining us today.

Leonard: Thanks, John. Happy to be here.

Harold: Thank you, John.

John: That was Leonard Leicht and Harold Moroknek, co-chairs of the Trucking and Transportation Litigation Practice Group at Marshall Dennehey. More information on this topic may be found at www.marshalldennehey.com.

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I'm John Czuba, and now this message.

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