MINIMIZING JURY DISTRACTIONS: STRATEGIES TO PRECLUDE ADMISSIBILITY OF PREVENTABILITY DETERMINES AND CSA/SMS DATA

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A. Overview Regarding Preventability Determinations

While motor carriers conduct accident reviews for many reasons, the general focus of the preventability determination is safety. Preventability determinations are used by the transportation industry to analyze and understand accidents and serve as a tool for risk managers to aid in accident prevention.

Criteria governing the process employed to reach a preventability determination vary. A motor carrier may have developed their own internal processes and directive to employ in accident reviews; however, many motor carriers utilize the preventability standard of the National Safety Council or the American Trucking Association while others use the DOT definition and appendices.

**National Safety Council** definition: “A preventable collision is one in which the driver failed to do everything that reasonably could have been done to avoid the accident.” The Council clarifies that its preventability standard “is not solely based on or determined by legal liability.

**American Trucking Association** inquiry: “Was the vehicle driven in such a way to make due allowance for the conditions of the road, weather and traffic and also to assure that the mistakes of other drivers did not involve the driver in a collision?

**Section 385.3 Federal Motor Carrier regulation:** “A preventable accident on the part of the motor carrier is an accident (1) the involved a commercial motor vehicle and (2) that could have been averted but for an act, or failure to act, by the motor carrier or the driver.” Appendix A to §385 Explanation of Safety Audit Evaluation Criteria states “Preventability will be determined according to the following standard: if a driver, who exercises normal judgment and foresight, could have foreseen the possibility of the accident that in fact occurred, and avoided it by taking steps within his/her control which would not have risked causing another kind of mishap, the accident was preventable.”

Each of these preventability inquiries focuses on what the commercial driver could have done to avoid an accident, which effectively imposes a different standard of care on the commercial driver than the standard imposed by common law negligence (failure to act as a reasonably careful and/or prudent driver). While a driver may not be at fault under the common law standard for negligence, the driver may be deemed to have been involved in a preventable accident. And although preventability determinations are not meant to be used to assign blame, fault or liability for an accident, these determinations are very often the centerpiece of accident litigation, and the distinction between the negligence and preventable accident standard may be lost on the jury at trial.
B. Best Practices in Accident Litigation

As you will be reminded by the case summaries below, there are a number of tactics which can be employed when seeking to exclude an accident investigation and preventability determination both during discovery and during trial.

The answer of admissibility largely may be determined by the motor carrier’s policy and protocols before an accident occurs. Where the motor carrier’s preventability standard mimics or is substantially similar to the standard imposed by the law of the jurisdiction where litigation is pending, there is an increased risk that the Court will permit the motor carrier’s preventability determination into evidence at trial. On the other hand, where a motor carrier has carefully created its policies and delineated that the preventability determination is not an assessment of fault or liability; that many factors are taken into consideration, some of which would not be considered by a court or jury; that a heightened standard is being employed with the goal of improving driver performance, enhancing safety and preventing future accidents; and that the determination is not intended to be used in litigation, a stronger argument for exclusion of the evidence exists.

Although the Federal Motor Carrier Safety Regulations do not explicitly require that motor carriers engage in the preventability analysis, preventability of accidents is one factor considered by the FMCSA in evaluating a motor carrier’s safety rating under 49 C.F.R. §385.7(f). If a motor carrier is engaging in preventability analysis for this purpose, then the policy should tie the practice to the requirements of the FMCSA in order to maximize potential applicability of the protections of 49 U.S.C. §504(f) (Recall that Section 504(f) precludes admissibility of a motor carrier’s accident register, Sajda v. Brewton, 265 F.R.D. 334, 340 (2009)).

Following an accident – particularly a serious accident or an accident that could develop into a serious matter -- a motor carrier should consider whether its internal policies require that a preventability determination be made in each instance, and might consider the following: If the policy requires a preventability determination, are there exceptions? Does an exception apply here? If we make an exception to the policy requiring preventability determinations, how is that exception documented? Are there timing requirements, and if there is no required timeframe, why is a preventability determination being made at this time?

If a preventability determination is required, document the process employed, the persons engaged and the information considered. When counsel is hired by a motor carrier following an accident, it is typically because there is a reasonable anticipation of litigation. Use the anticipation of litigation as a springboard to work closely with your counsel and develop a sound basis for asserting the work product privilege for materials developed during the course of the investigation, many of which may be utilized in the preventability determination. Investigative materials may qualify to be excluded from discovery and admissibility under the work product doctrine even if the ultimate preventability determination comes into evidence. Consider including your general counsel or in-house attorneys in the investigative/preventability determination process.
Build your objections and develop assertions of privilege during the written discovery phase, identifying investigative materials developed as work product in a privilege log.

Use motions to quash and motions for protective orders to preclude deposition questions about investigations and preventability determinations, particularly with respect to Rule 30(b)(6) corporate depositions. If depositions cannot be avoided, prepare your motor carrier witnesses to explain that the preventability standard is not the same as the negligence standard, and explain why the standard is different. You are laying the groundwork for in limine motions and other evidentiary motions based on common arguments such as the attorney client privilege/work product doctrine; imposition of a higher standard of care for commercial drivers; relevancy under Rule 401; confusion/risk of unfair prejudice under Rule 403; subsequent remedial measures under Rule 407; self-critical analysis privilege where recognized; and depending on the investigative documentation, lack of foundation and hearsay objections.

While the following list is not exhaustive, we have included many of the often-cited decisions regarding preventability, and where available, we have referenced key facts supporting the Court’s decisions.

C. Discovery of Preventability Determinations

Preventability determination is discoverable where no evidence that defense counsel was involved in making the preventability determination but rather, the preventability decision was made by the motor carrier in the normal course of business pursuant to the regulations of the Federal Motor Carrier Safety Administration.


**Heartland Express v. Torres, 90 So.3rd 365 (Florida, June 25, 2012)**
On appeal, the Court held that Plaintiff could not obtain discovery from Heartland’s corporate representative during a Rule 30(b)(6) deposition concerning the preventability determination as this information concerned Heartland’s risk management investigation, and the investigation was conducted in the anticipation of litigation and thus, the findings are protected work-product.

Where Wal-Mart employed its Serious Accident Review Committee following a fatality accident, Wal-Mart’s subjective evaluation of its legal responsibility for the accident (preventable vs non-preventable) was a protected mental impression of the merits of the anticipated litigation (i.e., work product) which was shielded from discovery. The Court noted, however, that had Plaintiff sought the unprotected facts discussed in the SAR committee or the criteria/uniform methodology used by the SAR committee, this information would have been discoverable.
Following a fatality accident, Werner’s general counsel implemented Werner’s Catastrophic Loss Team protocol for serious accidents in the anticipation of litigation, and the Court held that the work product doctrine protected the investigative file from discovery. Although a preventability decision had not been made at the time the motion to compel was filed (and there was some evidence that general counsel made the preventability determination), the Court stated that “even if such a preventability determination had been made, information regarding this CAT Loss investigation would be privileged.” The Court did note that persons other than general counsel (those in the “risk department”) might have knowledge of the factors reviewed by general counsel in making a preventability determination.

D. Admissibility of Preventability Determinations

Preventability determination ruled not admissable as it is not relevant. “There is no evidence in the record as to the basis on which the person expressed that rather vague and indefinite opinion. There is no indication that the opinion is based on national, company or personal standards. The opinion is, therefore, unreliable and the jury should not and will not hear it.”

Asbury v. MNT, Inc., 2014 WL 6674475 (D. New Mexico Aug. 6, 2014)
An expert witness cannot testify about preventability by using a definition of preventability which differs from the definition in the FMCSR, 49 C.F.R. §385.3.

Cockerline v. UPS, 2013 WL 5539064 (Superior Court of New Jersey, Oct. 9, 2013)
Preventability determination was not an admission of fault, and was not admissible as the preventability determination was substantially more prejudicial than probative. The preventability determination made by UPS contained no admissions by UPS about how the accident occurred, and the preventability determination could only be probative after an “entirely collateral” proceeding about how it had been conducted. The Court concluded the preventability determination “was a matter entirely separate from the circumstances of the accident itself” and “could only confuse, take an undue consumption of time and mislead a jury.” There was no evidence that “UPS attempted to determine [the driver’s] blame or legal responsibility for striking [Plaintiff’s vehicle] or that UPS attempted to investigate subsequent aspects of the accident, much less assign liability.”

Preventability determination by Plaintiff’s expert using FMCSA definition of preventable accident at 49 C.F.R. §385.3 was not admissible as it “will not assist the jury.”

Preventability determination ruled admissible. The Court concluded that Swift applied 49 C.F.R. §385.3 to assess the preventability of the accident. Section 385.3 defines a preventable accident as “an accident (1) that involved a commercial motor vehicle; and (2) that could have been averted but for an act, or failure to act, by the motor carrier or the
driver.” Ruling that the preventability determination could come into evidence stated that “the meaning of preventable embodied in the [DOT] regulation is no different from the meaning of the term in ordinary usage” and “no confusion or prejudice would result from the introduction” of the preventability determination.

Pursuant to Rule 407 (subsequent remedial measures), the Court precluded evidence generated by Crete Carrier’s Accident Review Board which was “of a conclusory nature” such as ARB’s thoughts, analyses, inferences or deductions based on the factual circumstances of the accident and their recommendations and employment decisions in light of the accident. However, the ARB evidence relating to the causes, circumstances or damages caused by the accident was admissible.

Preventability determination ruled admissible. “Defendants admit that Martin Brower investigates any accidents involving its vehicles to determine if they were preventable. Such information is clearly relevant to the claims at issue here. To the extent that these investigations are conducted and recorded as part of Martin Brower’s regular business practice, information contained herein is also admissible. Defendants argue that jurors would not understand the difference between “preventability” and “liability” and thus, that such information would be more prejudicial than probative. The Court disagrees and finds that any misapprehension or prejudice can be adequately addressed on cross-examination and/or in the jury instructions.”

- A favored response to the curative instruction: Instructing the jury to consider the evidence only for its admissible purpose is “often an admonition to perform a mental gymnastic beyond its powers.” Bruton v. United States, 391 U.S. 123 (1968).

Preventability determination reached by Old Dominion’s Accident Review Committee ruled inadmissible as “the evidence shows that Old Dominion’s definition of preventable is different from the standard of liability.” Old Dominion’s internal review policy provided as follows:

“Responsibility for accidents is based on whether or not the accident was preventable and not on who was primarily responsible or at fault. Responsibility to prevent accidents goes beyond careful observance of traffic rules and regulations. Drivers must drive in a manner to prevent accidents, regardless of the other fellow’s faulty driving or failure to observe traffic regulations. This standard has been set for internal purposes only and shall not be considered to impose a greater burden of blame than that required by law in the event of an accident whose cause is disputed or where litigation arises.”

Preventability determination ruled inadmissible. The Court found important the fact that the preventability analysis employed a higher standard than the negligence standard, that the
preventability analysis considered less evidence than the evidence presented at trial, and that the transit board would have to conduct a trial within a trial to illustrate the preventability determination is entitled to less weight in the negligence analysis. The transit board had offered this proof regarding its investigation: “The accident grading board is convened after a collision occurs, and the idea behind the grading board is to grade these accidents, assess preventable or unpreventable for two purposes. One, a preventable accident leads to discipline of an operator and the hearing is designed to educate and keep these kinds of accidents from happening again…. “The standard – it is not the standard that is used in a civil lawsuit.” “It is not the reasonably prudent person’s standard that the jury’s going to be applying in this case.”


Consolidated Freightways conducted an accident review pursuant to the company’s fleet safety program for the sole purpose of increasing the driver’s understanding of how to prevent accidents, and Consolidated utilized the National Safety Council rules to determine accident preventability. While Villaba argued that the standard for preventability is the same as the standard for negligence under Illinois law, the Court found that the National Safety Council definition of preventability makes clear that it “is not solely based on or determined by legal liability.” The Court found that having two standards – the Illinois standard for negligence and the NSC definition of preventability – “may confuse and mislead the jury and result in a mini-trial regarding the different standards and the significance of the preventability finding, diverting attention away from the real issue of negligence. Consolidated’s finding of preventability could lead the jury to decide the issue of negligence by improper reference to the preventability standard and Consolidated's finding of preventability.”

**NSC Definition of Preventability:** The NSC definition appears to be the same 15 years after the Villaba decision.

### E. Discovery of CSA/SMS/PCP Data

There continue to be relatively few reported decisions concerning the discovery and admissibility of data generated through the Compliance Safety Accountability (“CSA”), Safety Measurement System (“SMS”) and Pre-Employment Screening Program (“PSP”) data.

One helpful approach may to be to get acquainted with the articles written about the statistical meaningfulness of the CSA scores and crashes. A 2012 study by the American Transportation Research Institute (“ATRI”) suggests a possible relationship between the SMS data and carrier safety. See *Compliance Safety Accountability: Analyzing the Relationship of Scores to Crash Risk*, October 2012.

A 2013 American Trucking Association white paper (The Reliability of CSA Data and Scores, http://www.trucking.org/ATA%20Docs/Waht%20We%20Do/Trucking%20Issues/Documents/Safety/Are%20CSA%20Scores%20Reliable%20Dec%202013Final.pdf) is critical of the ATRI paper and references two studies that found there was little, if any, statistical correlation between a motor carrier’s SMS scores and crash risk. A study by Wells Fargo Securities in
2012 found that of the 4,600 largest carriers, there was no meaningful relationship between BASCI scores and accident history, and concluded that the scores should not be relied upon as an indicator of safety performance or crash risk. See Gallow, A.P. & Busche, M., CSA: Another Look with Similar Conclusions, Wells Fargo Securities Equity Research (July 12, 2012). A similar study conducted by University of Maryland Professor James Gimpel found that the “association between crash risk and the BASIC scores is so low as to be irrelevant.” See Statistical Issues in the Safety Measurement and Inspection of Motor Carriers, Alliance for Safe, Efficient, and Competitive Truck Transportation (July 10, 2012).

In addition to evidentiary objections on the grounds of relevance, confusion of the issues, unfair prejudice, hearsay, prior bad acts/dissimilar occurrences, character attack, objections to production of CMS/SMS data should note that the data is generally unreliable, along with the DOT's website disclaimer:

“Readers should not draw conclusions about a carrier’s overall safety condition based on the data displayed on this system. Unless a motor carrier in the SMS has received an UNSATISFACTORY safety rating pursuant to 40 CFR Part 385, or has otherwise been ordered to discontinue operations by the FMCSA, it is authorized to operate on the nation's roadways.”

A comprehensive set of discovery is circulating among the Plaintiffs’ bar regarding “violations” of the BASCI so it is also good to keep in mind that BASCI (Behavioral Analysis Safety Improvement Categories) are measurements, not regulations and thus, they cannot be violated.

Objections to disclosing PSP data may include statements that a motor carrier cannot disclose this data without written authorization and several federal statutory schemes protect unauthorized disclosure, including the Privacy Act of 1974, the Drivers Privacy Protection Act of 1994, and the Fair Credit Reporting Act; however, as illustrated below, a narrowly drawn discovery request may defeat these objections.

The Court held that documents from the Driver Safety Measurement System (“DSMS”) or any pre-employment screening program (“PSP”), the driver profile from the Motor Carrier Management Information System (“MCMIS”) are discoverable as they may relate to potential claims for negligent hiring, training, retention and supervision. The Court did not address the motor carrier’s privacy issues but presumably did not find them meritorious as the Court directed the motor carrier to respond to the subpoena duces tecum for the documents’ production.

F. Admissibility of CSA/SMS Data

The Court granted summary judgment in favor of the motor carrier on the issue of punitive damages despite CSA data reflecting that the motor carrier had a 92.8% score on the BASIC of unsafe driving. The Court noted that Plaintiff had not shown that the driver involved in the
accident was among the pool of drivers which constitute the 92.8%; that the 92.8% BASIC score appears to carry little weight with the FMCSA in light of the fact that the motor carrier had a satisfactory safety rating. The Court further premised its decision on the fact that the motor carrier had implemented monitoring and safety systems and equipped its trucks with on-board communication systems which are not required by the FMCSA.

The Court denied a motion in limine to exclude a motor carrier’s CSA scores and percentiles at the time of the accident, permitting an expert to offer testimony about the motor carriers’ safety practices. Relevant to the Court’s decision (although not included in the decision) was evidence that the motor carrier did not have a cell phone or texting policy, that the driver had been engaged in voluminous texting prior to the accident and that the driver had submitted false driver’s logs.

The Court permitted a motor carrier’s expert to testify regarding the motor carrier’s favorable federal government data and safety statistics, stating that references “to federal law and statistics and industry standards will not confuse the jury or prejudice the plaintiffs, since the report is brief and the information and statistics objected to are not complicated.” The Court further noted that such information by experts on both sides “will help the jury assess whether Defendant Panther violated the standard of care in training [its driver].” Although the evidence was favorable to the motor carrier in this instance, the same wisdom could be applied to support the admission of unfavorable CSA/SMS data.

Although the decision did not address CSA/SMS data, the Court’s holding that a compliance review occurring five (5) years prior to the accident was not relevant to the accident, has some potential applicability to the CSA/SMS admissibility issue.

Although the decision did not address CSA/SMS data, the Court’s decision declining to take judicial notice of a motor carrier’s Safestat data because it was not the type of reliable or scientific evidence contemplated by Federal Rule of Evidence 201 has potential applicability.