

## DOT/FMCSA - Noteworthy Updates

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On 9/18/14, Congressman Lou Barletta (R-Pa.) introduced the Safer Trucks and Buses Act in the House of Representatives. The bill prohibits public access to the Safety Management System's (SMS) motor carrier scores until a new system is approved by Congress. The bill also prevents the SMS scores from being used as evidence in civil litigation. In his critique of the current system, Congressman Barletta cites the negative impact on small carriers from safety scores that do not reflect carriers' actual safety performance. The bill remains in the House Committee on Transportation and Infrastructure.

A proposed survey by the Federal Motor Carrier Safety Administration (FMCSA) seeks to determine whether safe driving is related to driver pay. The random survey compares compensation methods with safety ratings and is intended to give managers another tool for the increasing safety and efficiency of their drivers. The FMCSA will release the results in 2015.

The FMCSA also proposed a survey of 82,000 entry-level drivers and drivers who have received an inspection in the last 12 months. The survey seeks data that will assist in creating the new entry-level training regulations. Progress on the entry-level training rules has been slow. The FMCSA has missed numerous rule-making deadlines since the rules were demanded by Congress 20 years ago. In response, the Advocates for Highway and Auto Safety, the International Brotherhood of Teamsters, and the Citizens for Reliable and Safe Highways, filed suit against the FMCSA in the U.S. Court of Appeals for the District of Columbia on 9/18/2014, demanding that a judge force the FMCSA to propose regulations establishing minimum entry-level training requirements for commercial drivers within 180 days of the court order.

The FMCSA has delayed publication of its expected rule on increasing insurance minimums for property motor carriers. The current \$750,000 insurance minimums for non-hazardous

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## Damages Recoverable in Personal Injury Lawsuits

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A person is injured in an accident involving a truck and makes a claim or files a lawsuit against the truck driver. The claimant must first prove that the truck driver was negligent and that the claimant suffered injuries and perhaps other damages as a result of the truck driver's negligence. Assuming that the claimant can do that, what sort of damages is the claimant entitled to recover?

A claimant can recover his medical expenses, which includes all hospital, doctor, drug, and other medical expenses incurred as a result of injuries sustained in the accident. Thanks to a new law that was passed just several years ago, the amounts that a claimant can recover in **North Carolina** are limited to the amounts actually paid to satisfy the bills

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materials carriers have been in place since 1985. In April 2014, an FMCSA study found that the current minimums are insufficient to cover most fatal and serious-injury accidents. Publication of the Notice of Proposed Rule Making was scheduled for late October 2014. Despite the FMCSA's efforts, the House of Representatives voted in June 2014 to block funding of the DOT's appropriations for the 2015 fiscal year, which will likely delay the rulemaking. The House bill stalled in the Senate but is expected to be addressed in the 2014-2015 lame duck session of Congress. Also expected to be addressed is the potential suspension to the hours-of-service restart provisions.

The FMCSA delayed publication of a rule requiring speed limiters on heavy trucks until 3/16/2015. The proposed rule could restrict truck speeds to 65 mph and is expected by the FMCSA to decrease the estimated 1,115 fatal crashes every year. However, critics of the rule have cited a National Highway Transportation Safety Administration study that found that a higher percentage of crashes were caused by exceeding a reasonable safe speed for the conditions rather than exceeding the posted speed limit, which is not affected by a speed limiter.

On 10/28/2014, the FMCSA issued an "information collection request" seeking comments on the FMCSA's plan to require Electronic Logging Device (ELD) manufacturers to certify that their product meets the agency's specifications. Final publication of FMCSA's rule requiring most interstate carriers to equip their trucks with ELDs is expected in 2015. The FMCSA will accept public comment on its proposed certification requirement until 12/29/2014. The FMCSA's final rule on the use of ELDs is expected on or before 9/15/2015. The comment period remains open until 12/15/2014.

On 7/14/14, the Office of General Counsel and the Office of Drug and Alcohol Policy and Compliance of the Department of Transportation provided authoritative guidance to interpreting 49 CFR Part 40s drug testing regulations. Regarding when an employee is permitted to leave the collection site, the guidance states that employees may not be released until the testing is complete. This includes the following:

- For tests under § 40.73, testing is complete when the employee and collector have completed chain of custody forms as specified by § 40.73(a)(1)-(6).
- For tests under § 40.193, testing is complete once sufficient specimen is collected, the chain of custody forms are completed, or the employee is unable to provide a sufficient specimen within 3 hours of the first unsuccessful attempt.

If the employee leaves the collection site before completion, the collector must notify the employer, who generally considers the action a refusal to test. The employer must document its decision to consider the departure a refusal according to § 40.333. Considerations include information documented on the custody and control form, the advice and information from the collector, and any supporting information provided by the employee, including hospital records, EMS records, police records, etc. Failure to properly document the decision subjects employers to penalties.

The Safety Measurement System (SMS) has been updated with the results of adjudicated citations associated with inspections conducted on or after August 23, 2014. Carriers may access their safety assessment at <http://ai.fmcsa.dot.gov/sms>. Carriers may also find results of adjudicated citations by logging on through their Portal account at <https://portal.fmcsa.dot.gov/login> or through the SMS website with the carrier's Department of Transportation PIN.

## Legal Implications for Emerging Transportation Technology

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Stein Renegar

This summer Daimler demonstrated what it hopes the future of trucking will look like. The Mercedes Benz Future Truck 2025 is capable of responding to traffic while driving completely autonomously down a freeway at speeds of 50 miles per hour. Does this spell the end of the driver shortage problem in the industry? Daimler does not believe so. Rather the new driver that Daimler envisions will be a "manager of the cockpit" handling business tasks while on the move. A demonstration video of the Future Truck shows a driver reclined in a comfy leather chair performing tasks on his tablet computer.

Future Truck relies on cameras and sensors to recognize other vehicles around it. This includes a "stereo camera that recognizes lane markings as a major function for autonomous lane guidance." To operate the truck safely the technology recognizes lane marking on the road. Future Truck also relies upon other vehicles on the roadways to be networked such that each vehicle is constantly communicating with other vehicles around it such as speed, dimensions, accelerations, and braking.

While auto and trucking manufactures have made significant advances in safety technology over the last ten years, a primary question to consider is whether the driving public is ready for Future Truck? The U.S. Department of Transportation announced in February 2014 it would begin taking steps to enable vehicle-to-vehicle (V2V) communications for light vehicles, but it has not begun the regulatory process of requiring that this technology be installed in all vehicles. As a result there are no standards for implementing the Future Truck technology across all vehicles, nor is there a particular timetable for when all vehicles are required to meet such standards.

When implementing these technologies, manufactures will be well served to consider simple legal concepts regarding public safety and the rules of the road. Technology may change rapidly, but the law evolves at a snail's pace. The law is also reactive in the sense that it may, or may not, change to address the prevailing events of the day.

With respect to automobile and trucking safety, drivers are charged with a duty to use reasonable care under the circumstances to avoid injury to property and other people. More specifically, the common law holds drivers to a duty to always keep a reasonable lookout; keep their vehicle under proper control; to not only obey the speed limits, but to conform their speed to the conditions then existing, and of course to obey traffic control signals. These duties sound clear enough, but V2V technology must account for circumstances that could make complying with these duties more difficult such as: road construction, fading lane lines, streets where lanes are not clearly marked, heavy rainstorms, and/or malfunctioning traffic signals.

The law of products liability addresses situations if V2V technology fails or malfunctions in some way. Product liability law may vary from state to state, but it generally falls into one of two categories: (1) Strict liability, and (2) Negligence. In jurisdictions controlled by strict liability the manufacturer will be liable for all injury resulting from a product defect or malfunction. In negligence jurisdiction a plaintiff must prove that a product malfunction or defect was caused by some negligence of the manufacturer.

Technological evolution has changed the world in so many ways, and no doubt Future Truck will change the nature of the trucking and transportation business as well. However as V2V technology evolves it must evolve while keeping public safety as its chief concern. It is more likely that the rules of the road and common law of negligence and personal injury will evolve much slower, if at all. As a result trucking manufacturers and transportation companies would be well served to be mindful the simple laws when developing the Future Truck technology.

or the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied. In other words, if a medical provider submits a bill to Blue Cross Blue Shield, or to Medicare, and is paid only a percentage of the gross amount of the bill, then a claimant will be entitled to recover only that amount actually paid to satisfy the bill. This is true for claims arising from all accidents which occur on or after October 1, 2011. For any claims arising from accidents which precede that date, the claimant is entitled to recover the gross amount of the bills.

In addition to her medical expenses, a claimant also is entitled to recover damages for physical pain and mental suffering experienced as a result of her injuries. The North Carolina courts have said that there is no fixed formula for evaluating physical pain and mental suffering, and the jury will be instructed to determine what is fair compensation by applying logic and common sense to the evidence. The jury thus has extraordinary discretion to determine the appropriate amount of damages to award for pain and suffering. Lawyers frequently will attempt to assist the jury in its calculation by suggesting that a certain injury is worth a certain amount of dollars per day in pain and suffering for however long it took for claimant to recover from his injury (or for a lifetime if the case involves a permanent injury).

A claimant also can recover damages for scars and disfigurement, as well as damages for loss of use of part of his or her body. A claimant can recover for partial or full loss of use of part of the body. With respect to loss of use of part of the body, however, the jury will be instructed not to consider whatever inconvenience and handicap it previously considered in determining what was fair compensation for pain and suffering because a claimant is not entitled to double recovery for the same element of damages.

A claimant further can recover damages for permanent injury. A jury typically will be provided a life expectancy table to use in assessing how much should be awarded for permanent injury. The jury also will be instructed, however, that it should consider other evidence as to the claimant's health, constitution, and habits when awarding damages for a permanent injury.

Another category of economic damages besides medical expenses is the loss of earnings a claimant may have suffered. A claimant may have lost time from work, or, more seriously, now have a reduced capacity to earn money in the future as a result of his injuries. Calculating the amount of lost earnings usually is relatively simple when the claimant is paid by the hour or is paid a salary. However, it can get devilishly complicated in other scenarios, particularly where a claimant is claiming a loss of future earning capacity. A claimant frequently has to utilize medical witnesses, vocational experts, and economists to fully make his case for loss of future earning capacity. The defendant often employs similar experts to rebut the testimony of claimant's experts.

It is important to note that a claimant is entitled to recover past and future damages with respect to all of the elements of damages noted above. Any amount awarded for future damages, however, should be reduced to its present value because, due to the ability to earn interest on money received today, a smaller sum received now is equal to a larger sum received in the future. Especially in a larger case, a

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claimant frequently will employ an economist to testify as to the present value of the claimant's future damages.

Finally, a claimant may recover punitive damages in an appropriate case. Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) fraud, (2) malice, or (3) willful or wanton conduct. The term "malice" is defined as a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant. The term "willful or wanton conduct" means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonable likely to result in injury, damage, or other harm. If there is an aggravating factor in a trucking accident case, it is most likely to be willful or wanton conduct. An example of a case where a jury may find willful or wanton conduct is where Defendant driver was operating his truck while impaired.

A claimant must prove the existence of an aggravating factor by clear and convincing evidence in order to recover punitive damages. This standard makes it more difficult for the claimant to recover punitive damages because the claimant must prove negligence and her compensatory damages only by the preponderance of the evidence. In addition, punitive damages may not be awarded against a person or company solely on the basis of vicarious liability for the acts or omissions of another unless that person or company participated in the conduct constituting the aggravating factor given rise to the punitive damages, or if, in the case of a corporation, the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages.

By statute, punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or \$250,000.00, whichever is greater. This cap on punitive damages does not apply if the driver of the truck was operating his vehicle while impaired.

The next article in this series will be devoted to what damages may be recovered for wrongful death claims.

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*Wishing you a joyous holiday season  
and a prosperous new year.*



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