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Session IV:  
Not Legalese but Legal T's  
TRIALS

**Fleet Safety Council**

**2017 Annual Educational Conference**

Presented by: John L. (Jack) Weston, Partner  
Secret Wardle – Michigan

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# Background



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## I. Setting the Stage

- The world's first road traffic death involving a motor vehicle is alleged to have occurred on August 31, 1869, when Irish scientist Mary Ward fell out of her cousin's steam car and was run over
- James William Lambert of Ohio was involved in the first automobile accident in world history when his single-cylinder gasoline automobile hit a tree root, causing the car to careen out of control and smash into a hitching post

# Background



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## According to Statistics Canada:

- Over 227,000 Canadians are truck drivers, making it one of the top occupations in the country
- There are about 190,000 registered tractor-trailers in Ontario and about 1,100 people annually earn their AZ licenses to drive them in that province alone
- In 2003, freight originating in Ontario for long-distance trucking accounted for 38% of domestic tonnage and 37% of domestic revenues in Canada

# Background



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- The Canadian trucking industry employs over 3% of the entire Manitoba labor force
- Over 269,000 commercial trucks cross the Manitoba - U.S. border each year
- As a whole, the Canadian trucking industry generates more than \$67 billion in revenues each year between private carriers, courier firms, for-hire carriers and owner-operators. Trucking firms or freight carriers accounted for 57 % of the for-hire revenues of the industry. Heavy truck freight carriers accounted for 21.8 billion vehicle-kilometers, while medium-sized trucks accounted for 7.4 billion kilometers

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- Trucking is a key trade facilitator between Canada and the United States. Approximately two-thirds of Canada-US trade is moved by truck, including more than 80% of all US exports to Canada. Canadian for-hire trucking firms are responsible for just over 80% of the total tonnage shipped intra-provincially

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- A sample study conducted by the Federal Motor Carrier & Safety Administration (FMCSA) and the Department of Transportation (DOT) revealed that, in the year of the study, over 4,500 tractor-trailers were involved in fatal collisions, with almost 5,000 fatalities resulting from those accidents
- 70% of these accidents occurred during daylight hours and 85% occurred Monday to Friday. 80% occurred on dry roadways in non-incident conditions and 70% took place on rural highways

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These studies further revealed that a third of these fatal accidents were due to tractor-trailer driver error, which included:

- Driver fatigue
- Driving too fast for road conditions
- Overcorrecting
- Making improper turns
- Running off of the road

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- Studies also found that over 8% of drivers had no commercial driver's license and another 2% were under the influence of drugs or alcohol at the time of the accident.
- This is significant, as tractor-trailers make up 8% of all vehicles involved in fatal crashes each year and the number of tractor-trailers on the roads has increased over 40% in the past 20 years. There are approximately 8 million tractor-trailers currently registered in the United States.



# Plaintiff's Claims in a Lawsuit



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## II. Plaintiff's Claims in a Lawsuit

### A. Liability

1. Respondeat Superior
2. Employer Negligence
  - a. Failure to Train
  - b. Failure to Supervise
  - c. Failure to Maintain Equipment

# Plaintiff's Claims in a Lawsuit



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## B. Types of Damages

### 1. Compensatory Damages

- Loss of society & grief (by child)
- Loss of consortium (by spouse)
- Loss of support (by any dependent)
- Medical bills (in some states)
- Funeral expenses
- Property damage, including environmental damage claim raised by government

If Plaintiff survived the accident, will also add:

- Pain and suffering

# Plaintiff's Claims in a Lawsuit



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2. Punitive Damages - Not Covered by Insurance. Not all states have these damages. Michigan doesn't.

## How Damages are Apportioned (Varies by jurisdiction)

1. Pure Comparative – each parties actual percentage of fault
2. Modified Comparative –  $> 50\%$  (most common - 32 states)
3. Pure Contribution – If Plaintiff is 1% at fault, no recovery

# What Can the Company Do?



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## III. What Can the Company Do?

- Don't tie your attorney's hands
- Allow him/her full access to records (attorney should personally go through)

### Why Important?

- Because Plaintiff will move at trial to suppress anything not provided

# What Does Your Attorney Need for a U.S. Case?



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## IV. What Does your Attorney Need for a U.S. Case?

### a. Document Retention - What are the rules?

- Federal Motor Carrier Safety Administration (FMCSA) has identified 7 major areas in which a motor carrier is required to maintain documents for a specific period of time – these are all found in CFR (Code of Federal Regulations) §49:

# What Does Your Attorney Need for a U.S. Case?



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§382 - Drug use and alcohol misuse for drivers of 26,001 lb. GVW or greater, those who carry hazmat requiring placarding, or who transport passengers of 16 or more, including driver

**Note:** This includes those who don't regularly drive but also those who are "ready to perform"

§387 - Financial responsibility

§390 - Accident data/information

§391 - Driver qualifications

§395 - Hours of service (logs – manual or electronic)

§396 - Vehicle maintenance

§397 - Business records

# What Does Your Attorney Need for a U.S. Case?



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Some areas are more critical than others and 2 areas – Hours of service and vehicle maintenance – are time-sensitive

- All areas, however, should be reviewed

# What Does Your Attorney Need for a U.S. Case?



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## 1. Hours of Service

Hours of service require the carrier to maintain copies of the driver's records of duty status (RODS) or logs for a minimum of 6 months

- These are critical records – can be good/bad
- Important that the person reading and interpreting the logs is up to date in current regulations, exemptions and current interpretations



# What Does Your Attorney Need for a U.S. Case?



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## 2) Maintenance Records

FMCSA requires motor carriers to keep 2 types of records:

- a. Driver's Vehicle Inspection Report – Prepared daily and signed by driver
  - Should identify any safety related defects, including specific items listed in the regulations
  - If a defect is listed on the report, the motor carrier or its agent must certify on original report that the defect is either repaired or that the repair is unnecessary before the vehicle can be safely operated

# What Does Your Attorney Need for a U.S. Case?



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- The reports must be maintained a minimum of 90 days, and may or may not be attached to the Driver's Log

## b. Entire vehicle maintenance records

- Required to maintain for at least 1 year

## c. Driver qualifications file

- Should be kept from hire date until 3 years after employment ends
- Mandatory background checks – driving and criminal history

# What Does Your Attorney Need for a U.S. Case?



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**Note:** Using a third-party administrator or other service agent who fails to meet the regulation requirements does not relieve the employer of overall responsibility – so research the company or person that you hire!

# The Case Before the Case



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## V. The Case Before the Case

What the Company should have compiled and preserved in the normal course of business to be able to have available for their counsel:

### Driver Information:

- Education, training, experience, driving history documentation

### Initial Company Training:

- Written, road test, comprehensive safety training documentation

# The Case Before the Case



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## Ongoing Training:

- Type, frequency, comprehensive documentation

## Supervision:

- Policy Manual (signed by driver), “No Cell Phone” and driver conduct policies (also signed), records that a supervisor was on duty on all shifts to assess driver’s condition before starting the shift

## Technology:

- On-board cameras (dash cam and driver-facing), Peoplenet, Teletrac Navman, governor, GPS, Qualcomm, black box

# The Case Before the Case



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So now there has been an accident – what next?

Beginning the investigation:

1. Contact your counsel (Does driver need separate counsel?)
2. Consider early expert involvement
3. Accident scene/vehicle inspection – do early while the evidence is fresh
4. Interview witnesses

# The Case Before the Case



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5. Secure your vehicle to avoid a spoliation claim.
6. Consider securing other involved vehicle(s).
7. Secure all relevant accident, driver and vehicle documentation:
  - Driver employment/training records
  - Driver record of duty status (Driver's logs) – ideally for 90 days before accident

# The Case Before the Case



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- Drivers Vehicle Inspection Report
- Fire and rescue reports
- Tow company records
- Police records
- Vehicle maintenance records
- Copies of media coverage (may provide relevant or unknown details)



# The Case Before the Case



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- There should be one “point” person at the company to respond to inquiries from your counsel and handle the claim. Other inquiries (from the media, police agencies, other attorneys) should be referred to your counsel for handling
- Your driver should also be instructed to not speak with anyone (although he will have likely already spoken with Police at the accident scene)

# Take Home Message



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- Probably the single most important thing that a company can do *before* the accident occurs, and something which is often the key to a successful defense, is to have comprehensive, defined, and written training and safety policies and procedures in place, which are consistently adhered to and thoroughly documented.
- Once the accident occurs, work closely and cooperatively with your counsel. He or she is there to defend your interests and only through cooperation can that goal be achieved.

# Contact Information



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Thank you for attending “Session IV: Not Legalese  
but Legal T’s - TRIALS.”

Please contact me with any questions or comments you may have.

Secrest Wardle – Michigan - Troy office

2600 Troy Center Drive

Troy, MI 48084

(T) 248-851-9500



[www.secrestwardle.com](http://www.secrestwardle.com)



John L. Weston, Partner  
Direct (T): 248-851-2801  
[jweston@secrestwardle.com](mailto:jweston@secrestwardle.com)