

# Road Safety and the Law — When Is a License Check Not Enough?

by Paul Farrell

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Since the first motor vehicles took to the road, there have been collisions with pedestrians, cyclists and other vehicles. Around the world, deaths and injuries from motor vehicle operations are a serious issue — with staggering statistics. Considering the U.S. alone, there were 37,248 deaths due to traffic crashes in 2007<sup>1</sup>.

While insurance programs mitigate most of the financial risk involved in operating a motor vehicle (or a fleet of vehicles), litigation arising from collisions can introduce a time and resource drain on even the best-managed organizations. Judgments may include punitive damages, awards that exceed insurance limits, and, in extreme cases, potential jail time.

This article provides a cursory overview of common legal concepts attached to vehicle collisions and employer strategies that may reduce collision exposure and potential legal consequences. There is also a brief review of case law examples where an employer was held accountable for the acts of its employees or for failing to follow through on its managerial responsibilities.

Before going into detail, I must offer the reader a blanket disclaimer: I am not an attorney, and I cannot provide legal advice in this article. Every case is unique, and every jurisdiction practices law with distinctions that set it apart from others. What I can provide is an introduction to concepts, basic vocabulary and a review of how these theories intersect with companies that operate motor vehicles as part of their day-to-day operations.

## Post-Collision Questions

When a collision happens, there may be physical damages to repair, bodily injuries to be healed and financial consequences to be settled. Even with an insurance program in place, there may be uninsured costs and lingering questions that can lead to civil litigation as a remedy for the consequences of the loss.

Questions start with some variation of “Who caused this crash to happen?” and continue into greater detail as the investigation continues:

- Were there violations of traffic safety laws that materially contributed to the crash?
- Was either driver physically impaired?
- Were there roadway-design issues or other “engineered” issues?
- Was each driver “competent” to drive, for example, any valid license issues, etc.?

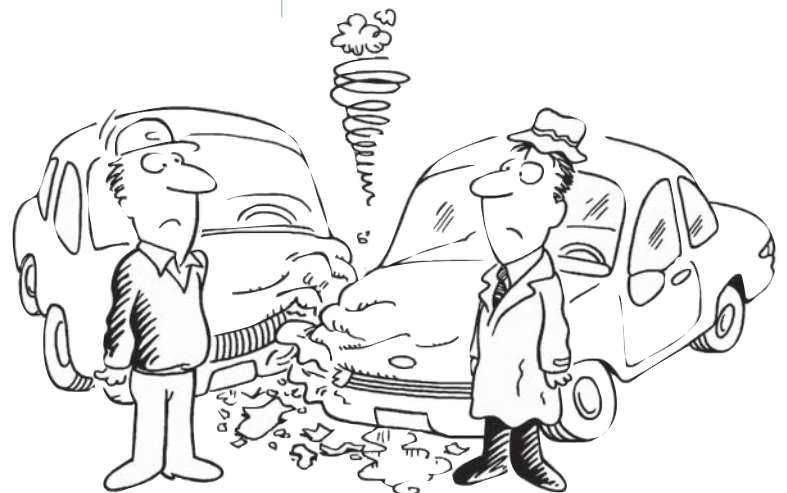
The question “Are any other persons involved through their relationship to the driver(s)?” adds a new twist to the investigation via two legal theories:

- “Vicarious Liability” — Vehicle owner is responsible for the conduct of the driver (such as a neighbor or subcontractor) who has been given permission to operate the vehicle.
- “*Respondeat Superior*” (Latin: “Let the master answer.”) — Employers are responsible for the conduct of an employee while the employee is acting in the scope of his/her employment (for example, driving).

Another area of concern that often surfaces following a crash is whether either driver was engaged in “business” driving at the time of the collision. Some questions that help investigators determine whether the trip was “personal” or business driving include:

- Who owns the vehicle?
- What are the normal garage location and the first destination of the day?
- What is the typical use of the vehicle? Is it used for sales calls or the paid carriage of passengers or goods?
- Are trips spontaneously self-selected and self-initiated by the driver or suggested/directed by the employer?

The conduct of the driver during the trip may also be examined. (For example, it has already been suggested via litigation that while driving a personally owned car to a personal appointment outside



of normal business hours or use of a cell phone to transact “business” while driving could create a scenario where the trip is alleged to be a “business” trip and the potential responsibility of the employer.<sup>2)</sup>

If determined to be a “personal” trip, then the crash investigation will examine:

- The individual’s contribution of fault/negligence.
- Any driver impairment.
- Individual’s license to drive (status).
- Whether material traffic laws may have been violated.

If a “business” trip, then the investigation may become substantially broader in scope to determine whether the employer’s practices contributed to the event.

## Employer Responsibilities — An Added Dimension

When examining the employer’s role as a contributory cause to a collision, there are several key areas of concern:

- Hiring practices that relate to the qualification of the driver.
- Driver supervision.
- Vehicle maintenance.
- Whether the vehicle was actually “entrusted” to the driver at the time of the accident.

The investigation of these areas of concern will either build or undermine a case based on various legal theories, including:

- **Negligent Hiring.**  
An employer is responsible for the conduct of an employee if the employer failed to use due care in hiring and/or retaining said employee. For example, if an employee’s driving history had been checked, would the employer have found a history of problems that would signal alarm? In other words, an employer could

be found negligent for its failure to check a driver applicant’s driving record when it would have revealed a reckless driving history or to research a driver applicant’s MVR when it would have revealed a background “beyond acceptable limits.”

- **Negligent Supervision.**  
An employer is responsible for the conduct of an incompetent employee if the employer failed to use due care in monitoring the driver to detect problems and practices in his or her job (driving) performance. For example, an employer could be found negligent for its failure to ensure that employees understand and comply with stated company driving rules and regulations.
- **Negligent Retention.**  
An employer is responsible for the conduct of an incompetent employee if the employer failed to use due care in retaining the driver after detecting and failing to address problems. For example, if the driver develops an inclination toward alarming behavior (repeated tickets and/or collisions) and is retained without retraining or other remedial management interventions, this might be alleged as negligent retention.
- **Negligent Maintenance.**  
An employer is responsible for the care and upkeep of the vehicle. Failure of the employer to properly maintain the vehicle, which led to an unsafe condition (bad tires, nonfunctioning brakes, etc.) that was materially responsible for causing or contributing to a collision, might be alleged to be negligent maintenance.
- **Negligent Entrustment.**  
Negligent entrustment is to charge someone with a trust or duty in an inattentive or careless fashion or without completing required procedural steps. More specifically to vehicle collisions, it could be rephrased as allowing another person to use a vehicle, knowing, or having

reason to know, that the use of the vehicle by this person creates a risk of harm to others.

## Negligent Entrustment in Greater Detail

A collision occurs and it is later alleged that the employee or contractor was dispatched without due regard for his or her qualification or ability to safely operate the vehicle. How might an attorney set about to “prove” or “assert” that the management team was responsible for negligently entrusting the vehicle to the operator?

Most commonly, there are five specific “tests” applied to determine whether a case qualifies as a negligent entrustment case:

- (1) Was the driver negligent in causing the crash?
- (2) Did the driver’s negligence proximately cause the crash?
- (3) Did the vehicle owner actually entrust the vehicle to the operator?
- (4) Was the driver deemed incompetent?
- (5) Did the employer know or should have known of this incompetence?

Let’s examine each test in more detail.

- (1) **Was the driver negligent in the crash?**  
If the driver wasn’t negligent in contributing to the crash, in theory, a negligent entrustment suit would be stopped short. However, in reality, most crashes cannot be closed without each

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party at least responsible for 1 percent or more of the “blame.” Additionally, most plaintiff attorneys would be able to “sell” the contributory involvement of a business driver in many different ways (one brake out of adjustment, a prior crash with similar circumstances, etc.). Accident investigation reports from police officers, citations/tickets as a result of the accident charged against the driver, and emotionally stirring photos from the accident scene could help paint the picture of (or “prove”) negligence on the part of the business driver.

## (2) Were the driver’s actions (or inactions) the “proximate cause” of the crash?

As mentioned above, police reports and witness testimony will help establish if the business driver’s actions or inactions were material to the crash happening. “Proximate cause” deals with establishing a direct link between the driver’s incompetence/negligence and the cause of the accident.

## (3.) Is an employer-entrusted vehicle involved?

Entrustment is the act of giving access to the vehicle and is not based on the nature of the relationship between the owner and the operator. This means that if a supervisor at a construction job site “tosses the keys” to a subcontractor’s employee to make a coffee run, that operator has been given permissive access to operate the vehicle without any qualification of his or her ability to drive safely. So, contractors, third-party service providers (for example, security guards) or family members of an employer/employee could be “entrusted” to operate company vehicles.

## (4) Has incompetence been demonstrated?

In simple terms, the defendant should be prepared to answer whether the driver was “qualified” to drive. This qualification examination could include experience; training; physical qualifications; past history of “safe operation” of a vehicle; a driver’s ability to determine that cargo was loaded and/or

secured properly; and more. The examination by the plaintiff’s counsel will look at many factors, whether the management team of the negligent driver used those same measures or not. If a fact is discovered by plaintiff’s counsel, the management team could have done so as well.

Business drivers can be painted as incompetent by many brushes, including, for example, a past history of tickets, violations, fines, collisions or a previously suspended license.

Additionally, the Federal Motor Carrier Safety Regulations could be cited as a “standard,” because it goes into much detail about the characteristics of a federally qualified driver of commercial motor vehicles. Even if a defendant’s fleet operation isn’t subject to these regulatory standards, it is possible that the standards could be introduced as a “minimally acceptable practice” for those fleets that are regulated by the standard. The question “Why wouldn’t the defendant strive to achieve at least these minimal requirements to assure the safety of the general public?” can be raised. New standards could also be introduced, such as the 2006 ANSI Z15.1, “Safe Practices for Motor Vehicle Operations.”

## (5) What did the employer “know or should have known?”

The employer has a responsibility to know or investigate (to become aware of) the qualifications of operators to whom it entrusts a dangerous instrument — a motor vehicle. An employer’s responsibility “to know or should have known” is derived from case law<sup>3</sup> that lays out the burden of “claiming ignorance is never an excuse or a defense.”





Because of this broad burden, all employment records may be researched and the operator's background closely examined. Further, any "exceptions" to established business practices (for example, safety, hiring, discipline, etc.) will be reviewed to determine whether the exception led to the incident. (Some may argue that this is a reason to avoid "formalizing" policies, but to abandon safety policy creation isn't a real defense because the employer "should have known" anyway.)

## Spoliation

Spoliation of evidence is asserted where a defendant "loses" evidence that may be material to the plaintiff's case. Common examples in commercial vehicle litigation include missing hours-of-duty driver logs, erased camera-in-cab video footage of the incident, erased or overwritten GPS logs, or any other missing documents that would help determine negligence, operator qualifications, etc.

Some jurisdictions allow the filing of a suit as a separate tort action against a management team when spoliation occurs, but others do not. Some handle spoliation as an instruction to the seated jury to assume the evidence was damaging to the defense's case. Clearly, the preservation of evidence following a collision is important, and many firms are revising their document-retention policies and practices to deal with potential spoliation issues.

## Business Practices — Prevention and 'Defense' Action Steps.

As a manager responsible for people that drive on the job, you may be asking questions such as:

- How do I prevent collisions, preserve property and protect lives (and avoid lawsuits)?

- How do I develop, document and enforce meaningful policies/practices?
- How do I prepare a defense in case of litigation?

While a complete review of setting up a workable, results-oriented safety program are beyond the scope of this article, there are numerous resources available to help employers set up reasonable policies regarding:

- Driver selection, qualification and training.
- Driver supervision and monitoring.
- Permissive use of vehicles and maintenance.
- Post-accident investigations.
- Governmental regulations (if applicable).

An excellent starting point can be found in the ANSI Z15.1 standard for motor vehicle safety programs. This standard applies to any motor vehicle fleet regardless of industry or fleet size. It can be tailored to fit varied circumstances and is useful as a "self-audit" tool to check existing programs for gaps.

Other standards that may apply (or be useful sources for ideas), include:

- Federal Motor Carrier Safety Regulations (U.S.).
- Carrier Safety Management System (CSMS) Standard (Canada).
- Corporate Responsibility/Driving for Work (U.K.).
- Corporate Manslaughter and Corporate Homicide Act 2007 (U.K.).

## Sample Cases

Simply searching the Internet will yield current cases, verdicts and summaries of legal actions resulting from motor vehicle collisions. Sometimes the stories are very tragic, and, unfortunately, evolved as a result of a simple chain of decisions or actions on the part of the employer to make exceptions.

A recent news story highlights a crash that occurred in November 2008<sup>4</sup>. A California man was driving home from work in a company truck. At 6:45 p.m. (likely after sunset), he dropped his cell phone and reached down to retrieve it. At that moment, he felt a bump, but after looking in the mirror and seeing nothing of note (and that none of the trailing cars had pulled off the road behind him), he continued home. The next morning he was arrested on the charge of felony hit-and-run. According to the police, he had hit two teenage boys who had been walking on the side of the road. A negligent entrustment lawsuit was filed against the employer alleging that:

- The company entrusted its vehicle to the California man.
- The employer knew or should have known of competency issues, but allowed the employee to drive anyway.

The competency issues were alleged to include:

- Previous convictions for drunk driving in 1993 and 2006.
- The driver was participating in a drug-treatment program after an arrest in 2007.
- The driver was driving on a restricted-use license. (He was allowed to drive to and from a work location and to and from a treatment program site.)

Another example of a negligent entrustment lawsuit was reported on Jan. 8, 2009<sup>5</sup>. This case involves an intersection collision outside a truck stop, where the plaintiff alleges the truck driver was negligent by:

- Failing to keep a proper lookout.
- Driving in a reckless manner.
- Driving too fast.
- Proceeding into an intersection without first determining whether it was safe to do so.
- Failing to yield the right-of-way.

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- Failing to sound his horn.
- Failing to slow down to avoid a collision.
- Failing to obey traffic laws.
- Entering the intersection while he knew traffic was present.

Further, the plaintiff alleges the employer was negligent by failing to properly:

- Train its employees.
- Monitor its employees.
- Screen applicants in the hiring process to eliminate unqualified drivers.
- Provide proper equipment to its employees.
- Provide proper training to its employees.
- Supervise its employees.
- Determine whether its employees were capable of safely operating trucks.

While these two cases demonstrate that negligent entrustment cases continue to be filed, cases that were filed years ago continue to be settled.

On June 24, 2002, a chartered bus taking youngsters to a church camp crashed into the concrete pillar of an overpass, killing the driver and four passengers. The bus driver reportedly was previously cited twice for driving 90 mph in a 60 mph zone. Also, the driver had at least eight traffic tickets during the last three years for speeding, speeding in a school zone, driving the wrong way on a one-way street and for not having insurance. According to a news release issued by Dallas, Texas, law firm Sayles Werbner on Aug. 9, 2008, [Mark Werbner, J.D.](#), won a \$71 million verdict for one of the families involved in that crash.<sup>6</sup>

In August 2000, a trucking company became involved in litigation from a tragic crash.<sup>7</sup> The jury found that the company had ignored its own standards when it hired the truck driver accused of causing the crash and awarded the plaintiff a \$6.8 million verdict against the company.

Plaintiff's counsel said the driver had:

- Eight preventable accidents and six moving violations in the three years before he was hired.
- Two additional minor accidents and another four tickets in the months before the accident.
- A previous driving record that should have prevented his being hired (that is, negligent hiring), and a record after his hire that should have led to his being fired (that is, negligent retention).

## Summary

Anyone who is charged with driving should be carefully qualified at the time of hire and then re-qualified periodically. Business practices covering the qualification, training and supervision of drivers should be in place and followed without exceptions. Managers should take corrective actions, when needed, to address deviations from accepted practices, and these actions should be documented because “not knowing of a problem” is never an excuse or a defense. Standards such as the ANSI Z15.1 provide a reasonable benchmark for minimum practices and practical guidance on how to establish and maintain a driver safety program regardless of industry type or fleet size. ■

## References

1. *Fatality Analysis Reporting System Encyclopedia*. National Center for Statistics and Analysis (NCSA) of the National Highway Traffic Safety Administration. <<http://www-fars.nhtsa.dot.gov/Main/index.aspx>>
2. Ferraiolo, Tammra. “THE TOPIC: Cell Phones and Driving, October 2007.” VillageSoup® Community Network. <<http://waldo.villagesoup.com/financial/story.cfm?storyID=100892>>; and “Employers’ Guide to Cell Phone Liability.” *Braun Consulting News*. Vol 7, No. 1, Summer 2002. <[www.braunconsulting.com/bcg/newsletters/summer2002/summer2002.html](http://www.braunconsulting.com/bcg/newsletters/summer2002/summer2002.html)>
3. *American Jurisprudence* (5A Am.Jur.2d). Automobiles and Highway Traffic, e 580,

pp. 590-591; and *American Jurisprudence* (8 Am.Jur.2d). Automobiles and Highway Traffic, ee 561, 573; 60 C.J.S., Motor Vehicles, e 431.

4. “Man pleads not guilty to hit-run.” *Monterey Herald*. November 2008. <[http://www.montereyherald.com/news/ci\\_11413684?nclick\\_check=1](http://www.montereyherald.com/news/ci_11413684?nclick_check=1)>
5. “Hogan Transport and Driver Sued over Tractor Trailer Accident”, *St. Clair Record* <<http://www.stclairrecord.com/news/216825-hogan-transport-and-driver-sued-over-tractor-trailer-accident>> <<http://www.stclairrecord.com/news/216825-hogan-transport-and-driver-sued-over-tractor-trailer-accident>> >
6. “Texas Bus Crash Could Have Been Prevented, Attorney Says.” Sayles Werbner Web site. <<http://www.swtriallaw.com/press-releases/texas-bus-crash-could-have-been-prevented-attorney-says.html>>
7. “Tennessee Jury Awards \$6.65 Million in Tractor-Trailer Lawsuit.” InjuryBoard.com. Dec. 30, 2002. <<http://www.injuryboard.com/national-news/tennessee-jury-awards.aspx?googleid=27636>>