



ALFA International Phoenix Transportation Regional Seminar

INTERACTIVE CASE EVALUATION: WHAT IS THIS CLAIM REALLY WORTH?

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OBJECTIVES:

- Quick, efficient, economical claims planning.
- Sound, reasoned, supported claims handling.

FUNDAMENTALS:

- Who - What - Where - When
- ** How - **Why
- **“Devil’s in the details”**
- ***You cannot have “too much” information.***

SAMPLE CLAIM - - THE FACTS

** WHO **

- First question: Who is your insured?
- **Small Wheels, LLC** owns the tractor (owner-operator)
- **Big Energy** hauls fuel tankers interstate but has no tractors.
- Small Wheels leases tractors to Big Energy

** WHO **

- LEASE: Independent Contractor Agreement
 - Small Wheels:
 - Small Wheel's drivers
 - must be qualified
 - per FMCSR and,
 - Big Energy criteria
 - Big Energy has right to disqualify

** WHO **

- Driver Qualifications
 - Class A CDL w/ one year experience with tanker endorsement
 - No alcohol or drug convictions x 7 years
 - No drug or violent felony convictions
 - No positive drugs tests
 - Clear DOT physical and drug test

FACTS:

- Driver Paul
 - Contacts Small Wheels on Thursday
 - Fills out application
 - Takes driving and drugs tests
 - Not issued driver number by weekend
 - Asks Small Wheels to stay in truck
 - Big Energy is aware and approves

FACTS:

- Dispatch Manager AI
 - Himself an independent contractor
 - Works for multiple companies
 - Gives permission for Driver Paul to go get gas on Saturday
 - Paul requests to get truck fixed Sunday.
 - AI denies request.

** CRASH **

- The accident:
 - Paul drives to town Sunday night
 - Crosses center line
 - Kills Decedent Diane, Harry suffers TBI













**HARRY'S LONG HAUL
COLD COUNTRY, USA**

US DOT 001001

DECEDENT DIANE

- 52-year-old female
- Single
- 3 adult children
- Earned \$24,000 per year working for welding company
- Running parts at time of accident

HEAD INJURY HARRY

- 42 years old
- Married; 3 young children
- Truck driver
- \$73,000/yr
- Chronic PTSD
- Diminished cognitive functioning

FACTS:

- Small Wheels tractor hauling Big Energy trailer
- Small Wheels tractor with Big Energy placard
- Paul convicted of manslaughter
- Paul high on meth and medical marijuana
- Felony record but not reported in time

PLAINTIFFS' CLAIMS

- Vicarious Liability
- Negligence
 - Negligence per se
 - Negligent entrustment
 - Negligent hire, training, supervision, retention



PLAINTIFFS RELY ON EMOTION
DEFENDANTS RELY ON EVIDENCE

THE LAW

- Vicarious Liability
 - Most dependent on the relationship between employer and employee
 - In order to establish liability of a master to a third person, to whom he owes no contractual duty, for the negligent act of his servant, this burden is on the plaintiff to prove...that the tortfeasor was a servant of the master working under his control when the injury was sustained, and that the negligent act was done within the course of the employment.

THE LAW:

- **Scope of employment:** If found to be an employee, Plaintiff must still prove that Paul was acting within scope of employment.
- The American Law Institute:
- (1) Conduct of a servant is within the scope of employment if, but only if:
 - (a) it is of the kind he is employed to perform;
 - (b) it occurs substantially within the authorized time and space limits;
 - (c) it is actuated, at least in part, by a purpose to serve the master.
- (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

THE LAW:

- Negligent Entrustment
 - Arizona courts have recognized a cause of action for negligent entrustment with the following elements: (1) Defendant owned or controlled the vehicle; (2) Defendant gave the driver permission to operate the vehicle; (3) the driver, by virtue of his physical or mental condition, was incompetent to drive safely; (4) Defendant knew or should have known the driver, by virtue of his physical or mental condition, was incompetent to drive safely; (5) causation; and (6) damages.
 - Plaintiff would have to prove that Defendants gave permission to Paul to drive the tractor and knew or should have known Paul presented an unreasonable risk of harm.

THE LAW:

- Negligence Per Se
 - “A breach of a statute intended as a safety regulation is not merely evidence of negligence but is negligence per se.”
 - However, if the statute does not impose an absolute duty, its violation may be excused if, for example, the defendant was unable to comply after reasonable diligence, because of physical circumstances beyond the defendant’s control, due to innocent ignorance of the operative facts making the statute applicable, etc.
 - Plaintiff relied heavily on violation of federal regulations

THE LAW:

- Admissibility of criminal conviction
 - In Arizona, “a defendant who is convicted in a criminal proceeding is precluded from subsequently denying in any civil proceeding brought by the victim or this state against the criminal defendant the essential allegations of the criminal offense of which he was adjudged guilty, including judgments of guilt resulting from no contest pleas.” A.R.S. 13-807
 - A.R.S. § 13–807 does not, however, bar a civil defendant from alleging contributory negligence or seeking a reduction of his/her percentage of comparative fault.
 - AZ has not decided whether a guilty plea has preclusive effect as to the defendant’s negligence in a later civil suit.

THE LAW:

- **Voluntary Intoxication**
 - While voluntary intoxication does not excuse negligence, it is not itself negligence.
 - Voluntary intoxication is a circumstance that may tend to prove negligence, which the jury may consider along with other evidence.

THE LAW:

- Preponderance of the Evidence:
 - Who was at fault?
 - Whether fault was proximate cause of damages;
 - Respective percentages of fault; and
 - Amount of Plaintiff's damages without reduction for fault.
- Pure Comparative Fault
 - Plaintiff's damages reduced by Plaintiff's percentage of fault.

THE LAW:

- PUNITIVE DAMAGES:
 - Clear and convincing;
 - Evil mind guided by evil hand;
 - Reckless disregard for safety of others;
 - More than gross negligence;
 - NO CAPS.
 - Must be expressly excluded in policy or its included in coverage.

DISCUSSION - LIABILITY

- Is Small Wheels vicariously liable for the acts of Driver Paul?
- Is Big Energy vicariously liable for the acts of Driver Paul?
- Was Small Wheels negligent?
- Was Big Energy negligent?

PUNITIVE DAMAGES:

- Impact:
 - Delay accepting fault;
 - Exposure of company finances;
 - Angry jury is a pricey verdict.

HARRY:

- Causation
 - Did plaintiff really suffer a TBI?
 - If so, is the TBI related to the accident?
- Nature and Extent
 - Is the TBI disabling?
- Damages
 - What amount does the injury translate to in dollars?

HARRY:

- Taken to ER after accident
 - Complained of being thrown about in the cab of his tractor; seat belt?
 - Headaches
 - Dizzy
 - No double vision
 - No confusion
 - No loss of consciousness

HARRY:

- Plaintiff's Neurologist
 - MRI: 4 mm Gliosis on frontal lobe consistent with trauma to the brain

HARRY:

- Plaintiff's Neuropsychologist
 - Functional IQ less than 50 (average: 90-110)
 - PTSD
 - Severe cognitive deficits
 - Will never work as a truck driver again
 - Needs inpatient brain therapy
 - Needs lifetime counseling

HARRY:

- Plaintiff's Life Care Planner & Economist
 - Future medical care \$3.3 million
 - Future diminished earning capacity - \$1.2 million

DEFENSES – HARRY:

- ALL ABOUT the experts:
 - Neurologist
 - Neuropsychologist
 - Neuro-radiologist
 - Voc. Rehab and Life Care Planner
 - OT/PT/ST
 - Economist
- Best and brightest

CAUSATION, NATURE, EXTENT OF DAMAGE:

- ESTABLISH A BASELINE:
 - Prior medical history
 - Work history/Family relationships
 - Other accidents – pre and post subject accident
- Effective surveillance and social media search

HARRY'S EXPERTS:

- Check licensures
- Subpoena all records provided to Plaintiff's experts
- Investigate expert's background (litigation and profession)
- Search for conflicts of interest, contradictions
- Meet science with science

YOUR EXPERTS:

- More information than Plaintiffs' experts
- Unbiased
- Stick with science – emphasis **PROBABILITY** and **CERTAINTY**
- Don't be penny wise and pound foolish
 - * Spend the money necessary to provide a legitimate counter – attack *

DISCUSSION – CASE VALUE

- **Decedent Diane**
 - 52-year-old female
 - Single; 3 adult children
 - Earning \$24,000/yr
- **Head Injury Harry**
 - 42 years old
 - Truck driver earning \$73,000/yr
 - Chronic PTSD
 - Diminished cognitive functioning

MISC. ISSUES

- Who is on the verdict form?
- Admissibility of FMCSR
- Placard liability
- Workers Compensation Lien
- Medicare Lien

Discussion – Best Practices

