Flipping the Paradigm:

Presenting Subsequent Remedial Measures as a Defense to Punitive Damage Claims against Motor Carriers

By Michael B. Langford

Punitive damage claims are pled regularly against motor carriers in vehicular accident injury and death lawsuits. Plaintiffs' attorneys assert that it's not enough for a jury to find negligence. Rather, the holy grail of plaintiff trucking accident litigation has become attempting to prove with clear and convincing evidence that a truck driver or motor carrier engaged in reckless indifference, gross negligence, or with a heedless disregard for the safety of others. The jury's award should be generous enough to deter future obdurate conduct by the defendant and those similarly situated. This means that the defendant motor carrier's net worth becomes a factor in determining just how much should be awarded in punitive damages. Punitive damage awards against the trucking industry can now tally into the tens of millions of dollars.

The Conventional Path for the Punitive Damage Defense

There are two traditional baseline devices used to defeat punitive damage claims. First, the defendant files a summary judgment motion, contending that the defendant's conduct, even when viewed in the light most favorable for the plaintiff's case, does not rise to the heightened punitive standard. It should be dismissed before the jury considers it. Second, if the summary judgment motion fails, then the next step is convincing the jury that the underlying facts don't rise to punitive conduct. Rather, the acts or omissions were not quasicriminal but ranged from completely reasonable to — at most — mere human failing. Unfortunately, the plaintiffs' counsel are armed with a bevy of industry experts ready to criticize, with 20-20 hindsight, the defendant's every misstep. That hindsight bias, coupled with a punitive damage verdict form just waiting to be completed with a big number, affords plaintiffs the upper hand in the punitive damages phase.

Embracing and Sharing the Motor Carrier's Post-Accident Changes

The legendary Green Bay Packers coach, Vince Lombardi, is credited with saying, "Hope is not a strategy." The trucking industry and those who defend it need to move beyond merely hoping that the jury will be convinced that the plaintiffs have failed to carry their burden of proof on punitives. Recent verdict history shows that arguing that the conduct at issue "wasn't that bad" often fails.

Certain punitive cases call for a radically different defense. This defense embraces a motor carrier's remedial measures as a reason punitive damages should be denied or reduced — not as something to be hidden from the jury. This is radical thinking. After all, defendant attorneys are quick to cite Fed. R. Evid. 407 when objecting to the introduction of evidence showing that defendants are doing something differently because of the subject accident. FRE 407 specifies as follows:

"Subsequent Remedial Measures

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

• negligence;

• culpable conduct;

• a defect in a product or its design; or

• a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures."

The longstanding policy behind FRE 407 is that courts do not want to discourage defendants from making post-accident safety policy decisions because they worry those changes will be used against them in court. If punitive damages are not before the jury, then a motor carrier's invocation of Rule 407 continues to make sense. This is especially true if the motor carrier is arguing the accident was not the fault of the driver or motor carrier.

But how about those cases where the motor carrier admits that its driver was at fault. The focus of the trial then turns to the plaintiff's compensatory and punitive damages. Should the motor carrier introduce evidence of its subsequent remedial measures taken because of the accident? Conventional wisdom says no. After all, if the motor carrier makes changes because of the accident, isn't it admitting fault, even punitive level conduct, for the accident? Doesn't this send a message to the jury that punitives are deserved? Isn't this exactly the type of subsequent remedial measure evidence that FRE 407 is meant to guard against? Conventional wisdom forgets that the stated purposes of punitive damages are to punish, teach a lesson, and deter future bad behavior by the defendant or others similarly situated. Wouldn't evidence of new measures be a reason for arguing that large punitive damages are no longer required to send a message? The motor carrier could, after engaging in a robust post-accident self-critical analysis, adopt changes that include:

• Firing or disciplining the personnel

who had a role in the accident.

• Tightening hiring criteria.

• Boosting driver orientation on the

subject that gave rise to the accident.

• Training drivers to address the

subject issues.

• Stiffening policies — such as

mobile phone device policy, a sleep

apnea policy or a preventative

maintenance schedule.

• Purchasing safety-related technology,

including collision avoidance systems,

dash cameras, mirror replacement

camera systems or speed monitoring.

• Increasing the company's

safety budget.

Moreover, if safety metrics have improved between the time of the accident and the trial, then that improvement should be part of the jury's evaluation of whether the motor carrier learned and acted on a lesson. The motor carrier's mitigating actions and positive safety metrics could persuade a jury against a punitive damage award or at least diminish the amount awarded.

U.S. Supreme Court Precedent Supports Post-Accident Changes to Defend against Punitive Damages

The good news for motor carriers is that presenting subsequent remedial measure evidence should usually be admissible for a punitive damage defense. Its admissibility is reinforced by the U.S. Supreme Court. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Supreme Court specifically addressed the subsequent remedial action undertaken by BMW in evaluating the constitutionality of the punitive reward. One of the factors the court established for determining whether a punitive damage award violates a defendant's substantive due process is "the degree of reprehensibility of the defendant's conduct." It is the "most important indicium of the reasonableness of a punitive damage award." In the Court's view, the remedial acts by BMW diminished the reprehensibility factor and led to the finding that the punitive damage award against BMW was constitutionally excessive.

Just five years after *Gore*, the U.S. Supreme Court again analyzed the reprehensibility factor in evaluating the jury's punitive award in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc*., 523 U.S. 121 (2001). The court commented that the remedial actions undertaken by the defendant after the filing of the lawsuit were a basis for finding less reprehensibility by the defendant when evaluating punitive damages.

The 9th Circuit has also found that subsequent remedial measures serve as mitigating evidence under the Supreme Court's reprehensibility factor. In *Exxon Valdez v. Hazelwood*, 270 F.3d 1215 (9th Cir. 2013), the 9th Circuit addressed Exxon's appeal of a $5 billion punitive damage award arising out of the infamous 1989 Exxon Valdez oil spill off the coast of Alaska. The 9th Circuit observed, "Some factors reduce reprehensibility here compared to some other punitive damages cases. Exxon spent millions of dollars to compensate many people after the oil spill, thereby mitigating the harm to them and the reprehensibility of its conduct. Reprehensibility should be discounted if defendants acted promptly and comprehensively to ameliorate any harm they caused in order to encourage such socially beneficial behavior."

In the employment litigation context, the 9th Circuit earlier ruled in *Swinton*

v. Potomac Corp., 270 F.3d 794 (9th Cir. 2001), that a district court may allow a defendant to introduce evidence of its remedial conduct undertaken to mitigate punitive damages. The court reasoned that if the plaintiff contends that punitives are necessary to "teach the defendant a lesson," then post-incident remediation may be relevant to the defendant's posture. The 9th Circuit noted that adoption of this approach has the advantage of encouraging employers to implement remedial measures while allowing the trial court the discretion to determine the limitations on such evidence.

The only recent example where a court denied a defendant's introduction of subsequent remedial measures to defend a punitive damages claim can be found in *Tom v. S.B., Inc.,* 2013 WL 12097663 (D.N.M. 2013). The district court addressed whether the motor carrier could present evidence that it made improvements to its driver log auditing practices after a commercial motor vehicle accident. The court acknowledged that FRE 407 did not require exclusion of the motor carrier's post-accident log auditing improvements. Still, the court found that a jury might be confused by the differences between the pre- and post-accident log auditing practices. Therefore, the court, under a Rule 403 "substantially prejudicial vs. probative" analysis, ruled that the defendant was prevented from introducing into evidence the post-accident log auditing improvements.

Certainly, the New Mexico district court in *Tom* gets it right that FRE 407 doesn't prevent the introduction of a defendant's subsequent remedial measures to defend a punitive damage claim. But the court misses the mark by not recognizing the U.S. Supreme Court's acknowledgement that a defendant's subsequent remedial measures are probative evidence to consider for the possible mitigation of the reprehensibility factor. Furthermore, the purported prejudicial confusion of sorting out that motor carrier's logging practices before and after the accident seems easily addressed with detailed testimony and exhibits. The court offers no explanation why distinguishing between the before and after logging practices is confusing. The court just says that it is. Accordingly, *Tom* is neither persuasive nor precedent-establishing, and it does nothing to buck the course established by the higher courts on the admissibility of post-remedial actions.

Answering the Tough Questions about the Strategy Change-Up

Certainly, anytime a conventional litigation approach is flipped on its head, skepticism and legitimate questions follow.

If the motor carrier wants to withhold subsequent changes from the jury, will the plaintiff now be able introduce them in a punitive damage claim?

No. FRE 407 should still prevent a plaintiff from introducing this evidence since it would be to show a defendant's "culpable conduct," which is a stated prohibition of the evidentiary rule.

Whenever punitives are alleged, should the motor carrier adopt policy changes just to counter the allegations?

Certainly not. Punitive damage allegations are usually unfounded. They often include embellished facts and assertions that wrap simple negligence in punitive nomenclature. Even in those instances when a driver has arguably committed punitive conduct, that conduct may be aberrational and not the result of a systemic failure of the company. Therefore, wholesale changes may make no sense, irrespective of the pending punitive claim.

Aside from the mitigation of the reprehensibility defense, are there other reasons to make post-accident changes?

Yes. The most important reason to upgrade safety technology, make wellreasoned policy changes, or alter hiring criteria is to prevent the next accident. Promotion of safety for the motoring public should always be paramount. A better safety record may also result in improved safety scores, fewer accident claims, and reduced insurance premiums. Post-accident changes could well provide a mitigation defense for the motor carrier, but it's hardly the chief reason for making the changes.

Will making subsequent remedial changes appear manipulative to the jury?

Plaintiff's counsel may insist that the motor carrier's remedial changes are "too little, too late" and that the motor carrier made changes only to bolster a punitive damage defense. However, the point for the motor carrier should be that it didn't make the changes because of the punitive damage allegations. The motor carrier made the changes to be a safer company. That's not being manipulative for litigation purposes. That's acknowledging mistakes and growing from them.

As the trucking industry continues to be beset with grossly unfair and disproportionate "nuclear" verdicts, we should reconsider conventional strategies in defending against punitive damage claims. Transparently sharing with juries the improved safety measures adopted from lessons learned could well be a bold and important step in the right direction.•

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