NEGLIGENT ENTRUSTMENT

The Hidden Fleet

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The Theories of Liability:

✓ Related Negligence Claims;
  ▪ Negligent Hiring
  ▪ Negligent Retention
  ▪ Negligent Supervision
✓ Motor Carrier Liability for
  Negligent Entrustment;
✓ Negligent Entrustment
  (Common Law)

Related Negligence Claims

• Negligence is the failure to exercise the degree of
care of a reasonable person.
• Minnesota recognizes:
  (1) Negligent Hiring;
  (2) Negligent Retention;
  (3) Negligent Supervision; and
  (4) Negligent Entrustment.
Negligent Hiring

• Duty to Exercise Reasonable Care in Hiring Driver
• Breach of Duty by Hiring Driver Carrier “Knew or Should Have Known” Was Unfit
• Injury
• Proximate Cause


• Illinois Court of Appeals denied motor carrier’s motion for summary judgment on negligent hiring claim
• The motor carrier’s driver sexually assaulted a hitchhiker
• Illustrates that motor carriers may be held liable for employee acts that are outside of the scope of employment under negligent hiring theory

Negligent Retention

• Duty to Exercise Reasonable Care in Retaining Driver
• Breach of Duty by Retaining Driver Carrier “Knew or Should Have Known” Was Unfit, Without Taking “Appropriate Action”
• Injury
• Proximate Cause
**Negligent Retention**

- Difference Between Negligent Hiring and Retention:
  - Time at Which Carrier Knew or Should Have Known of Driver’s “Unfitness”
- “Appropriate Action”
  - Disciplining Driver
  - Removing Driver from Driving Duties
  - Closer Supervision
  - Terminating Driver

**Negligent Supervision**

- Driver Was Acting Within the Scope of Employment
- Driver’s Negligence Occurred on Carrier’s Premises or With its Property
- Carrier Failed to Use Ordinary Care When Supervising Driver
- Physical Injury

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**Negligent Supervision**

- Difference Between Negligent Hiring, Retention, and Supervision

(1) Negligent Hiring and Retention:
  - Direct Liability

(2) Negligent Supervision:
  - “Respondeat Superior” or “Vicarious Liability” Based on Agency Law Principles
**Negligent Entrustment**

- **Two Theories:**
  1. Strict Liability
  2. Common Law Negligence

**Negligent Entrustment**

- **Strict Liability (Minn. Stat. § 169.09)**
  - Vehicle Operated in Minnesota
  - Vehicle Operated by Person Other Than Owner
  - Vehicle Operated With “Express or Implied” Consent of Owner

**Negligent Entrustment**

- **Consequence:** Driver Deemed Agent of Owner
- Driver’s Qualifications Irrelevant
- Owner Liable for Driver’s Negligence
- Unnecessary to Show Driver Was Acting Within “Scope of Employment”
- Motor Carrier can be Liable for Accidents that Occur During Personal Time
**Negligent Entrustment**

- Common Law Theory
  - Carrier Had Temporary Control of Vehicle
  - Authorization Was Given to Driver
  - Carrier “Knew or Should Have Known” that the Driver Was Unqualified
  - Driver’s Negligence Caused Injury
  - Unnecessary to Show That Driver Was Acting Within “Scope of Employment”

**Establishing a Claim**

- Key Issue Under Both Theories: Scope of Consent, Not Scope of Employment
- Courts Permit Plaintiff to Submit Both Theories to Jury
- Plaintiff Can Admit Evidence of Prior Accidents
- Such Evidence May Prejudice the Jury

**Recovery by the Driver**

- Some Courts Permit Recovery by the Driver
- Example: Driver Might Sue Employer for Permitting Driver to Use Vehicle While Impaired
- Consequences: Potential Liability for Injury to Third Persons or the Driver
- Workers’ Compensation Might Provide the Exclusive Remedy
Take Steps to Minimize the Risk of Liability for Employee Negligence

- Follow all applicable DOT regulations
- Ensure drivers are qualified
- Ensure drivers are trained properly

DOT Employment Application

- Name/Address of Carrier
- Applicant’s Name, Address, DOB, and SSN
- Applicant’s Address for Past 3 Years
- Date Application Submitted
- Issuing State, number & expiration date of each unexpired CMV operator’s license
- Nature and Extent of Experience
- Identification of all Motor Vehicle Accidents in Past 3 Years
- Identification of all Violations of Motor Vehicle Laws in Past 3 Years

DOT Employment Application

- Circumstances Surrounding any Denial, Revocation, or Suspension of License
- Identification of All Prior Employers for Past 3 Years
- If Applying to Operate CMV in excess of 26,000 lbs.:
  - Identification of Employers for Whom Applicant Operated CMV for Past 10 Years
- Certification/Signature
**DOT Driver Qualifications**

- 21 Years Old
- Read and Speak English
- Safely Operate Vehicle
- Physically Qualified
- Possess Current CMV operator’s license (if operating vehicle in excess of 26,000 lbs, need a CDL)
- Furnish Violation Certificate Per 49 C.F.R 391.7
- Not be Disqualified Per 49 C.F.R. 391.15
- Complete and Furnish an Employment Application

**Motor Vehicle Records**

- Required to Investigate Driving Record
  - For Past 3 Years
  - In Any State in Which Driver Held License or Permit
- Must Be Made Within 30 Days After Employment Begins
- Results Must Be in Driver’s Qualification File
- Make Sure to Comply With the Fair Credit Reporting Act (FCRA) and State Law if You Use a Third Party Background Check Firm

**Employment History**

- Required to Investigate Employment Record
  - For Past 3 Years
  - May Consist of Personal Interviews, Telephone Interviews, Letters, etc.
- Must Be Made Within 30 Days After Employment Begins
- Results Must Be in Driver’s Qualification File
- Make Sure to Comply With the Fair Credit Reporting Act (FCRA) and State Law if You Use a Third Party Background Check Firm
**DOT Drug & Alcohol Testing**

For Commercial Driver Applicants:
- Applies only to drivers of commercial motor vehicles in excess of 26,000 lbs.

1. Pre-employment Drug Testing: Mandatory
2. Pre-employment Alcohol Testing: Bad Idea
3. Background Check For Past 2 Years

For Employees:
- Reasonable Suspicion
- Post-Accident
- Random
- Return-to-Duty
- Follow-up

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**DOT Drug & Alcohol Testing**

Consequences for Positive Tests
- Remove From Safety-Sensitive Functions
- List of Resources
- SAP Evaluation
- Return-to-Duty Test
- Follow-up Testing

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**DOT Drug & Alcohol Testing**

Exemption From Minnesota Drug and Alcohol Testing in the Workplace Act

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General Driver Training

- Maintain Ongoing Training Program for All Drivers
- Document All Training Initiatives and Programs
- Include Documentation in Each Driver’s Qualification File
- Additional Training Requirements for Entry-Level Drivers

DOT Entry-Level Training

*Applies only to drivers of commercial motor vehicles in excess of 26,000 lbs.

The Federal Motor Carrier Safety Administration (“FMCSA”) has issued a final rule requiring training for entry-level drivers who are subject to the commercial driver’s license (“CDL”) requirements.

These new requirements are required by the Intermodal Surface Transportation Efficiency Act of 1991 (“ISTEA”).

DOT Entry-Level Training

Training Must Include Instruction in the Following Four Areas:

- Driver Qualification
- Hours of Service
- Driver Wellness
- Whistleblower Protection

See 49 C.F.R. § 380.503(a) through (d)
Annual Reviews

- DOT Requires Motor Carriers to Review Driving Record of Each Driver Every 12 Months
- Conduct Full Review to Ensure Every Driver Is Still Qualified
- Document the Review and Include Documentation in Driver’s Qualification File
- See 49 C.F.R. § 391.25(c)(2)

Hours of Service

- “Out of Hours” Means a Driver Exceeded the DOT’s Maximum Number of Driving Hours
- Ensure Drivers Keep Daily Driving Logs
- FMCSA Issued a Final Rule on Hours of Service that:
  1. Reduces Number of Hours Drivers Can Work Each Week
  2. Requires Drivers Rest 30 Minutes After 8 Hour Shift
  3. Penalizes Employers That Commit Egregious Violations

Distracted Driving

- FMCSA and PHMSA Issued Final Rule Prohibiting Use of Cell-Phone While Driving
- Companies Should Not Allow or Require Commercial Drivers to Use Mobile Devices While Driving
- Companies May Face Penalty of up to $11,000 for Noncompliance
Criminal Background Checks

- Employers Should Not Obtain Arrest Record Information About Applicants
- EEOC Limits Use of Conviction Records Because of Disparate Impact on Minorities
- Only Use Conviction Records if “Job-Related and Consistent with Business Necessity”
- Look to Green Factors
- Minnesota Private Employers Be Aware of Efforts To “Ban the Box” on Applications

Investigative Reports

- Investigation of Applicants’ Consumer Credit Information Must Be Reasonable in Scope and Job-Related
- Required to Give Notice Under State and Federal Laws
- Applicant Has the Right to Receive Report
- EEOC and MN Dept. of Human Rights Say Use of Credit Checks Might Be Discriminatory

Best Practices

- Comply with State and Federal Laws
- Conduct “Legal-Audits” to Ensure Policies Are Up-To-Date
- Institute Policies That Go Beyond What the Law Requires
- Investigate All Incidents
- Take Appropriate Responsive Action and Document Thoroughly