Points North

Representing a Canadian Truck Driver

By Thomas J. Fay
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Regulations, border concerns, language barriers and cultural issues will inevitably impact your case.

In general, Americans have difficulty comprehending the extent that trucking has become a part of Canadian culture and economics. In 2005, the Canadian trucking industry generated approximately $67 billion dollars in revenue. "Trucker" is the number one occupation among Canadian males. Of course, trucking does not stop at the Canadian border. In 2008, the road-based trade from Canada to the United States totaled $327 billion dollars, 80 percent of which traveled through the Ontario and Quebec border crossings. In total, Canadian truckers drive approximately 60 billion miles per year within the United States. Those miles account for more than 25 percent of the miles traveled by large trucks within the United States. While most Americans appreciate that Canada is the United States' number one trade partner, it is easy to overlook that much of that trade is made possible through trucking and that the industry employs many Canadian citizens.

Canadian truckers are involved in nearly 5,000 fatal accidents in the United States each year, and more than 12,000 additional accidents involve injuries. Obviously, a vast majority of these miles, fatalities, and injuries are concentrated in the northern half of the United States. For counsel working in these states, it is crucial to understand the implications of representing a Canadian truck driver or a Canadian trucking firm involved in an accident across the border. Counsel must address language barriers, regulations, and cultural issues and potential additional causes of action when evaluating a case and preparing a defense.

The purpose of this article is to assist defense counsel to handle cases involving Canadian truck drivers and trucking firms. Regulations, border concerns, language barriers and cultural issues all inevitably impact a case involving a Canadian trucker or trucking firm. Unless defense counsel is aware of the issues that differentiate a case involving a Canadian trucker or trucking firm from other trucking cases up front, counsel will face legal and practical disadvantages that may be difficult to overcome later in the case. This article will discuss the issues to better prepare counsel for trial and to counter strategies that a plaintiff's counsel will likely raise.

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How Do Canadian Regulations of Trucking Compare with Regulation in the United States?

Regulation of commercial motor vehicles in the United States is primarily handled by the Federal Motor Carrier Safety Administration (FMCSA), an administration within the Department of Transportation. The FMCSA was created in 2000, following passage of the Motor Carrier Safety Improvement Act of 1999. The primary mission of the FMCSA is to reduce crashes, injuries, and fatalities involving large trucks and buses. The FMCSA does this primarily through regulations and enforcement of the regulations on all motor vehicle carriers operating within the United States.

In Canada, regulation is partially handled by Transport Canada, a department of the federal government somewhat analogous to the U.S. Department of Transportation. Transport Canada creates standards, with input from provinces and the trucking industry, governing issues related to driver qualifications, carrier safety, vehicle weight, and transportation of hazardous materials. These standards are adopted as the National Safety Code (NSC). Established after consultation with the transportation industry in Canada, this code is made up of 16 minimum standards that, when followed, allow carriers and drivers to remain in compliance with local, national, and international rules for owning and operating commercial vehicles.

In Canada, the federal role in establishing trucking regulations and policy is not as great as in the air, rail, and marine industries. This is because the roads used by trucks are primarily owned and maintained by the provinces, territories, and local governments. As in the United States with the FMCSA, Transport Canada is not the exclusive regulator of trucking. While the government of Canada has the constitutional responsibility for regulating trucks and busses that operate between provinces and internationally, the Motor Vehicle Transport Act (MVTA) delegates that authority to regulate these carriers to the provinces. Unlike many countries where the central government sets standards, Canadian provinces and territories have sole responsibility for the regulations controlling truck weights and dimensions. In fact, provincial and territorial governments are responsible for ensuring that their safety ratings systems comply with the requirements of the MVTA regulations. Transport Canada will monitor the implementation and enforcement of these ratings. Canada's regulation system, therefore, is considered much more decentralized than the system in the United States, due to the control and authority to regulate motor carriers enjoyed by Canadian provinces.

A study sponsored by the FMCSA was recently performed analyzing and comparing the motor carrier regulatory regimes in the United States and Canada. In August 2008, a report was submitted to the FMCSA entitled *Canadian Issues Study Final Project Report*. The purpose of the study was to understand differences between rulemaking in the United States and Canada and to identify issues impacting harmonization and reciprocity between the two countries.

Overall, the study concluded that U.S. and Canadian regulations are largely similar, including regulations pertaining to safety ratings, accident reporting requirements, and regulation of motor carriers. Generally, the U.S. Federal Motor Carrier Safety Regulations (FMCSR) and the Canadian NSC provide similar regulations for accident reporting requirements and company responsibilities after it has reported an accident. Differences were noted, however, between regulations pertaining to hours of service, driver qualifications, and daily log requirements, among others. While the differences may appear minor, as discussed below, they can often significantly affect litigation.

How Do Canadian Driver Qualification Requirements Compare with U.S. Requirements?

In the United States, driver qualifications are governed by 49 C.F.R. §391.11. Generally, this section requires that drivers be 21 years of age, be physically and medically able to operate a commercial vehicle, be able to read and speak English, and have completed a road test certifying the driver's ability to operate the commercial vehicle.

Canadian drivers must meet the same general requirements of 49 C.F.R. §391.11, but are allowed to satisfy the requirements in alternative ways. Canadian drivers license requirements are regulated from province to province and provide varying class levels that correspond to the type of vehicle a driver will operate. There is no analogue to the Commercial Driver's License (CDL). Rather, every licensed driver in Canada is capable of operating vehicles at a higher class, provided that they pass the necessary tests and other licensure requirements.

Canadian drivers are also required to pass certain medical examinations before receiving a license. This is because the medical examination is part of the general license requirement for all Canadian motor vehicle drivers. It is important to understand these basic requirements as the physical and medical capabilities of your client may be raised both by a plaintiff's counsel and local police regarding a serious motor vehicle accident. It is not uncommon for a plaintiff's counsel to raise issues regarding licensing when your driver has no special training or unique license. Moreover, the FMCSA has a program specifically for training local police throughout the United States on the issues presented by foreign commercial motor vehicles. Understanding your driver's qualifications will instantly put you ahead of the other side.

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Are Canadian Drivers Required to Speak English?

Perhaps no other issue so obviously presents itself when representing a Canadian driver as the language requirement. At its most basic level, ensure that before meeting with your client you secure an interpreter familiar with the French-Canadian dialect, if necessary. A French interpreter, usually Parisian French, will often have difficulties with precise interpretations of the French-Canadian dialect. This is a little more than just inconvenient when realizing this problem in the middle of your client's deposition.

Canadian regulations do not have a specific language requirement for drivers. In

fact, while Canadian drivers are required to have basic knowledge of road signs, the regulations explicitly allow an interpreter for drivers impaired by a language barrier. This unique American requirement, presents specific legal and practical issues for defense counsel.

First, 49 C.F.R. §391.11(b) states:

Except as provided in Subpart G of this part, a person is qualified to drive a motor vehicle if he/she—

(2) Can read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records.

Courts have split on whether negligence per se applies to violations of the Federal Motor Carrier Safety Regulations.

There has been considerable confusion over the years on the proper purpose and application of the regulation. In 2007, the owner and operator Independent Driver's Association, Incorporated, in a report to the Federal Board of Carrier Safety Administration of the U.S. Department of Transportation, noted certain documentation compiled by SafeStat regarding the effects of language requirement violations. In particular, the report noted that one of the violations regularly cited among those listed in SafeStat is the failure of a driver to speak English as required by 49 C.F.R. §391.11(b)(2). The comments indicated that, "Under the Commercial Vehicle Safety Alliances Out of Service Criteria, a violation of this rule merits an out-of-service order. In the last four months of available data, [one particular firm] was cited for 25 violations of using a driver who does not speak English."

States have also expressed difficulties in applying the requirements uniformly. When originally promulgated by the Interstate Commerce Commission (ICC) in 1936, the ICC noted that the regulation was not intended to be enforced at roadside. It does not appear that the FMCSA has monitored this regulation very closely. In 1995, Utah sought guidance from the Federal Highway Administration (FHWA) on enforcing the regulation. In 1997, the FMCSA considered amending the rule and sought information about prior enforcement histories and guidance from the states and members of the public regarding the efficacy of the regulation.

The potential rule revision was withdrawn in 2003 when the FMCSA noted that it had insufficient information to change the existing rule. During withdrawal, evidence was presented of problems associated with enforcing regulations. Representative Lincoln Diaz-Balart, of Florida's 21st Congressional District, advised the FMCSA that in numerous instances police officers, judges, and magistrates had suspended individuals' licenses. For example, judges suspended drivers' licenses when drivers could not sufficiently communicate with a court. The ACLU submitted comments taking the position that the regulation was discriminatory and invited discriminatory enforcement.

One notable example of enforcement of the regulation occurred after Hurricane Rita. As Hurricane Rita churned through the Gulf of Mexico on September 23, 2005, a full evacuation of the Gulf Coast was taking place. As part of this effort, a 54-passenger motor coach traveled northbound on Interstate 45 near Wilmer, Texas. The motor coach carried 44 assisted-living facility residents and nursing staff. As they traveled along the interstate, a motorist noticed a right rear tire hub was glowing red and alerted the motor coach driver. The bus driver stopped in the left traffic lane and proceeded to the right shoulder of the interstate. The driver and nursing staff exited the motor coach and observed flames near the right rear wheel well. Evacuation was initiated, but the fire spread quickly. In the end, 23 passengers were fatally injured. Of the 21 passengers who did escape, two were seriously injured, and 19 suffered minor injuries.

Prior to this, the senior assisted-living center had contacted a Canadian transportation carrier and negotiated a contract to transport residents from Bellaire, Texas to Dallas, Texas. The carrier then contracted with a direct carrier to provide motor coaches to evacuate residents and nursing staff. Hurricane Rita was expected to hit near Galveston on September 24. In addition to the bus being operated in violation of a contract signed by the Canadian owners and not being maintained, it was determined that the bus driver could not communicate with the passengers because he did not speak English. According to the National Transportation Safety Board accident report on this incident, the Canadian carrier failed to put the direct carrier "through a 'due diligence' process, did not adequately know the operator, and had no ongoing qualifications process for this operator." National Transportation Safety Board, Highway Accident Report, Motor Coach Fire on Interstate 45 during Hurricane Rita Evacuation near Wilmer, Texas, September 23, 2005, at 107 (Feb. 21, 2007).

How Does the English Language Requirement Affect Civil Litigation?

The primary manner in which an alleged violation of 49 C.F.R. 391.11(b)(2) may affect a lawsuit defense is through a claim of negligence per se. While it appears that no case law has addressed whether a violation of 49 C.F.R. 391.11(b)(2) constitutes negligence per se, examining how courts have addressed alleged violations of other similar regulations can offer guidance. Under this rubric, whether a violation of the 49 C.F.R. §391.11 requirement that drivers speak English constitutes negligence per se largely depends on whether a driver's inability to speak English was a proximate cause of the damages alleged. Courts have split on whether negligence per se applies to violations of the Federal Motor Carrier Safety Regulations.

In the case *Hill v. Western Door*, 2005 WL 2991589 (D. Col. 2005), a U.S. District Court in Colorado ruled that violation of the FMCSR Driver-Log Rule constitutes negligence as a matter of law, but that a plaintiff must present evidence of a causal relationship between a violation and a wreck. The court held:

[T]he requirement that drivers keep an accurate log of their duty status is related to the safety of other travelers on the road. Drivers are required to record their duty status so compliance with limita-

> tions on hours of service contained in Part 395 can be monitored and enforced. FMCSR 395.3 and 305.5 provide specific limitations on the number or (sic) hours a commercial vehicle operator can be driving during certain periods of time. Although the regulations do not explicitly declare their purpose, a tie between safety and fatigue is clear.

The court went on to conclude that in this particular case the evidence in the record failed to show a causal connection between the log violation and the accident. The court, therefore, granted summary judgment the defense on the plaintiffs' negligence per se claim concerning the logbook violation portion of the allegations.

In contrast, in *Fortner v. Tecchio Trucking Inc.*, 597 F. Supp. 2d 755 (2009), the plaintiff sued the driver of a tractor-trailer truck, alleging that the defendant was negligent in failing to secure a load of paper rolls in the trailer causing a collision with the plaintiff's vehicle resulting in property damage and personal injuries. There, the district court judge held that the defendant's violation of the FMCSR requiring the defendant to ensure that the load was properly secured was negligence per se under Tennessee law.

The court explained that the plaintiff could recover on the basis of negligence per se by showing that "(1) the defendant violated a statute or ordinance which 'imposes a duty or prohibits an act for the benefit of a person or the public'; (2) the injured party was within the class of persons whom the legislative body intended to benefit and protect by the enactment of that particular statute or ordinance; and (3) such negligence was the proximate cause of the injury." *Id.* at *757 (internal quotation marks omitted) (citing *Smith v. Owen*, 841 S.W.2d 828, 831 (Tenn. Ct. App. 1992) (quoting *Nevill v. City of Tullahoma*, 756 S.W.2d 226, 232–33 (Tenn. 1988)).

The court first noted that the authorizing statute, 49 U.S.C. §31136(a), directed the secretary of transportation to establish minimum safety standards to ensure commercial motor vehicles are operated and loaded safely. In addition, the court noted that the Court of Appeals for the Sixth Circuit determined that "the purpose of the statutory provision underlying the relevant regulations was, at least in part, "the protection of the public on highways of interstate commerce from the operation by inexperienced, incompetent and unfit persons, by those engaged in excess of maximum hours, or operating with bad conditioned and dangerous equipment." *Id.* (citing *Commercial Standard Ins. Co. v. Robertson*, 159 F.2d 405, 410 (6th Cir. 1947)). The court went on to state, "Thus, the FMCSR regulation at issue in this case requires drivers of commercial motor vehicles to act in a certain way for the benefit of the public. Since plaintiffs clearly fall within the class of people the FMCSR intended to protect, the Court need only assess whether any genuine dispute as to a material fact exists as to whether Defendant violated the FMCSR or whether such violation was the proximate cause of Plaintiffs' injuries." *Id.*

In analyzing the facts, the court concluded that the defendant did, in fact, violate 49 C.F.R. §392.9 when it failed to secure the load of paper rolls to prevent lateral movement. The court proceeded to grant the plaintiffs' motion for partial summary judgment but left for the jury the issue of damages and comparative fault.

How Does Negligence Per Se Apply to Alleged Violations of 49 C.F.R. 391.11(b)(2)?

Defense counsel have two primary ways to oppose a claim of negligence per se based on a Canadian truck driver's inability to speak English. First, defense counsel can prove that the regulation was not violated. As some complaints noted in 2003 before the FMCSA withdrew the regulation revision, the regulation does not provide clear guidance on what constitutes a violation. This problem becomes somewhat more complicated when you meet your driver and you assess his or her ability to speak English. Certainly, all but the most incompetent of drivers will understand signs, signals, and other basic road requirements. Assessing a driver's English reading and speaking capabilities involves a grey area. It is important to assess your driver's English speaking capabilities early in your case, including his or her academic background and other experience or training.

However, your most complete defense to a negligence per se claim will be to file a motion for summary judgment on the ground that a plaintiff will be unable to prove that the alleged violation of the regulation caused or contributed to the accident, following the reasoning of *Hill v. Western Door*. More often than not, your driver's ability to speak English will not have contributed to the accident at all. Proving causation will likely be a difficult hurdle for a plaintiff's counsel to overcome,

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given that nearly all drivers are completely capable of understanding the U.S. rules of the roads and given the substantial miles driven by Canadian drivers in the United States. Removing this potential claim will prevent a plaintiff's counsel from using language skills as leverage in the litigation and should also present an opportunity to prevent him or her from mentioning the regulation to potentially influence the jury.

What Issues Are Presented to Canadian Drivers at the U.S. Border?

In the United States, drivers are generally limited to a maximum of 11 hours of driving after spending 10 hours off-duty, and they cannot drive more than 60 hours in a seven-day week or 70 hours in an eight-day time span. Canada, on the other hand, allows drivers to drive a maximum of 13 hours per day before eight hours of consecutive off-duty time is accumulated. In Canada, drivers are allowed 70 hours per seven-day cycle or 120 hours if following a 14-day cycle. The biggest issues that Canadian drivers face in cross-border driving involve the differences between Canadian and United States' hour regulations. Defense counsel need to have familiarity with these differences when defending Canadian drivers.

Canadian drivers are required to comply with U.S. regulations on crossing the border. While obviously a problem will arise if a driver continues to use the Cana-

dian standard in the United States, failure to comply with U.S. regulations will most likely arise first at the U.S. border. When a Canadian driver arrives at the border, he or she must present a Record of Duty Service (RODS) for the last seven days of his or her work. Additionally, while a driver cannot suffer consequences for violations while operating in Canada, he or she must demonstrate compliance with requirements on entering the United States. This includes a requirement that the driver had spent at least 10 consecutive hours of off-duty time for their last off-duty period consistent with U.S. regulations.

One noteworthy cultural difference between the United States and Canada involves the disparate views about motor vehicle accident litigation.

You must scrutinize your client's driver's log entries. Most importantly, verify that your client has strictly complied with sleeping requirements in both the United States and Canada. Get ahead of a potential argument that your client's fatigue contributed to the accident. Also note that while your client will face no regulatory consequences for violating Canadian regulations over the U.S. border, a plaintiff's counsel can still use these violations in the civil context.

What Cultural Issues Are Presented to Canadian Drivers at the Border?

As discussed above, counsel must address a myriad of legal issues when representing a Canadian truck driver or trucking firm. In addition to the legal aspects of your case, in preparing a defense you should have awareness of other intangible and subtle issues. Due to the vast similarities between the United States and Canada, counsel tend to ignore all but the most obvious cultural issues. Nonetheless, the cultural issues may very well affect how your client presents at a deposition, how witnesses and local law enforcement treat your client, and most importantly, how a jury perceives your client.

The importance of the Canadian trucking industry in Canada cannot be minimized. Some 400,000 Canadians are employed in the industry. The industry is influential and well organized. At least one Facebook.com group is dedicated to Canadian truckers.

One noteworthy cultural difference between the United States and Canada involves the disparate views about motor vehicle accident litigation. In the United States, people accept motor vehicle accidents as fodder for litigation. "Ambulance chaser" and "whiplash" are well known terms in the United States. Insurance cards advise drivers not to accept fault at accident scenes and to document damages. Americans are ingrained from an early age on the basic aspects of litigation.

While Canadians obviously have an understanding of the purposes and general nature of litigation, their basic approach and expectations of motor vehicle accident compensation is generally very different. In Quebec, for example, drivers are not allowed to sue for pain and suffering or economic loss. Insurance is purchased and administered by the Société de l'assurance automobile du Québec (SAAQ). The SAAQ covers damages caused by all personal injuries suffered in motor vehicle accidents, regardless of fault.

When representing a driver from Quebec, for example, an attorney must realize that the different systems will lead to different expectations and behaviors. More than with other types of cases, it is important to fully describe the litigation process to your client, to make sure that he or she understands what the plaintiff seeks, how they intend to prove his or her case, and how your client should respond. This becomes especially difficult in a province such as Quebec, where more than 80 percent of the population speaks French only.

In fact, each province has its own motor vehicle accident compensation regime. In British Columbia, one can sue for pain and suffering and economic loss. In Ontario, drivers can sue for pain and suffering under certain circumstances. In each situation, it is important to speak with your client as soon as possible to discuss the accident and implications of litigation. This understanding will impart the serious nature of the litigation and the importance of your client's future testimony.

Another cultural issue that potentially may affect your case is bias against Canadian truck drivers. Counsel who have represented truckers in the past are well aware of the biases held by the general public against all truckers. People can perceive truck drivers as a public menace, and truckers are often considered dangerous due to the inherent differences between cars and tractor-trailers.

Adding the factor of "foreignness" further compounds the prejudices potentially involved. A juror could have had an experience with Canadian truckers and may recall a specific instance in which a driver has passed him or her at what that juror considers excessive speed, or has cut that juror off while merging. Drivers can find these events terrifying, regardless of who is at fault. The fact that a vehicle contains a foreign license plate will further solidify a memory and cement bias. It is often useful to confirm the potential existence of biases through voir dire.

The fact that the driver and his or her company are foreign also will hinder the jurors' ability to empathize with the defendants. In a case in which a company is sued for negligent hiring or vicarious liability, for example, secure a representative who will present well before a jury and has familiarity with American legal and cultural issues. More than anything, having awareness of the cultural issues will help you to determine the value of your case and the potential risk and exposures involved.

Conclusion

This article presented a brief overview of the issues involved in representing Canadian truck drivers and trucking firms. Considering the issues discussed above immediately with your client will permit you to get ahead of plaintiff's counsel as quickly as possible. As with any other case, however, the facts of your particular case will ultimately decide the outcome. Nonetheless, by understanding different aspects, you will have an advantage over a plaintiff's counsel. FD