31st Annual Conference on Transportation, Innovation and Cost Savings

Burlington, Ontario, September 26, 2017

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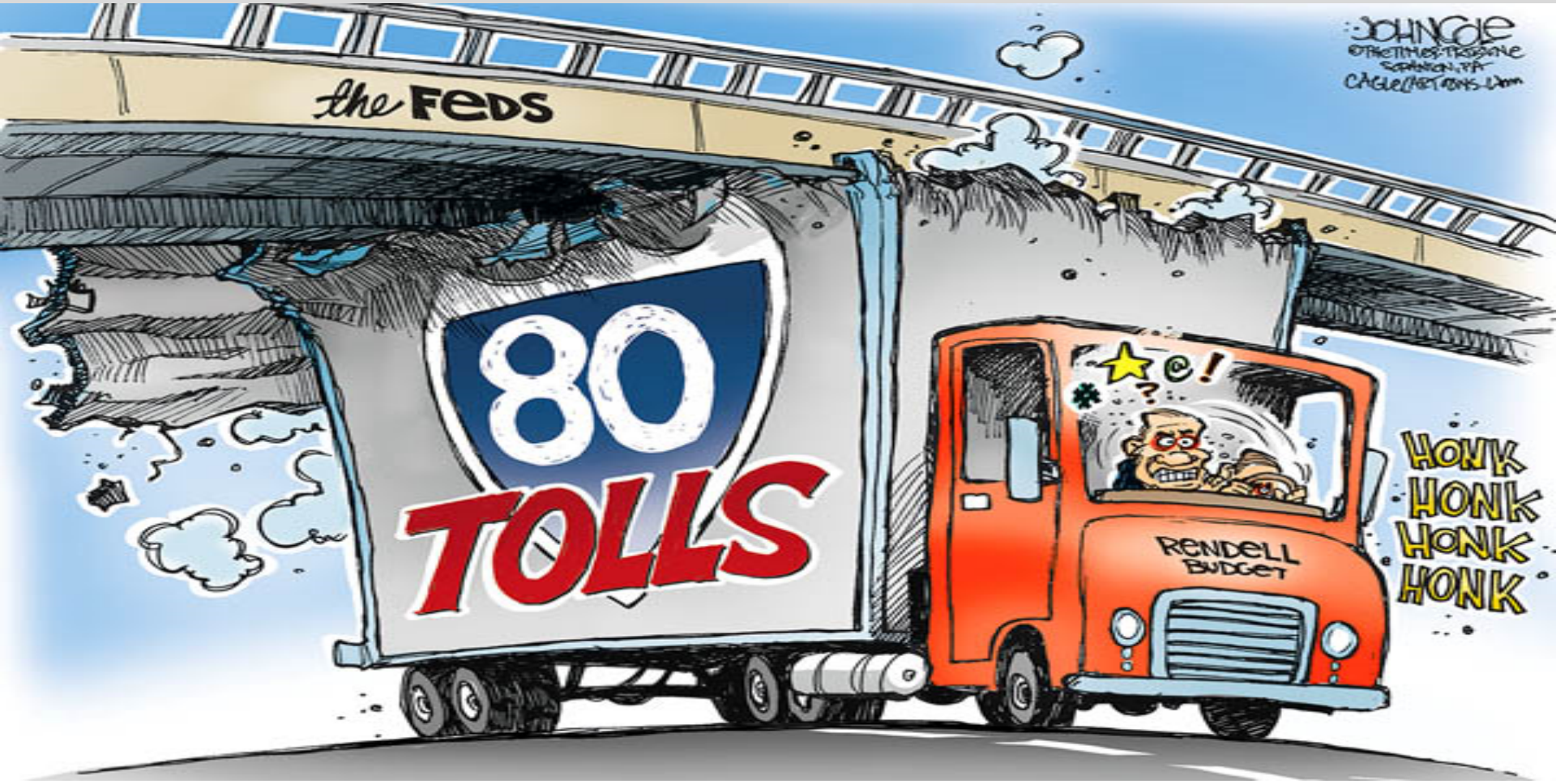
JB HUNT AMICUS BRIEF



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The Underlying Facts

- JBH driver loses control on icy, snowy interstate and jackknifes into grassy median. No other vehicles involved.
- Ambulance transports JBH Driver from scene. No triangles or flares placed by unit. Flashers not activated.
- Police officer determines unit is not a safety hazard and leaves scene to tend to another accident.

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The Underlying Facts

- One hour after JBH single vehicle accident, Robinson is driving a car with fiancée Zak as passenger.
- Robinson car spins out of control on icy interstate and hits the jackknifed JBH trailer in the median.
- 31 year old Zak receives brunt of impact and sustains serious brain damage. She cannot walk or care for herself or her six year old daughter.

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The Lawsuit Allegations

- Zak and Robinson sued for negligence and JBH driver/JBH sued for negligence and vicarious liability.
- JBH's motions for summary judgment and directed verdict denied on argument of two separate accidents, no duty owing by JBH driver to Zak, and JBH driver not the proximate cause of the second accident.
- Trial court admits JBH's preventability determination on the first accident.

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Motor Carrier's Duty to Monitor Weather Conditions?

- On Cross-Examination, JBH's retained safety compliance expert testified that:
  - Reasonable motor carrier should monitor weather where all drivers are operating.
  - Motor carrier should be in contact with drivers about road and weather conditions.
  - Motor carrier should shut down trucks when weather dictates.
- Trial court judge then allows Zak to amend pleadings to include direct action for negligence against JBH for failure to monitor. (Punitive damages not alleged.)
- Verdict form allows assessment of fault against Robinson, JBH driver and now JBH for direct negligence.

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The Verdict

Robinson:	40%
JBH Driver:	30%
JBH:	30%

Gross Damages: $32.5 million

JBH's Share is $19.5 million (60% of $32.5 million)

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On Appeal

- Indiana Court of Appeals Unanimously Affirms Judgment at 58 N.E.3d 956 (Ind.Ct.App. 2016)
- Indiana Supreme Court accepts Amicus Curiae briefs, but then denies Petition to Transfer.

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The Problems with *Zak*

- Direct Claim Against Motor Carrier for Failure to Monitor Weather and Road Conditions is Contrary to 49 CFR §392.14 and its Interpretation.
- Rejects Majority Position that Direct Negligence Claims Only Allowed for Punitive Claims.
- Preventability Determination is Admissible.
- Upholds Jury Assessment of JBH Being Responsible for a Second Accident an Hour Later and Where Vehicle from First Accident is a Condition Not a Cause of Second Accident.

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So, What Now with *Zak*?

- Challenge Holdings as Minority Positions, Incorrectly Decided.
- Appeal the Right Cases and Get *Zak* Effectively Rejected.
- Legislative Remedies
  - Statute Making Preventability Determination Inadmissible.
  - Statute Prohibiting Direct Negligence Actions without Punitive Damages.

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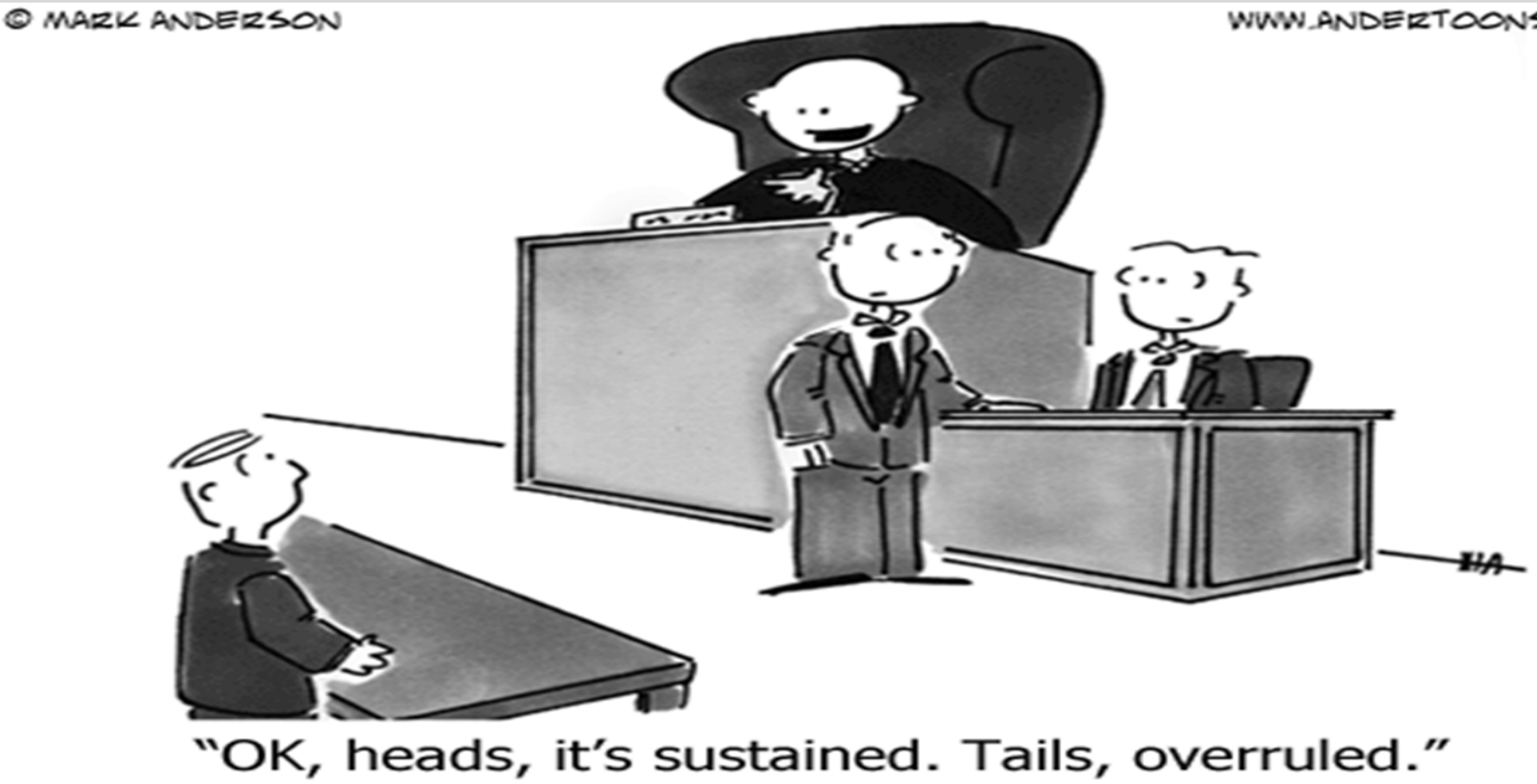
ADMISSIBILITY OF PREVENTABILITY DETERMINATIONS



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Admissibility Trends of Post-Accident Investigations and Preventability Determinations

- The Challenge: Conducting a Complete Investigation with a Preventability Conclusion for Ongoing Safety Purposes but What if Admissible?
- The Distinct Differences Between Accident Being Preventable and Being at Fault.

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The Arguments Against Admissibility

- Inadmissible under Subsequent Remedial Measure Rule
- Inadmissible under Self-Critical Analysis Rule
- Determination of Preventability Confuses Jury on Negligence Standard
- Prejudice Substantially Outweighs Probative Value

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Trend is Admitting Investigations and Preventability Determinations, But with Variations

- Allowing the Report and Preventability Determination
- Not Allowing the Report but Allowing Preventability Determination
- Only Admissible for Impeachment Purposes
- Preventability Determination Has No Legal Presumptive Weight
- Differences Between Fault and Preventability May Be Explained to the Jury

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How to Best Make Preventability Determination Inadmissible

- Make it a "Remediation Report," with Report's Focus on Remediation:
  - Counseling/Re-Training
  - Discipline
  - Termination
  - Reinforces the "Subsequent Remediation Measure" Aspect.
- Legislative Changes – A Simple Statute Solution?

"A motor carrier's accident preventability determination and remedial actions taken after and because of a motor vehicle accident are not admissible in a civil action arising from the same accident."

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DAKTER v. CAVALLINO: HEIGHTENED STANDARD OF CARE

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Dakter v. Cavallino
Negligence Instruction

At the time of the accident, the defendant… was a **professional truck driver** operating a semi tractor-trailer pursuant to a commercial driver's license issued by the State of Wisconsin. **As the operator of a semi tractor-trailer it was [the defendant's] duty to use the degree of care, skill and judgment which a reasonable semi-truck driver would exercise in the same or similar circumstances having due regard for the state of learning, education, experience, and knowledge possessed by semi-truck drivers holding commercial driver's licenses.** A semi-truck driver who fails to conform to the standard is negligent. The burden is on the plaintiff to prove [the defendant] was negligent.

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GRAVES AMENDMENT

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Auto Rental NEWS

"Aug. 10, 2005 will go down in history as one of the most significant dates in the vehicle rental industry. On that day, President George W. Bush signed into law a bill popularly known as the 'highway bill.' The legislation contained a section, known as the Graves Amendment, which effectively bars all states from forcing vicarious liability on rental and leasing companies." – Sept/Oct 2005 *Issue of Auto Rental News*

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"Graves Amendment"

- 2005 law ending vicarious liability for car leasing companies
- Declares "the owner of a motor vehicle is not liable under any state law for any harm that results from the use of the vehicle while leased, so long as there is no negligence or criminality on the part of the owner"
- Estimated by Samuel Graves to save consumers over $100 million annually
    - Unlimited vicarious liability contributes to high insurance rates – caused companies to go out of business and paused both commercial and consumer leasing, especially in areas such as NY and DC

Congressman Sam Graves (R-Mo.) speaks at Car Rental Show

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Opposition

- Strongly opposed by trial lawyers due to law's drastic restriction on liability
  - Wide variety of claims have been asserted over past decade, but typically fall into categories: The renter was impaired in some way at the time of the rental; the renter was not qualified to drive (by way of an expired or suspended license); or the renter had a poor driving record.
- Constitutionality of law challenged
  - *Garcia v. Vanguard Car Rental USA, Inc.* – upheld the federal preemption law where defendant driver of rental car was at fault in fatal accident.
  - US Court of Appeals for the 11th Cir. Found that "the Graves Act is valid" because rental car market has substantial effect on interstate commerce.

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Trucking Context

- US District Court for the District of Minnesota applied "Graves Amendment" in *Canal Ins. Co. v. Kwik Kargo, Inc. Trucking*
- Applies in cases involving truck companies where the company leasing equipment leases exclusively to another affiliate company owned by same entity
- Upheld by NY magistrate judge in *Stratton v. Wallace,* where Millis Transfer, Inc. employee Thomas Wallace struck Julie Stratton's disabled vehicle causing death with a vehicle owned and leased by Great River Leasing, LLC
- US District Court for Western District of NY rejected magistrate's *Stratton v. Wallace* decision, stated that in order for "Graves Amendment" to apply, both the lessor *and* any affiliates of the lessor must be free of negligence

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Recent Developments

- *Eisenberg v. Cope Bestway Exp., Inc.* – defendants argued not liable in summary judgement as intermodal chassis lessor, because they were a bona fide commercial lessor of vehicles, and there was no allegation that accident was result of negligence related to the chassis
- NY Appellate Division found that interpool defendants established that the "Graves Amendment" applied to shield them from liability given:
  - They demonstrated the absence of any material issues of fact with respect to whether they were commercial lessors of MVs
  - They had in fact leased the subject chassis to the CSX defendants pursuant to user equipment agreement at time of accident
  - That the chassis qualifies as a MV under the "Graves Amendment"
  - That there are no allegations of direct negligence
  - Conclusion – NY Appellate Division agrees "Graves Amendment" bars vicarious liability claims against intermodal container and chassis owners/lessors/lessees
- "Graves Amendment" will continue to be attacked by trial lawyers while trucking industry defends it. Issue is not decided at appellate level, thus remains an open issue to be aggressively litigated

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Questions?

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