

NEGLIGENT ENTRUSTMENT

The Hidden Fleet



Craig W. Trepanier, Esq.
TREPANIER & MACGILLIS P.A.
8000 Flour Exchange Building
310 Fourth Avenue South
Minneapolis, MN 55415
Tel: 612-455-0502
Fax: 612-455-0501
craig@trepanierlaw.com

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**



Malorney v. B & L Motor Freight, Inc.

- **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**



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

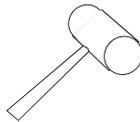
- **Strict Liability (Minn. Stat. § 169.09)**
 - **Consequence:** Driver Deemed Agent of Owner
 - Driver’s Qualifications Irrelevant
 - Owner Liable for Driver’s Negligence
 - Unnecessary to Show Driver Was Acting Within “Scope of Employment”
 - Motor Carrier can be Liable for Accidents that Occur During 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

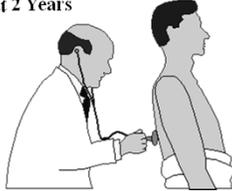
For Commercial Driver Applicants:

**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

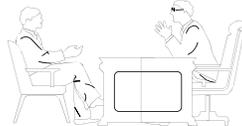


DOT Drug & Alcohol Testing

Consequences for Positive Tests

- Remove From Safety-Sensitive Functions
- List of Resources

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- SAP Evaluation
 - Return-to-Duty Test
 - Follow-up Testing



DOT Drug & Alcohol Testing

Exemption From Minnesota Drug and Alcohol Testing in the Workplace Act

Not Exempt:

- FAA
- USCG
- RSPA
- DOE
- NRC
- DOD
- Other Federal Agencies

Exempt:

- FMCSA
- FRA
- FTA

General Driver Training

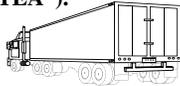
- **Maintain Ongoing Training Program for All Drivers**
- **Document All Training Initiatives and Programs**
- **Include Documentation in Each Driver’s Qualification File**
- **Additional Training Requirements for Entry-Level Drivers**

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”).

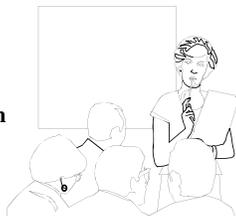


DOT Entry-Level Training

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-Phones 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
