Taming the Reptile: Nuclear Verdict Disarmament Spreads in State Legislatures to Combat Sky-High Verdicts – A State-by-State Survey of Where the Action Is

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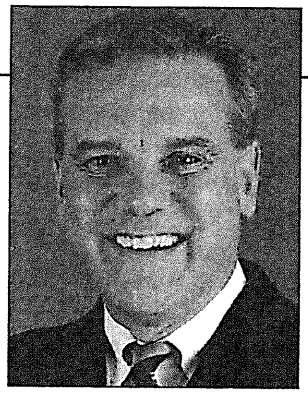

Introduction: The Nuclear Verdict Albatross

The nuclear verdict phenomenon grows and prospers in 2021. A "nuclear verdict" is described as a verdict of $10 million or more.[1] In a nuclear verdict case, Plaintiffs' counsel, propagating a sophisticated yet primordial strategy known as the Reptile Theory, seek to vilify the trucking company as opposed to seeking recompense for actual damages. The propagation of nuclear verdict litigation is an albatross around the proverbial neck of the motor carrier industry and the transportation brokerage sector. Nuclear verdicts have jumped over 300% in the past decade.[2] The average verdict size for a lawsuit involving a motor vehicle accident ("MVA") has increased from $2.3 million to $22.3 million.[3] That trajectory includes the first billion-dollar verdict in late summer 2021 (albeit a default verdict).[4] Also problematically, the number of MVAs involving trucks doubled in the decade between 2009 and 2019, and commensurate MVA-related deaths have increased 36%[5] (the U.S. Department of Transportation found in 2003 that passenger vehicles cause 56% of these accidents). This unsettling phenomenon has caused trucking insurance premiums to soar and many smaller motor carriers to simply close their doors.

Reining in the Reptile: A Lone Star Template

State legislatures across the country are taking notice of this phenomenon and its deleterious effects upon the transportation sector and are legislating accordingly. One of the first and most comprehensive laws, Texas House Bill 19, codified in Texas Civil Practice and Remedies Code Ann. § 72.051-055, was recently enacted by the Texas Legislature on a broad, bipartisan basis.[6] This law serves to compartmentalize the trial process, and interjects various other procedural thresholds, to slow the nuclear verdict freight train in these cases. The hope is to put the brakes on the Reptile Theory by excluding evidence of industry-wide trends likely to bias juries against motor carriers (and brokers).

Texas has been one of the hotbeds of the nuclear verdict battlefield. In fact, in Texas they say that ten million is the new one million! Recent cases include a verdict against a motor carrier in the $100 million range (including $75 million in punitive damages) in a case where the Plaintiff told the officers at the scene that he was not hurt. Similarly, there have been at least twenty other nuclear verdicts in Texas in the last several years. The February 2021 black ice-spawned 133 vehicle, 36 injury and 6 fatality mega-MVA on I-35 in Fort Worth has precipitated a still rippling wave of personal injury lawsuits of its own; hence, the legislative action.

Right out of the box, the new statute splits the trial into two phases. The first phase deals only with the motor carrier driver's fault and liability (truck malfunction and negligent maintenance claims also are addressed in phase one). Notably, this phase excludes unrelated allegations of unsafe motor carrier safety practices. In fact, it is possible that during phase one, the jury may not even know the name of the motor carrier. The second phase allows Plaintiffs to sue the carrier itself, but only after the motor carrier driver's liability has been established. So, phase two concerns liability under respondeat superior and the amount of punitive damages, if any. Consequently, in trial proceedings under this bifurcated process, the evidence, testimony, and more importantly arguments, intimations and innuendo of Plaintiffs' counsel, are confined to actual facts of driver fault and liability and the common law legal principles that relate to those facts. The bifurcation is not automatic though. It must be requested by a motion to the court, made within 120 days of the Defendants answering the complaint–a critical docket date for motor carriers. This bifurcation mechanism thus effectively segregates that first phase from the potentially more Reptilian second phase and should result in a dramatic decrease in vilification of the motor carrier itself for practices that are completely unrelated to the underlying facts of the actual accident.

The statute also limits the admissibility of evidence of failure to comply with

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non-pertinent Federal Motor Carrier Safety Administration ("FMCSA") regulations. Often in these cases, Plaintiffs' counsel conduct exhaustive discovery into the full panoply of the motor carrier's policies and practices relating to FMCSA compliance, internal safety audits, maintenance programs, vehicle inspections, the company's "safety culture" as a whole, and a host of other operational facts, almost all of which typically have no direct bearing on the facts related to the accident. They do this, with an aim toward demonizing the trucking company, by finding some fault in an unrelated policy or practice and attacking that instead of the actual accident and its causation. The law should serve to dramatically limit this inflammatory practice.

Under the statute, evidence of the Defendant motor carrier's failure to comply with an FMCSA regulation must be directly relevant to the accident. There are two criteria that must be met in order for evidence of the carrier's failure to comply with FMCSA regulations to be admissible. First, the regulation must apply to the action or omission that caused the accident. Second, a reasonable jury must be able to find that the failure to comply was the proximate cause of the accident (another threshold point ripe for pretrial evidentiary motions). The regulation must specifically govern the causative conduct and be an element of the duty of care applicable for the Defendant in this phase. If evidence of the carrier's failure to comply is admissible, other evidence of similar failures are admissible only if they occurred within two years of the accident and only if the Plaintiff obtains a court order allowing such historic (and archaic) discovery. Those court orders are subject to review for abuse of discretion. These procedural restrictions should limit, even before the trial stage, the broad-based, "gotcha"-type of discovery often sought by Plaintiffs' counsel in these cases. Also, if the Defendant motor carrier stipulates that the driver was its employee acting within the scope of his or her employment, the motor carrier's liability for damages will be based only on principles of respondeat superior.

In the first phase of the trial against the motor carrier driver, however, certain specifically referenced regulatory, registration and driver qualification evidence can be presented, presuming it meets other evidentiary criteria. These permissible evidentiary proofs include whether the driver–at the time of the accident–had a commercial license, was subject to any type of out of service order, or was driving in violation of any particular license restriction. Whether the driver had been medically certified as physically qualified to operate the vehicle under 49 C.F.R. § 391.41–or was operating the vehicle when otherwise prohibited by applicable regulations–also is admissible. Similarly, evidence relating to the following is admissible in phase one: the driver was texting or using a handheld device in violation of federal or Texas law; the driver refused to submit to a controlled substance/drug test as required by 49 C.F.R. § 382; the driver was operating the truck in violation of federal hours of service regulations on the day of the accident; and the driver was operating the vehicle under the influence of a controlled substance at the time of the accident. These narrowed instances of admissibility directly relate to the actual accident and its causation and not to unrelated systemic policies of the motor carrier. These categories also are admissible in limited fashion as to the motor carrier, but only to prove, or attempt to prove, ordinary negligent entrustment, again, on the day of the accident.

This action by the Texas Legislature is a seminal one. It goes a long way in taking firm, concrete steps toward curbing abuses of the litigation and trial systems by Plaintiffs' counsel. It helps to ensure that liability is determined without inflammatory, Reptilian strategies that have nothing to do with the accident itself. Unfortunately, the Act does not apply retroactively,[7] but any MVA lawsuit filed in Texas after September 1, 2021–the Nuclear Disarmament Date ("NDD")–will be governed by the very logical, measured strictures of this statute. Not surprisingly, there was a tsunami of filings before the NDD. So, the Texas nuclear verdict roulette party is still open, but last call will come a lot earlier going forward.

A Legislative Awakening: Other States Take Action, in Varying Degrees

Several other states have passed laws designed to curb nuclear verdicts against trucking companies. The scope of these laws varies considerably. Texas's is the most comprehensive, although laws passed by Louisiana and Missouri involve significant provisions as well. Laws in Montana and West Virginia, by contrast, are much less ambitious. Iowa also has recently introduced legislation aimed to do the same.

Louisiana: A Bayou Bivouac

Louisiana is another nuclear verdict hotbed, and it is the forum for many "death by small cuts" personal injury cases against motor carriers.[8] It is also, of course, the birthplace and breeding ground for hundreds of contrived "scam MVAs" that recently resulted in criminal charges against Plaintiffs' counsel, doctors and assorted scamsters (over forty Defendants have now been indicted). To lessen litigation abuses by Plaintiffs in all civil cases, including those against motor carriers, the Louisiana Legislature recently enacted the Civil Justice Reform Act of 2020, codified in the Louisiana Code of Civil Procedure §§ 1732-33 and 4873.[9]

The Act has several provisions that should prove beneficial to the defense of motor carriers. First, under the Act, a Plaintiff's recovery of medical expenses is limited if payment has been received by private health insurance or Medicare. The court may only award the Plaintiff up to 40% of the difference between the amount billed by the health care provider and the amount actually paid by their hospital or service providers. If damages have been paid by Medicaid or workers' compensation, damages are limited to the amount actually paid. Then, the calculation of recoverable medical expenses is made by the trial judge after any Plaintiff's jury verdict.

Second, the Act also limits when evidence of insurance is admissible. Per Section 4873, evidence of the Defendant's insurance policy amount is not admissible unless it is in dispute, meaning: (1) there is a factual dispute related to the policy at issue, (2) the evidence would otherwise be admissible to attack the credibility of a witness, or (3) a cause of action is brought against the insurer itself. Evidence of the insurer's identity is admissible only to

attack the credibility of a witness. Also, at the opening and closing of a case involving an insurer, the court must read jury instructions indicating there is insurance coverage for the damages claimed by the Plaintiff.

Third and finally, the Act lowers the jury threshold from $50,000 to $10,000. Thus, there will be no trial by jury if the amount in the cause of action exceeds $10,000. Under the current $50,000 threshold, 53% of auto claim disputes in the State are heard by elected judges, which more easily permits forum shopping for favorable verdicts. The Act also limits when drivers' insurance can be mentioned.

Missouri: Show Me Just a Little Punitive Reform

Missouri's Senate Bill 591–codified in the Missouri Uniform Commercial Code §§ 407.020, 407.025, 538.205, and 538.210 and in its Rules of Civil Procedure § 510–makes it more difficult for Plaintiffs to recover punitive damages. It introduces a complicity rule for vicarious liability, limits the scope of discovery against employers in claims for compensatory damages, and changes the pleading procedure for punitive damages.[10]

Section 510.261 raises the standard for punitive damages from negligence to intentional harm or reckless disregard: "punitive damages shall not be awarded unless the claimant proves by clear and convincing evidence that the Defendant intentionally harmed the Plaintiff without just cause or acted with deliberate and flagrant disregard for the safety of others." Punitive damages cannot be based upon a compensatory award of nominal damages, unless the claim is for a violation of privacy rights, property rights, or "rights protected by the Constitution of the United States or the Constitution of the state of Missouri." Finally, punitive damages "shall not be based, in whole or in part, on harm to nonparties."

The statute also limits vicarious liability for punitive damages. Section 510.261.3 adopts the "complicity rule" for vicarious liability from Restatement (Second) of Torts § 909, explaining that:

> Punitive damages can be awarded against an employer for acts of its personnel only if: (1) the employer "authorized the doing and the manner of the act," (2) the employee was unfit and the employer was "reckless in employing or retaining him or her," (3) an agent of employer "was employed in a managerial capacity and was acting in the scope of employment," or (4) the employer ratified or approved of the agent's act.[11]

Section 510.261.4 commensurately creates a rule of "limited discovery consisting only of employment records and documents or information related to the employee's qualifications" when the employer admits liability for the actions of the agent in a claim for compensatory damages.

The Act also imposes procedural hurdles for pleading punitive damages. Pursuant to Section 510.261.5, an initial pleading cannot contain a claim for a punitive damages award. A claim for punitive damages can be added only with leave of the court and only if it is supported by affidavits, exhibits, or discovery materials showing "a reasonable basis for recovery of punitive damages." This motion must be made within 120 days of the final pretrial conference or trial to give the judge time to consider it before it gets to a jury. Notably, at this phase the Defendant motor carrier may present evidence as to why punitive damages should not be allowed. These procedural hurdles should help to cull meritless punitive claims, which result in diversionary and negative out-of-court publicity and impede rational settlement negotiations.

Montana: The Big Sky Is Not the Limit

Montana has recently sought to limit artificially inflated phantom damages involving alleged medical expenses. (The Montana Supreme Court has been included on the "Watch List" of the American Tort Reform's annual "Judicial Hell Holes" list for the past three years.) Montana Senate Bill 251, codified at Title 27 §§ 1-202, 302, and 307, limits compensatory damages for injuries or death to the actual amount paid or to be paid in medical costs.[12] Under Section 27-1-308, damages cannot exceed the amounts actually (a) paid by or on behalf of the Plaintiff to health care providers that rendered "reasonable and necessary" medical services or treatment to the Plaintiff, (b) necessary to satisfy charges that have been incurred and at the time of trial are still due to health care providers for reasonable and necessary medical services or treatment to the Plaintiff, and (c) necessary to cover any future reasonable and necessary medical services or treatment for the Plaintiff.

West Virginia: Take Me Home–But Not Without a Seat Belt

West Virginia House Bill 3029 allows evidence that the Plaintiff was or was not wearing a seat belt to be admitted for determining damages.[13] If the Plaintiff is an adult and was the driver or a passenger at the time of the accident, evidence that the Plaintiff was not wearing a seat belt is admissible to show that the Plaintiff's failure to wear a seat belt exacerbated or contributed to the damages. This rule does not apply to child passengers. Evidence of seat belt use or nonuse, however, is not admissible for determining negligence. The Act also requires that the Defendant's burden of proof on this issue be supported by expert testimony.

Iowa: Getting Closer and Watching with a Hawkeye

Iowa HF 772/SF 537 limits employer liability and recovery for noneconomic damages in civil actions involving commercial motor vehicles.[14] It also modifies rules for pleading punitive damages. In these cases, the employer's liability would have to be "based solely upon respondeat superior and not on the employer's direct negligence in hiring, training, supervising, or trusting the employee, or other similar claims that the employer's negligence enabled the employee's harmful conduct." The Act also limits noneconomic damages for personal injury or death in civil actions involving commercial motor vehicles to $1 million, thus potentially eliminating the nuclear verdict risk. A claim for punitive damages cannot be included in any initial claim for

relief until after the Plaintiff establishes the existence of a triable issue (the court may then allow for additional discovery).

Conclusion: Leveling the Playing Field

The factfinding process, during discovery, pretrial proceedings and trial, in state and federal courts has always been intended to be fair, measured and deliberative, with each party in a civil case, the Plaintiff–and the Defendant–being able to tell their side of the story without an emotional rush to judgment. That process is intended to be guided by principles of logic and equity, and by a rationally balanced assessment of the facts under applicable law. It was never intended to be dominated by inflammatory, Reptilian efforts to inspire passion and prejudice for matters completely unrelated to the underlying facts of the accident. These principles are fair to both sides and are certainly not unfair to Plaintiffs. The legislatures in the states discussed in this article have taken rational and measured responses to tactics that often result in bountiful bonanzas for Plaintiffs' lawyers; windfalls beyond fair compensation to injured Plaintiffs; and seismic, destructive reckonings for motor carrier Defendants who are vilified, demonized, and pilloried for matters beyond the scope of the accident at hand, often driven out of business as a result of inflated nuclear verdicts. These state legislatures are taking action in response to a problem that is evolving within their state's borders and are seeking to do so in a manner that not only protects Defendants from unfair and irrelevant inflammatory evidence, but simultaneously maintains the rational, logical and equitable judicial factfinding process for the Plaintiffs. Time will tell how this legislation affects catastrophic accident litigation in the motor vehicle world, but at the very least–it is a start.

Endnotes

1 *See* American Trucking Research Institute ("ATRI"), "Understanding the Impact of Nuclear Verdicts in the Trucking Industry" (2020).
2 *Id.*
3 *Id.*
4 *See Dzion v. AJD Bus. Servs., Inc.*, 2018-CA-00148 (Nassau County, Fla. 2021).
5 According to the National Safety Council.
6 *See* Civ. Prac. & Rem. Code, TEX. STAT. tit. 4 § 72.002-003.
7 Section 6 makes clear that "[C]hanges in law made by this Act only apply to an action commenced on or after the effective date of this Act, which is September 1, 2021."
8 As exemplified by the state's proliferation of Plaintiffs' counsel highway billboards.
9 Code of Civ. Proc. LA. STAT. tit. 5, §§ 1732, 1733(A); 1 § 4873(1).
10 *See* Mo. Ann. Stat. tit. 26 §§ 4.020; 4.025; 36 § 538.205, 210; 510.265.
11 *See* Mo. Code of Civ. Proc. Mo. STAT. tit. § 510.261.3.
12 *See* Mont. Code Ann., MONT. STAT. tit. 27 §§ 1-202, 302, 307-308.
13 *See* Code of W. Va. STAT. tit. § 17-C-15-49.
14 *See* Iowa Code Ann., IOWA STAT. tit. 4 § 3.147.136A.