KEEPING THE VERDICT LOW – DAMAGE CONTROL

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I. INTRODUCTION

Anyone handling transportation claims for any length of time will eventually come from the case where liability is apparent. If the case is tried ten times, the case will be lost ten times. Significant damages are claimed and under the facts and circumstances of the case, may be recoverable. The question then is what can the claims handler or defense attorney do to control damages. What steps can be taken to leverage the case in a position where it can be settled for a reasonable amount, or failing that, what steps can be taken to put the case in a position where it can be tried without the fear of a run-away verdict. The focus of this paper will be on steps that are available for the claims handler and the attorney to control the damages in the case so that the case can be brought to a successful resolution. It should be noted that this discussion is from the perspective of Texas law. However, most other states have similar laws and provisions and most of the strategies discussed can be readily transferable to other jurisdictions.

Full and broad topics will be discussed in providing strategy to keep the verdict low. The first is caps or limitations on damages under Texas law. The second is how to spread the liability around. And, the third is limiting the evidence that the jury hears. Each of these strategies is important in keeping the verdict low. Not all will apply to every case. However, in most cases, more than one will apply. Without question, all should be explored when presented with a case with little or no liability defenses and extremely high damage exposure.

II. CAP OR LIMIT THE DAMAGES

The first strategy that should be employed is whether there is a statutory or common law argument for limitation of damages. In all cases, these caps or limitations are not made known to the jury. Generally, they are applied at the motion for judgment stage. However, many may require evidentiary predicates in order for their application. Therefore, it is important that the transportation entity which is involved makes sure the appropriate evidentiary predicate has been established.

A. Section 18.091, TEXAS CIVIL PRACTICES AND REMEDIES CODE

The first cap which should be explored in a high-damage case is Section 18.091 of the Texas Civil Practices & Remedies Code. This statute provides in part:

> § 18.091. PROOF OF CERTAIN LOSSES; JURY INSTRUCTION.
>
> (a) Notwithstanding any other law, if any claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance, evidence to prove the loss must be presented in the form of a net loss after reduction for income tax payments or unpaid tax liability pursuant to any federal income tax law.
>
> Subsection (b) goes on to provide that:
>
> (b) If any claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance, the court shall instruct the jury as to whether any recovery for compensatory damages sought by the claimant is subject to federal or state income taxes.
>
> Added by Acts 2003, 78th Leg., ch. 204, § 13.09, eff. Sept. 1, 2003.

Section 18.091 was added by the provisions of House Bill 4. The legislative intent of this provision was reflecting the economic reality of recipients of personal injury coverage. If the injured party had earned any loss income, it would be reduced by the appropriate federal income taxes. In addition, since the recovery itself is not subject to federal income tax, the most accurate measure of damages is to have it presented in an after-tax format.

Section 18.091 is important not only in a personal injury case but also in a wrongful death case. In a personal injury case, any evidence regarding loss of income must be proffered in an after-tax format. In other words, if the plaintiff

fails to offer the evidence in an after-tax format and only offers it in a pre-tax format, the evidence cannot and should not be received by the court. When the defendant is taking the depositions of approved experts or reviewing the disclosures regarding damages made by the plaintiff, careful consideration should be given as to whether such admission should be brought to the attention of plaintiff's counsel.

The same is true with wrongful death cases in which loss of inheritance damages are being sought.

Section 18.091 has received sparse attention in the court. In *Interconex, Inc. v. Ugarov*, 224 S.W.3d 523 (Tex.App.—Houston [1st Dist.] 2007), the defendant contended that the plaintiff had failed to comply with Section 18.091, and the testimony of lost income should not have been received. Plaintiff argued that there was substantial compliance with Section 18.091 or that, in the alternative, it was unconstitutional. The court did not reach the issue because the defendant in that case failed to object to the charge and the requirement that the limiting language in Section 18.091(b) be included. In addition to objecting to the charge states, counsel for defendant should also object at time the evidence is sought to be introduced in order to comply with the provisions of section 18.091(a). In general, the court held that:

> It is well established that this provision defines the class of persons who are entitled to recover punitive damages for wrongful death; parents of the deceased, while they are entitled to maintain an action under the Wrongful Death statute, are not included in article XVI, § 26 and are therefore unable to recover punitive damages. [Citations omitted.] The Wrongful Death statute cannot broaden the class of persons entitled to recover punitive damages beyond the scope of article XVI, § 26 of the constitution. [Citations omitted.] In 1889 this Court, analyzing the relationship between article XVI, § 26 and the Wrongful Death Act said, "the right to maintain an action for the recovery of exemplary damages for the death of a person . . . is confined to the class of persons who, by the terms of the constitution, are designated as entitled to maintain such action; namely, the surviving husband or wife, or heirs of the body, or the deceased, and not to the parents."

See *General Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 923 (Tex. 1993).

B. Section 41.0105, TEXAS CIVIL PRACTICES AND REMEDIES CODE

Section 41.0105 of the Texas Civil Practices and Remedies Code provides in pertinent part that:

> § 41.0105. EVIDENCE RELATING TO AMOUNT OF ECONOMIC DAMAGES. In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.
>
> Added by Acts 2003, 78th Leg., ch. 204, § 13.08, eff. Sept. 1, 2003.

This section was added in 2003 by House Bill 4. The provision was intended to insure that what many believe the common law of Texas was codified in the statute. This concept was addressed by the Texas Supreme Court in *Texarkana Memorial Hospital, Inc., v.Murdock,* 946 S.W.2d 836 (Tex. 1997). However, because the court decided the case on another point, it did not reach this issue.

The application of Section 41.0105 was first addressed in a written opinion in *Mills v. Fletcher*, 229 S.W.3d 765 (Tex.Civ.App.—San Antonio 2007). In that case, the defendant argued that the recovery of past medical expenses should have been reduced pursuant to section 41.0105 because the plaintiff's medical providers had accepted lesser amounts for the medical

services from plaintiff's health insurance company. In response, the plaintiff argued that he had "incurred" the medical charges at the time of his doctor's visit and the fact that the amounts were later written off because of an agreement between his health care providers and his health insurance companies did not effect whether the charges were "incurred." The plaintiff referred to several dictionary definitions of the term "incurred." For example, Black's Law Dictionary defined "incurred" to mean:

> To suffer or bring on oneself (a liability or expense).

As a result, plaintiff argued that the word "incurred" meant to become liable for and the fact that they were later written off did not effect whether they were "incurred."

In contrast, defendant pointed out that the statute did not merely use the word "incurred." Rather, the term was "actually incurred." defendant argued in his brief that the term "actually incurred" refers to those expenses that have been charged but not paid. The court noted that plaintiff's interpretation was consistent with the Legislative history which was "to bring more balance to the Texas civil justice system, reduce litigation costs, and address the role of litigation in society. The court also rejected defendant's argument that the statute violated the collateral source rule. The court rejected this argument. The court noted that the theory behind the collateral source rule is that the wrongdoer should not have the benefit of insurance independently procured by the injured party. Here, the insurance adjustments or amounts were "written off" and the defendant was not receiving the benefits of amounts paid by the insurance company.

Finally, plaintiff argued that Section 41.0105 violated the due process and open courts provision of the Texas Constitution. The court found no violation because in this case, the plaintiff would still be entitled to recover the full amount of medical expenses that were actually paid.

Section 41.0105 was next addressed by a court of appeals in *Gore v. Faye,* No. 07-06-0218-CV, 2008 Tex. App. LEXIS 252 (Tex. App.--Amarillo 2008, no pet.). In this case, the trial court did not allow the introduction of the write-offs in medical expenses before the jury, but rather required the defendant to introduce such evidence following the receipt of a jury verdict. The narration before the court was a procedural question of whether the trial court was required to implement Section 41.0105 in presenting the evidence to the jury. The court held that in the absence of more explicit statutory provision or guidance from the supreme court, there was no abuse of discretion on the part of the trial in its decision to apply Section 41.0105 post-verdict.

Many issues still exist regarding the application of Section 41.0105. This is the burden of the plaintiff or the defendant to demonstrate what amount was actually paid or incurred as opposed to billed. Some jurisdictions have adopted special rules to deal with these issues. For example, Lubbock district courts have adopted the Lubbock Rule in which the actual bills are submitted to the jury and then reduction occurs post-verdict at a separate hearing. Obviously, this method is not as favorable to defendants because it allows the plaintiff to "blackboard" a much larger medical figure than he or she may be actually entitled to recover.

It should also be emphasized that the statute is not limited to past expenses. If there is a future life-care claim, likewise this amount should be presented on a paid or incurred basis. The main impact in most cases of the application of Section 41.0105 is generally to reduce the amount of both past and future medical expenses by approximately one-half.

It should be noted that this provision essentially went under the radar during the 2003 Legislative Session. However, since

its passage, it has been one of the more discussed provisions of House Bill 4. In fact, in the 2007 Legislative Session, this provision was repealed as to all cases except medical malpractice cases. Only a veto by Governor Perry kept the repeal from becoming law.

C. Section 41.008, TEXAS CIVIL PRACTICES AND REMEDIES CODE

In those cases involving punitive damages, the caps under Section 41.008 of the Texas Civil Practices and Remedies Code should be pled. Subsection (b) of that statute provides as follows:

> b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of: (1)(A) two times the amount of economic damages; plus
> (B) an amount equal to any noneconomic damages
> found by the jury, not to exceed $750,000;

The term "economic damages" is defined by Section 41.001(4) to mean:

> [C]ompensatory damages intended to compensate a claimant for actual economic or pecuniary loss; the term does not include exemplary damages or noneconomic damages.

The term "Noneconomic damages" is defined by Section 41.001(12) to mean:

> [D]amages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages.

There are a couple of interpretations of the statute which must be remembered. The key term in Section (b) is "found by the jury." This provision has been interpreted quite liberally by Texas courts to mean that if there is a reduction of the damages because of settlement (*see Beverly Enters. of Texas, Inc. v. Leath*, 829 S.W.2d 382 (Tex. App.--Waco 1992, no writ)), or because of the contributory negligence of the plaintiff (*I-Gotcha, Inc. v. McInnis*, 903 S.W.2d 829 (Tex. App.--Fort Worth 1995, no writ)), that the cap will not take those reductions into consideration. Rather, the cap will be based upon the gross amount found by the jury without any reductions because of contributory negligence or settlement offsets. However, it should be pointed out that no court has carried this view so far that where there is insufficient evidence to support a particular award of economic or noneconomic damages, the courts have held that a cap should be still based upon a figure where there is either legally or factually sufficient evidence to support that figure. *See Wheelways Ins. Co. v. Hodges,* 872 S.W.2d 776 (Tex. App.--Texarkana 1994, no writ)

When dealing with punitive damages and transportation entities, it should be remembered that the gross negligence of the driver will not in and of itself be sufficient to impose punitive damages upon the company. Rather, Texas courts have held that the driver's conduct alone is insufficient to impose corporate liability for punitive damages. In *Fort Worth Elevators Co. v. Russell*, 70 S.W.2d 397 (Tex. 1934), the supreme court listed four circumstances in which a corporation could have punitive liability for the acts of its employees. Those four areas are as follows:

(1) The corporation authorized the doing and manner of the act; or

(2) The employee was unfit and the corporation was reckless in employing him; or

(3) The employee was employed as a vice-principal and was acting in the scope of his employment; or

(4) The corporation or vice-principal of the corporation ratified or approved the act.

D. Section 41.005, TEXAS CIVIL PRACTICES AND REMEDIES CODE

Another statute which must be delivered when there is potential punitive liability is the safe harbor of Section 41.005. Subsection (a) provides:

> In an action arising from harm resulting from an assault, theft, or other criminal act, a court may not award exemplary damages against a defendant because of the criminal act of another.

Initially, this statute was passed at the request of the apartment industry which was being sued for assault and other criminal acts that were perpetrated upon their residents. However, the statute has been applied beyond this application. With respect to transportation, if the driver is an actual employee of the transportation entity, Section 41.005(b) provides that:

> The exemption provided by Subsection (a) does not apply if:
>
> (1) the criminal act was committed by an employee of the defendant;

In this situation, it is important to determine whether or not the driver was an actual employee of the defendant, was a statutory employee or was an independent contractor. The precise definition of "employee" as used in the statute has not been addressed by the supreme court. Even if the driver were an employee of the transportation entity, there are additional provisions in subsection (c) of Section 41.005. Subsection (c) provides as follows:

> (c) In an action arising out of a criminal act committed by an employee, the employer may be liable for punitive damages but only if:
>
> > (1) the principal authorized the doing and the manner of the act;
> >
> > (2) the agent was unfit and the principal acted with malice in employing or retaining him;
> >
> > (3) the agent was employed in a managerial capacity and was acting in the scope of employment; or
> >
> > (4) the employer or a manager of the employer ratified or approved the act.

These provisions are similar to the ones contained in *Fort Worth Elevators Co. v. Russell*, 70 S.W.2d 397 (Tex. 1934).

In most cases, the provisions of Section 41.005 certainly will not be raised by the employer. However, the plaintiff may raise the issue of criminal act by attempting to invoke one of the exceptions under Section 41.008(c). Section 41.008(c) provides:

> (c) This section does not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if, except for Sections 49.07 and 49.08, the conduct was committed knowingly or intentionally:
>
> > (1) Section 19.02 (murder);
> >
> > (2) Section 19.03 (capital murder);
> >
> > (3) Section 20.04 (aggravated kidnapping);
> >
> > (4) Section 22.02 (aggravated assault);
> >
> > (5) Section 22.011 (sexual assault);
> >
> > (6) Section 22.021 (aggravated sexual assault);
> >
> > (7) Section 22.04 (injury to a child, elderly individual, or disabled individual, but not if the conduct occurred while providing health care

as defined by Section 74.001);

(8) Section 32.21 (forgery);

(9) Section 32.43 (commercial bribery);

(10) Section 32.45 misapplication of fiduciary property or property of financial institution);

(11) Section 32.46 (securing execution of document by deception);

(12) Section 32.47 (fraudulent destruction, removal, or concealment of writing);

(13) Chapter 31 (theft) the punishment level for which is a felony of the third degree or higher;

(14) Section 49.07 (intoxication assault);

(15) Section 49.08 (intoxication manslaughter); or

(16) Section 21.02 (continuous sexual abuse of young child or children).

Therefore, if the plaintiff wishes to not have the caps under Section 41.008 apply, he or she then must face the prospects that the punitive damages may only be recovered against the employee himself and not against the employer because of the safe-harbor provisions contained in Section 41.005.

E. Common Law Cap on Wrongful Death

For years, Texas courts have struggled with whether, absent some statutory provision, there should be some common law caps on noneconomic portion of wrongful death cases. In this long line of cases, courts have focused on whether there is a benchmark that should limit the amount recoverable for noneconomic portion of a wrongful death case. In *William N. Hawkins v. Vivian Walker, et al.*, 238 S.W.3d 517 (Tex.App.—Beaumont 2007), the court once again was faced with the situation. In this case, the parents sued for the death of a twenty-six year old daughter. The jury awarded $1.7 million to the mother for past and future mental anguish and for past and future loss of companionship and society. The court noted that there was only one Texas appellate case that affirmed the jury award more than $300,000 for a parent, when the evidence did not include testimony consistent with the conclusion the parent suffered severe mental anguish or severe grief because of the child's death. The court noted that there were several reported Texas cases that affirmed wrongful death awards for non-pecuniary damages of up to $300,000 when the evidence showed a close relationship, but did not show any significant interference in the wrongful death beneficiary's daily activities. Based upon this review of the Texas cases, the court concluded that while Texas has no physical manifestation rule for wrongful death cases, there is a presumption of mental anguish for the wrongful death beneficiary. Where there is no evidence to establish severe emotional trauma that resulted in lengthy physical manifestation such as depression or other secondary reactions, then the amount should be limited to those amounts that have been approved by courts in the past. Where physical manifestations had been approved, then amounts in excess of the $300,000 threshold may be recovered.

F. Recovery of Punitives By Parents

Under Texas case law and the Constitution, punitive damages are not recoverable in a wrongful death case by the parents of decedent. Rather, under case law and the Constitution, the recovery of punitive damages is limited to the spouse and children. This issue was most recently addressed in *General Chem. Corp. v. De La Lastra*, 852 S.W.2d 916 (Tex. 1993). There the Texas Supreme Court reaffirmed the principle that recovery of punitive damages in a wrongful death case would not be allowed for the parents. *See* Article 16, Section 26, of the Texas Constitution which provides:

> Every person, corporation, or company, that may commit a homicide, through willful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide.

G. Unity of Release Rule

Texas law has long been that a settlement with an employee does not release the employer nor does a settlement with the employer release the employee. *See Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805 (Tex. 1980). In that case, the court examined Texas public policy along with the laws in other jurisdictions to determine that a party would not be released unless there was express mention of the party in the release. However, the Legislature may have unknowingly reinserted the Unity of Release Rule by the passage of Section 33.003 of the Texas Civil Practices and Remedies Code. That provides in pertinent part:

> § 33.003. DETERMINATION OF PERCENTAGE OF RESPONSIBILITY. (a) The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for the following persons with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these:
>
> (1) each claimant;
>
> (2) each defendant;
>
> (3) each settling person; and
>
> (4) each responsible third party who has been designated under Section 33.004.
>
> (b) This section does not allow a submission to the jury of a question regarding conduct by any person without sufficient evidence to support the submission.
>
> Added by Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.06, eff. Sept. 2, 1987. Amended by Acts 1995, 74th Leg., ch. 136, § 1, eff. Sept. 1, 1995; Acts 2003, 78th Leg., ch. 204, § 4.02, eff. Sept. 1, 2003.

In a few cases, plaintiffs are settling with only the driver, leaving the transportation entity as the remaining defendant. If the plaintiff has allegations of direct liability and negligence against the transportation company, the settlement with the employee may offer no obstacle. However, in the event the only allegations against the transportation company are for vicarious liability, plaintiff has given up his entire cause of action. In this case, the only basis for liability being asserted against the transportation company is for the negligence of the driver. However, if the driver has settled under Section 33.003, one-hundred percent of the negligence will be attributable to a settlement person and there would be no negligence remaining for the transportation company.

H. No Recovery of Medical or Loss Wages by Injured Children

In the rare case, the cause of action against a transportation company will not be brought until the statute of limitations has expired against the parent, but has not expired against the injured child. Texas law is quite clear that up until the age of eighteen, a cause of action for loss wages or medical expenses does not belong to the child, but rather belongs to the parent. *See Hofer v. Lavender*, 679 S.W.2d 470 (Tex. 1984). In a situation where the parent waited past the applicable statute of limitations such that only the trial's cause of action is left, any medical expenses up to age eighteen and lost wages up to age eighteen are not recoverable because they do not belong to the child but rather belong to the parent.

III. SPREAD LIABILITY AROUND

The second strategy in attempting to address a case where there is high exposure and fairly certain liability is to attempt to spread the liability around among other parties. Fortunately, recent changes to Texas law allows this strategy to be implemented quite effectively. First and foremost is the designation of responsible third party or the joinder of a contribution defendant. The joinder of a responsible third party is governed by the procedural requirements in Section 33.004 of the Texas Civil Practices and Remedies Code.[1] The limitation of a designation of responsible third party is that the person's responsibility will be sent to the jury. However, there will be no recovery from that person and, if assistance is being sought at settlement, such assistance will not be there. The alternative to designating someone as a responsible third party is to join them as a third-party defendant. Section 33.004(b) provides that:

> Nothing in this section affects the third-party practice as previously recognized in the rules and statutes of this state with regard to the assertion by a defendant of rights to contribution or indemnity. Nothing in this section affects the filing of cross-claims or counterclaims.

Therefore, if a judgment is actually sought against the person or company, then the non-party should be joined as a third-party defendant as opposed to being designated as a responsible third-party. Of course, if the person is joined as a third-party defendant, they will have the right to hire an attorney and present a defense which may include attempting to blame the person who has joined them in the lawsuit.

A. Products Liability – Responsible Third Parties for Contribution Defendants

The addition of a products liability responsible third party or products defendant generally will focus in one of two areas. The first is the vehicle being driven by the plaintiff. In many circumstances, the actual collision may not be that severe, but the injuries to the plaintiff are severe because of a crash-worthiness defect that exists in the plaintiff's vehicle. Under Texas law, a products liability cause of action may be maintained not only for defects that result in the accident, but also for defects that increase or aggravate the injuries that otherwise would be sustained by the plaintiff. The types of defects that are often involved in the crash-worthiness case can include restraint systems, such as seatbelts, airbags, but can also include issues such as crumple zones in the vehicle as well as the mounting of the fuel tanks.

The second type of product liability responsible third parties or contribution defendants can be explored are those manufacturers who had some involvement in the manufacturing of the transportation company's vehicle. These may include the manufacturers of the braking systems or steering systems, and in cases where transportation companies which carry passengers for hire may involve the construction of restraint systems or the seats.

B. Medical Malpractice – Responsible Third Parties or Contribution Defendants

The second category of responsible third parties or contribution defendants that must be explored are those who provide medical services. In many cases, the initial injuries sustained by the plaintiff may have been relatively minor, but because of complications that develop during the kind of treatment, those injuries became much more severe or even fatal. A very common example of this type of situation is where the plaintiff acquires an infection while in the hospital being treated for injuries. The infection may lead to other complications such as amputations or, in the extreme cases, to sepsis and eventually death. Other types of cases may involve the wrong medication being given or failure to timely or appropriately diagnose and treat a particular injury. If a medical malpractice contribution is to be joined, it should be remembered that section 74 of the Texas Civil Practices and Remedies Code provides a very lengthy and specific set of procedures that must be followed. Without question, these procedures, including

[1] Section 33.004(a)(e)(f) and (g).

giving of the original notice of intent to sue must be followed with respect to a healthcare provider who is joined as a third-party defendant as opposed to being sued as a defendant. Where the healthcare provider is being designated as a responsible third-party, the procedural requirements should not apply. However, there are requirements regarding the qualifications of the experts who are going to testify regarding the standard of care, breach of the standard of care, and causation that will apply.[2] If a medical provider is designated as a responsible third party, it will be incumbent upon the defendants making such a designation to insure that the test used to establish liability does comply with Chapter 4 of the Civil Practices and Remedies Code.

C. Negligence – Responsible Third Parties or Contribution Defendants

In many cases, a transportation defendant will want to designate as a responsible third party or join as a contribution defendant companies who are involved in the repair or maintenance of the vehicles. The large companies contract out the maintenance of all or part of their vehicles. If there are allegations that one or more of these areas of the vehicle were responsible for the accident, then these companies should be joined as a contribution defendant or, at a minimum, designated as a responsible third party. However, this area may contain a number of minefields. If the maintenance or repairs of the vehicles were so substandard or continued over such an extended period of time as to indicate a standard of practice, there may be corporate liability on the part of the transportation company in failing to properly supervise or monitor the maintenance to see that it was being performed in a good and workmanlike manner.

D. John Doe – Responsible Third Party

One of the many features of the responsible third-party practice in Chapter 33 of the Texas Civil Practices and Remedies Code is that it specifically allows for a "John Doe" practice. Specifically, Section 33.004(j) provides as follows:

> Notwithstanding any other provision of this section, if, not later than 60 days after the filing of the defendant's original answer, the defendant alleges in an answer filed with the court that an unknown person committed a criminal act that was a cause of the loss or injury that is the subject of the lawsuit, the court shall grant a motion for leave to designate the unknown person as a responsible third party if:
>
> (1) the court determines that the defendant has pleaded facts sufficient for the court to determine that there is a reasonable probability that the act of the unknown person was criminal;
>
> (2) the defendant has stated in the answer all identifying characteristics of the unknown person, known at the time of the answer; and
>
> (3) the allegation satisfies the pleading requirements of the Texas Rules of Civil Procedure.

This practice is known as the "John Doe" or "Jane Doe" practice. Under the John Doe practice, it is not enough that the unknown person was responsible for the plaintiff's damage; rather, the procedure is only available when a party alleges that the unknown person committed a criminal act that was the cause of the loss or the injury that is the subject of the lawsuit. This applies to situations where the potential civil liability stems from an event involving a fugitive's criminal act. If the potentially responsible third party is alleged to have committed a criminal act, but has been apprehended or is identifiable, the special designation procedures do not apply. It is important that the defendant bears the burden of pleading sufficient facts "for the court to determine" that there is a "reasonable probability" that the act of the unknown person was "criminal." This provision creates a statutory delegation of authority to the court in a

[2] See Sections 74.401, 74.402 and 74.403, Texas Civil Practice and Remedies Code.

civil case to make a determination as a matter of law as to whether there is a reasonable probability that the criminal act of an unknown third person is the cause of some portion of the plaintiff's loss.

It should be noted that the facts and circumstances with this designation may be employed are somewhat more limited. However, they could involve circumstances such as where the phantom driver appeared to be intoxicated, where someone had illegally removed road signage, or similar circumstances.

E. Governmental Entity – Responsible Third Party or Contribution Defendant

There may be a rare circumstance where a governmental entity such as a municipality or the state of Texas may be designated as a responsible third party or jointed as a contribution defendant. Generally, the purpose for such designation or joinder would be for some defect in the roadway. These defects can be in the original design of the roadway, though such theories of liability are very difficult to prosecute under the provisions of the Texas Tort Claims Act. In addition, other theories of liability may involve dangerous conditions in the roadway or special defect. Because of the caps on damages imposed by the Tort Claims Act, consideration may be given as to whether it is more prudent to designate the governmental entity as a responsible third party rather than joining them as a contribution defendant.

F. Contribution Negligence -- Driver

Obviously one option of spreading the liability around is to determine whether the plaintiff-driver was contributorily negligent. Under Section 33.003 of the Texas Civil Practices and Remedies Code, the claimant's contributory negligence must be submitted to the trier of fact and compared with the defendant's. Under Section 33.012(a), if the claimant is not barred from recovery, the court is required to reduce the amount of damages to be recovered by the claimant by a percentage equal to the claimant's percentage of responsibility. In a typical case, the negligence of the plaintiff which would be focused will be the negligence which actually causes the occurrence itself. This may include excessive speed, failure to keep a lookout, and things of this nature. However, the contributory negligence of the plaintiff may extend into other areas other than conduct that caused the occurrence. For example, if the plaintiff is noncompliant in his or her medical treatment and the noncompliance enhances or exacerbates the plaintiff's injuries, such conduct can be a bar if it exceeds fifty percent or can serve to reduce the plaintiff's recovery if it is fifty percent or less. *See Jackson v. Axelrad*, 221 S.W.3d 650, 655 (Tex. 2007). One other possible source of contributory negligence on the part of the plaintiff is the failure to utilize the supplemental restraint systems in the vehicle such as seatbelts. This we will discuss below.

G. Failure to Wear Seatbelts

Prior to 2003, the law in Texas was very clear that the failure of a plaintiff to utilize seatbelts in the vehicle could not be introduced into evidence and was not contributory negligence on the plaintiff's part. However, this changed with the passage of House Bill 4 in 2003. The seatbelt evidence provision of Article VII of House Bill 4 repeals a provision in the Texas Transportation Code to allow the fact finder to hear evidence about whether a plaintiff was wearing a seatbelt at the time of the accident. The provision was passed for the purpose of allocating fault and determining the cause of damages. In the prior Texas law, the use or nonuse of a seatbelt was not admissible as evidence in a civil trial, except in certain cases involving parental rights. Consequently, the evidence that plaintiffs contributed to their injuries by failing to wear a seatbelt could not be considered by a jury in determining liability or damages. *See* Sections 545.412(d), 545.413(g) of the Transportation Code. The inadmissibility of seatbelt use applied despite the fact that drivers are required, by statute, to wear seatbelts. Other acts of plaintiffs that contribute to their injuries, such as excessive speed, reckless driving, or alcohol use, are admissible as evidence in civil trials and can be considered by the juries.

House Bill 4 removed the restrictions against safety restraint evidence. For example, Texas Transportation Code, Section 545.412(d)

previously disallowed evidence regarding the use or nonuse of a child-passenger seat safety system. In addition, Section 545.413(g) previously disallowed evidence regarding the use or nonuse of a seatbelt. Article 8.01 of House Bill 4 repealed Sections 545.412(d) and 545.413(g) of the Texas Transportation Code to allow the evidence to be admissible to the same extend other acts of plaintiffs are admissible under the Texas Rules of Evidence.

IV. LIMITING THE EVIDENCE THE JURY HEARS

The third strategy in addressing situations where liability is relatively clear and damages may be large is to try to limit the evidence that the jury hears when assessing issues of liability and damages. This section will not attempt to address specific issues of admissibility of evidence, but rather focus on larger and broader issues concerning evidence which will attempt to drive up or greatly increase the damages that are recoverable.

A. Separate Trials

If the joint trial of multiple claims will prejudice either one of the claims, the court should order separate trials. *See Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 630 (Tex. 1996) (orig. proceeding) (holding separate trials required where evidence probative of one claim was highly prejudicial to the other claim). Rule 174(b) of the Texas Rules of Civil Procedure allows "the court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims or issues." Tex. R. Civ. P. 174(b). Under Rule 174, the trial court usually has broad discretion to sever and order separate trials. See *F.A. Richard and Assocs. v. Millard*, 856 S.W.2d 765, 767 (Tex. App.– Houston [1st Dist.] 1993, no writ). However, a "trial court has no discretion to deny separate trials when an injustice will result:"

> [W]hen all of the facts and circumstances of the case unquestionably require a separate trial to prevent manifest injustice, and there is no fact or circumstance supporting or tending to support a contrary conclusion, and the legal rights of the parties will not be prejudiced thereby, there is no room for the exercise of discretion. The rule then is peremptory in operation and imposes upon the court a duty to order a separate trial.

In re Ethyl Corp., 975 S.W.2d 606, 610 (Tex. 1998) (emphasis added) (advising that "the express purpose of Rule 174(b) was to further convenience, to avoid prejudice, and to promote the ends of justice.") (quoting *Womack v. Berry*, 291 S.W.2d 677, 683 (Tex. 1956) (explaining that the trial court has discretion to order separate trials)); see also *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 207-10 (Tex. 2004) (holding consolidation was abuse of discretion in "toxic soup" case where different plaintiffs had different causes of their injuries).

In many cases, the issues of negligence in hiring, retention, or training become an issue in the case. In some cases, fairly egregious facts may appear, such as whether a company knew a driver had a prior history of drug use or whether the company was aware that the driver had been using drugs while employed at the defendant company. In most of these cases, the evidence may be that the driver at the time of the incident was not impaired. However, if the evidence of prior use of drugs or other substances comes into evidence, the effect on the ability of the defendant to get a fair trial is significantly impaired. In those cases, the transportation company should move for a separate trial. Unless there are facts establishing that the driver was negligent on the occasion in question, then the evidence concerning negligent hiring, retention or training is irrelevant. These issues only become relevant if there is a finding that the driver was negligent. Many courts have resolved this dilemma by ordering separate or bifurcated trials where only the issues of negligence and damages are tried to the jury initially. Only upon a finding of negligence on the part of the driver, then would the jury go into the second phase of the case where evidence regarding substance abuse would be admissible.

B. Criminal Convictions

Sometimes the transportation company may find itself in the unfortunate position of having a driver who has a prior criminal record be its employee. In most cases, the prior criminal conviction is absolutely irrelevant to the issues in the case. However, the mere fact that the driver may have been convicted of a misdemeanor or felony can have devastating consequences on the trial of the case. Texas Rule of Evidence 609(f) is a mechanism by which this information can be kept out. Rule 609(f) provides that:

> Evidence of a conviction is not admissible if after timely written request by the adverse party specifying the witness or witnesses, the proponent fails to give to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Where there is one witness who does have a criminal conviction, one method that is commonly used is to provide a written request to the plaintiff and list all potential witness in the case, including the witness who has the criminal conviction. In the event plaintiff fails to provide written notice of intent to introduce evidence of a criminal conviction, such conviction should be kept out of evidence at the trial of the case.

C. Limiting Expert Witnesses

Too often, plaintiff's counsel will attempt to use expert witnesses who are either not qualified, there is no foundation for their opinions, or are attempting to testify regarding matters which are not the proper subject of expert testimony. Literally, entire treatises are written regarding what subjects are proper for expert testimony and the procedural hurdles that must be met before the testimony should be admitted into evidence. One good example of this principle is *Volkswagen of America, Inc. v. Ramirez*, 159 S.W.3d 897 (Tex. 2004). In that case, the question was whether a defect in the vehicles left rear wheel assembly caused the accident. It was undisputed that the wheel separated from the vehicle, but the issue was whether the detachment of the wheel caused the accident or resulted from it. It was undisputed that the left rear wheel of the vehicle was found completely detached from the car's stub axle and lying on its side position directly under the left rear wheel well. The plaintiffs in the case offered the testimony of Ronald Walker, their accident reconstruction expert who testified that it was his opinion that the left rear wheel of the Passat detached from the axle but stayed "tucked underneath" the left rear wheel well as the car entered and crossed the grass and concrete median at 50-60 miles per hour, collided with a Mustang, and spun partially around before coming to rest. Walker further testified that the "laws of physics" explain how the wheel was able to remain pocketing in the rear wheel well through the turbulent accident sequence. He further testified that the defect in the wheel was the proximate cause of the accident. On appeal, the court noted that Walker did not conduct or cite any test to support his theory, that the wheel could remain tucked in the left wheel well under the "laws of physics." The court held that this was insufficient to prove the reliability of the opinion and, therefore, the opinion was unreliable and constituted no evidence.

Another example with respect to damages in *Seale v. Winn Exploration Co., Inc.*, 732 S.W.2d 667 (Tex. App.—Corpus Christi 1987). In that case, plaintiffs attempted to have Dr. Ebert Dillman, a fairly well-known economist, testify regarding the value of lost companionship and society in a suit brought by the mother for the wrongful death of her adult son. The court noted that expert opinions are admitted in evidence on the theory that the expert, by reason of study, has special knowledge which jurors do not possess and is thereby better able to draw conclusions from fact. The court concluded that an economist is in no better position to assess the loss of companionship or society than the jury and that the trial court properly excluded such testimony.