TYPICAL LIABILITY AND CAUSATION DEFENSES

IN THE TYPICAL AUTO CASE

A paper for the American Association for Justice (AAJ)

Annual Convention in Montreal, Canada

Motor Vehicle Collision, Highway and Premises Liability Section/Bus Litigation Group/Inadequate Security Litigation Group

Monday July 13, 2015

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The list of "typical" liability and causation defenses is long. These are only a few of the typical defenses raised in auto cases.

YOUR COMPLAINT LEFT OUT PARTIES. The first defense which always concerns me is that the complaint does not name the entities which are responsible for causing the accident. The starting point for analysis of this information is (a) **who drove the other vehicle, (b) who employs the driver of the other vehicle,** and **(c) who owns the other vehicle**.

The identity of who drove the vehicle usually can be obtained from the police report. The identity of the "owner" is also obtained from the police report but may be a little more complicated.

Ownership, of course, is relevant because of the dangerous instrumentality doctrine. In Florida, that doctrine is a common law doctrine which provides that the owner of any inherently dangerous instrumentality, which of course include any motor vehicle, is liable for injuries caused by the operation of that vehicle. In Florida, the case which extended the dangerous instrumentality doctrine to motor vehicles was *Southern Cotton Oil Company v. Anderson,* 80 Fla. 441, 469 (Fla. 1920). The doctrine imposes a strict liability on the owner who voluntarily entrusts the motor vehicle to an individual whose negligent operation causes damage to another.

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There are many limitations and extensions on the dangerous instrumentality doctrine. For example, golf carts have been held to be dangerous instrumentalities.[1] In the words of one court, the doctrine has "been applied to trucks, buses, tow-motors and other motorized vehicles".[2] A trailer has been held not to be a dangerous instrumentality, notwithstanding the fact that it meets the definition of motor vehicle under Chapter 320 of the Florida Statutes pertaining to motor vehicle licensing.[3] A forklift, however, is a dangerous instrumentality even though it is not a "motor vehicle" under that statute.[4]

Who has beneficial ownership? The dangerous instrumentality doctrine applies to all of those individuals and entities to have an identifiable property interest in the vehicle. The Florida Supreme Court in April 2014 said:

> The dangerous instrumentality doctrine serves to ensure financial recourse to members of the public that were injured by the negligent operation of a motor vehicle by imposing strict vicarious liability on those with an identifiable property in ownership interest in the vehicle.[5]

Christensen v. Bowen. There are limited circumstances in which someone who holds only "bare legal title" or "naked legal title" in the vehicle and has no "beneficial ownership" right to control the vehicle will not be liable in strict liability for its negligent operation.[6] In *Palmer v. R. S. Evans, Jacksonville, Inc.,* 81 So. 2d 635 (Fla. 1955), for example, the legal title owner was a car dealership where the driver already had submitted the down payment and signed a conditional sales contract and taken possession of the purchased vehicle. However, where others have put their name on the title but have failed to remove it even though the name was put on in order to obtain financing, courts have held that there was beneficial ownership as well as title ownership.[7]

The question which remains is whether title ownership is necessary for vicarious liability where an entity has a beneficial ownership and the right to control the vehicle. In *Auerbach v. Gallina*,

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[1] See, Meister v. Fisher, 462 So. 2d 1071 (Fla. 1984).

[2] *Festival Fun Parks, LLC v. Gooch*, 904 So. 2d 542 (Fla. 4th DCA 2005). Citing *Meister*, 462 So. 2d at 1072.

[3] See, *Edwards v. ABC Transportation Company*, 616 So. 2d 142, 143 (Fla. 5th DCA 1993).

[4] See, *Harding v. Allen-Laux, Inc.,* 559 So. 2d 107, 108 (Fla. 2nd DCA 1990).

[5] See, *Kraemer v. General Motors Acceptance Corp.*, 572 So. 2d 1363, 1365 (Fla. 1990).

[6] See, *Auerbach v. Gallina*, 753 So. 2d 60, 64 (Fla. 2000), *Metzel v. Robinson*, 102 So. 2d 385, 385 – 386 (Fla. 1958) and *Palmer v. R. S. Evans, Jacksonville, Inc.*, 81 So. 2d 635, 637 (Fla. 1955).

[7] See also *Christensen v. Bowen*, 140 So. 3d 498 (Fla. 2014).

753 So. 2d 60 (Fla. 2000), the Florida Supreme Court held that “although vicarious liability will generally flow from the legal title, this principle does not preclude the imposition of vicarious liability under the dangerous instrumentality doctrine pursuant to other identifiable property interests, including bailment."

PRACTICE TIP: In the search for “ownership" or “beneficial ownership", the following is a list of sources of information:

a) Police Report for identity of driver and of owner
b) Department of Motor Vehicles to obtain title information
c) Google for information about the Corporations which own the vehicle or employ the driver
d) Google, LinkedIn, Facebook, and Spokeo about the individual driver and who that driver works for
e) Websites of the Corporations which owns the vehicle or employ the driver
f) SEC filings and annual reports of the corporations which own the vehicle or employ the driver of the vehicle.

The anticipated defenses (and the identities of entities to sue) will depend on and will dictate the causes of action you allege. In one car crash case we have, the driver of the car which caused the accident was an employee of one of the many subsidiaries of a large multinational corporation. The car was leased by another subsidiary of the multinational corporation. We alleged the following causes of action:

1. Liability for negligent hiring, entrustment, supervision, training, and retention – the employer defendants
2. Liability based on beneficial ownership and control of the vehicle – the owner defendants
3. Liability based on title ownership of the vehicle
4. Negligent entrustment of the vehicle – the employer defendants and the owner defendants
5. Negligence of the driver of the vehicle.

THE ACCIDENT DID NOT HAPPEN THE WAY YOU SAID IT DID. After the ownership hurdle, the next most common challenges are to the facts of the accident itself. In a recent motor vehicle rollover case, we were faced with a police report and a witness at the scene, the driver of the other vehicle, who said that the accident happened exactly opposite to the way our client described it. This was a motor vehicle collision of two vehicles on a limited access highway, the Florida Turnpike in Miami. The police report, completed at the scene by a Florida Highway Patrol officer stated that the vehicle driven by our client, a Cadillac Escalade, passed the other vehicle, a white van owned by the Florida Department of Transportation (FDOT) and driven by a contract employee of an independent contractor. The report said that our vehicle struck the left side of the van. Our vehicle, according to this version, proceeded in front of the van and then swerved to the right and rolled. One witness said that she thought that our vehicle

had a tire blow out. Our client said that the van moved from the center lane to the right lane, cut off our vehicle which caused our vehicle to roll off the shoulder and off the Expressway. This caused our client to become a quadriplegic. The officer at the scene made his conclusions based on statements of the van driver. Our client was in shock, suffering from severe injuries including a broken neck which caused quadriplegia, and was unable to give an account at the scene when it happened.

PRACTICE TIP: Here are some key sources of information:

a) Videos from traffic signals. Issue a public records act request to have the traffic authority obtain these immediately after the accident.
b) Videos from nearby buildings. In one accident, we obtained the video from a bank which was adjacent to the intersection where the accident occurred.
c) Eye witnesses to the accident. Call the fact witnesses on the police report immediately. Fact witnesses are the most important witnesses in any case.
d) Accident reconstruction expert. Consider retaining immediately and request that he go the scene right away. The reconstruction expert can contact the investigating police officer and request that the officer meet the reconstructionist at the scene to discuss the accent and share observations.
e) Accident report. Request the accident reports from all investigating agencies. Request photographs and video taken of the accident. Usually photographs are taken only if there is a homicide.
f) Emergency Medical Services. Request these medical reports right away. Sometimes, they will have observations about the scene and about your client, for example about whether your client was wearing a seatbelt, i.e., "restrained".

THE IMPACT COULD NOT HAVE CAUSED THOSE INJURIES. The force of impact is almost always at issue in any motor vehicle and other accident. Force of the impact can be determined somewhat scientifically through the methods of experts. But the force of impact also can be imparted to the jury through common sense by way of photographs and videos of the vehicles from the accident.

Photographs are essential for the accident reconstruction expert to determine the crush of the vehicle. This in turn translates into an opinion about speed and force of impact, given the make and model of the vehicle.

A biomechanical engineer can be qualified to present expert testimony that the impact of any certain crash was sufficient to cause mild to moderate traumatic brain injury. See, *Berner v. Carnival Corporation*, 632 F. Supp. 2d 1208 (S.D.Fla. 2009) where the court denied motion to strike biomechanical expert in a slip and fall case holding that the engineers methodology, utilizing Newtonian Laws of Physics in the study of athletes with concussions, was reliable under *Daubert* standards).

Also, forensic physicians can testify whether force of impact is sufficient to cause certain

injuries. We utilize a former medical examiner for such opinions.

PRACTICE TIP: Here are some sources of information:

a) Photographs of the vehicles and the scene taken by you or your expert.
b) Photographs of the vehicles taken by the property insurance adjusters. These insurance adjusters always take photographs showing damage.
c) Photographs and video of vehicles taken by a forensic photographer or accident reconstruction expert you retain. Forensic photographers specialize in taking detailed and documented measurements of the vehicles and in photographing every aspect of the crash of the vehicles.
d) Event data recorder (EDR or "black box"). Obtain but do not download this until the other side is present to avoid a charge of spoliation of evidence. 96% of all vehicles sold in the United States have a black box. The black box typically does not record all data on an ongoing basis. It records data only immediately preceding the event. Actually, there are several different types of "black boxes". Some record continuously but save at any point in time the immediate to immediately preceding data. Others start the recording process only upon a certain event tripped by the rapid deceleration of the vehicle, for example. EDR's typically record speed, seatbelt usage, and the status of the throttle and brakes immediately preceding the collision or event.

The Eaton VORAD Collision Warning System includes forward radar sensors to detect the presence, proximity, and movements of vehicles around the vehicle and sensors that alert the driver that a vehicle is too close. In 2006, the National Highway Traffic Safety Administration (NHTSA) issued a final rule at 49 CFR. Part 563 which mandated certain EDR standards. EDRs, as of 2006 would be required to record at least 15 types of crash data. Those include pre-crash speed, engine throttle, brake use, measured changes in forward velocity (Delta V), driver safety belt use, airbag warning lamp status and airbag deployment times.

ACCIDENT CAUSED BY AN UNNAMED THIRD PARTY. In Florida, this is called the *Fabre* defense. The defendant must identify the third party in the answer to the complaint. Under the Florida Supreme Court decision of *Fabre v. Marin,* 623 So. 2d 1182, 1185 (Fla. 1993) an at fault entity which was not named as a party to the suit can be added to the verdict form for the jury to determine the proportionate responsibility of that party. The Defendant has the burden to provide evidence that the *Fabre* party caused the accident, however.

PRACTICE TIP: Take the deposition of these third parties before you name them as parties to the action.

ACCIDENT WAS CAUSED BY A MANUFACTURING DEFECT. This will allow the manufacturer to be put on the verdict form if the Defendant carries its burden to prove the fault of the third party.

PRACTICE TIP:

a) Preserve the vehicle. Your initial letter to the new client should clearly direct the client to preserve the vehicle in a safe and secure location and not to alter it in any way and should advise the client that if the vehicle is not retained and preserved in that way that their claim can be diminished or destroyed.
b) Send a letter to the storage facility retained by the insurance company that the storage facility is to store and not alter, destroy, or affect any aspect of the vehicle in any way and advise the facility that all aspects of the vehicle are important evidence in a significant personal injury case.
c) Videotape the vehicle for some aspect of the operation of the vehicle in order to preserve that testimony. In the case referenced above, *Puga v. Faneuil Inc.*, one witness at the scene said that it appeared that the rollover of our vehicle was caused by a tire blowout. We videotaped the inflation of all four tires. The vehicle was subsequently burned beyond recognition in a fire created at the storage yard. The video of the inflation of all four tires dispelled any notion that a tire blow out caused the accident.
d) Check the NHTSA website for manufacturing defects including tire defects to rule in or rule out a manufacturing defect.

COMPARATIVE NEGLIGENCE: "BUT IF THAT THIRD-PARTY DID NOT CAUSE THE ACCIDENT, THE PLAINTIFF DID".

PRACTICE TIP:

a) Interview fact witnesses immediately
b) Determine where your client was coming from and what they had been doing immediately before the accident and that day/night. Determine from an investigator or later in depositions where the defendant had been coming from and what he or she was doing
c) Determine from witnesses and depositions what the defendant driver did immediately after the accident. That can point to his or her guilt. For example, if in the rollover case above, the driver of the van said that our client's vehicle hit his van on its **left** side. After the accident and rollover of our client's car, the van driver got out of the van and inspected the **right** side of the van. This gave credence to our client's version of the facts. The van driver then called his supervisor and never went close to the car of our client.

COLLATERAL SOURCES. Collateral sources in Florida which can be "boarded" in front of the jury are "reduced by unearned benefits", that is, Medicare, workers comp, charitable or other similar benefits.[8] However the amount to be boarded is not reduced by the insurance carrier's

[8] See, *ThyssenKrupp Elevator Corp. v. Lasky*, 868 So. 2d 547, 551 (Fla. 4th DCA 2003). See also Fla. Stat. § 768.76.

discount.[9]

THE INJURY IS NOT "PERMANENT". Florida's no-fault law requires that the injury be "permanent" in order to a claim for pain and suffering damages. Florida Stat. § 627.730 *et seq*. Beware that some neurologists will testify traumatic brain injury cannot be determined to be permanent until from 2 to 3 years after the incident. Before you ask for trial date, talk to the treating neurologist to determine what his or her opinion is on permanency.

"BUT THE PLAINTIFF WASN'T WEARING HIS SEATBELT". The seatbelt defense is a relatively young defense, first attributed to a case in 1964 in Wisconsin, *Stockinger v. Dunich*. According to an article on the subject, despite this initial success, most states have rejected the defense, some legislatively and others judicially, and therefore exclude evidence of plaintiff's failure to use "an available seatbelt".[10] Seatbelts were used extensively in early aviation. The first seatbelt used in a car was placed in a Volvo in 1959.[11] In Florida, the seatbelt defense is a defense even in a product liability case, but only to the extent that the failure to use a seatbelt caused any particular injuries.[12]

THE GRAVES AMENDMENT. This relates back to the dangerous instrumentality doctrine. Under that doctrine, the "owner" of the vehicle is strictly liable for the negligent use of that vehicle. The definition of "owner" has been changed by Federal Statute, called the Graves Amendment. 49 USC § 30106 requires that "if a motor vehicle is rented or leased by an entity which is engaged in the trade or business of renting or leasing motor vehicles" then negligence or criminal wrongdoing on the part of the owner is required in order for the owner to be liable.

In Florida, Florida Statute § 322.38 provides a narrow duty for the rental companies when renting the motor vehicle. The renter is required to be "duly licensed". The rental company under that statute also is required to inspect the driver's license of the person to whom the vehicle is to be rented and compare and verify the signature of such person written in his or her presence.

The rental company, therefore, can be liable for negligence if it violated the state statute or for conduct outside the duties of the state statute if the rental company in renting the vehicle to the defendant was "foolish" or negligent. See, e.g., *Rivers v. The Hertz Corporation*, 121 So. 3d 1078 (Fla. 3d DCA 2013) and *Mullins v. Harrell*, 490 So. 2d 1338, 1340 (Fla. 5th DCA 1986).

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[9] See, for example, *Goble v. Frohman*, 901 So. 2d 830 (Fla. 2005).

[10] *Mercer Law Review* 19 (2013 – 14), Jacob E. Daly

[11] *Journal of Trauma and Acute Care Surgery,* August 2012, Volume 73, Issue 2 page 301 – 307.

[12] See, for example, *Alvarez v. Cooper Tire & Rubber Co.,* 75 So. 2d 789 (Fla. 4th DCA 2011).

SOVEREIGN IMMUNITY. In Florida, whether a party contracted by the state is an agent of the state turns on the degree of control retained or exercised by the state agency. See, *M. S. v. Nova Southeastern University Inc*., 881 So. 2d 614, 617 (Fla 4th DCA 2004). See also Florida Stat § 768.28 (9).

PRACTICE TIP: Obtain the contract between the State or governmental entity and the contractor to determine whether the agency prohibited the contractor from representing that the contractor was an agent of the state and whether the contract specifies that the contractor is not an agent of the state.

PERSONAL JURISDICTION, SERVICE OF PROCESS, VENUE. For service of process of an out-of-state defendant who hides his whereabouts, serve the Secretary of State by substituted service. The Complaint must plead the facts which support substituted service of process under the statute.[13]

APPORTIONMENT OF DAMAGES. Under our 1986 "tort reform" damages were apportioned pursuant to Florida Stat. §768.81. That apportionment is according to fault of each individual party thereby eliminating joint and several liability.

THE INJURIES WERE CAUSED BY THE MEDICAL MALPRACTICE OF THE TREATING PHYSICIAN. This should not matter. Any injury down the line of the accident itself is the responsibility of the tortfeaser which caused the accident. *Stuart v. Hertz Corporation*, 351 So. 2d 703 (Fla. 1977); *Dungan v. Ford*, 632 So. 2d 159 (Fla. 1st DCA 1994) (Failure to give jury instruction; reversed and remanded for new trial; *Nason v. Shafranski*, 33 So. 3d 117 (Fla. 4th DCA 2010) (where trial court refused to give instruction on point in a case where the Defendant raised the issue, refusal was reversible error. Remanded for new trial).[14] The Court in *Dungan v. Ford Motor Co.* said:

> It is well-established that a wrongdoer is liable for the ultimate negligence on the part of a physician who has treated an injury in such a way that the treatment may have increased the damage which otherwise would have followed from the original wrong.[15]

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[13] See, for example, Florida Stat. § 48.171.

[14] See also, *Tucker v. Korpita*, 77 So. 3d 716 (Fla. 4th DCA 2011), *Pedro v. Baber*, 83 So. 3d 912 (Fla. 2d DCA 2012), and *Costa V. Aberle*, ___ So. 3d ___; 37 FLW D1823 (Fla. 4th DCA 2012).

[15] *Dungan*, 632 So. 2d at 162. *Stuart v. Hertz Corp*., 351 So.2d 703 (Fla. 1977); *Davidson v. Gaillard*, supra; *Rucks v. Pushman*, 541 So.2d 673 (Fla. 5th DCA), rev. denied, 549 So.2d 1014 (Fla. 1989); 57 Am.Jur.2d Negligence § 149, and Restatement (Second) of Torts § 457 (1965). Cf. *Barrios v. Darrach*, 629 So.2d 211 (Fla. 3d DCA 1993).

The results have been similar in other states. It is clear that "[s]ubstandard medical care generally does not break the chain of causation even if the care adds to the damages."[16] Where joint and several liability is imposed, "the chosen tortfeasor may seek contribution from another concurrent tortfeasor," however the defendant would still be liable for the full amount of damages to the Plaintiff, despite the fact that a third-party's negligence contributed to the injuries. *Doyle* at 1082-1083 (citing *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 210 n.10, 114 S.Ct. 1461 (1994)); *see also* Restatement Second of Torts § 457 ("If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner."). *Kansas City S. Ry. Co. v. Justis*, 232 F.2d 267, 271-72 (5th Cir. 1956) ("Defendant argue[d] that [Plaintiff's] consequences resulted solely from the negligence of the attending physicians. . . . [T]he [jury] instruction was too favorable to the defendant, for the law is well settled that: 'If the negligent actor is liable for another's injury, he is also liable for any additional bodily harm resulting from acts done by third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or negligent manner.' Restatement, Torts, § 457, p. 1214."); *Miss Janel, Inc. v. Elevating Boats, Inc.*, 725 F. Supp. 1553, 1569 (S.D. Ala. 1989).

CAUSATION: BACK INJURIES. The defense is that the plaintiff has no back injury and if he or she does have one it was pre-existing. The debate often is about the condition of the discs on the MRI; Are the discs merely bulging or are they herniated?

PRACTICE TIP: See the new standards adopted by the *American Society of Neuroradiology* as published in *The Spine Journal*, Official Journal of the North American Spine Society, November 1, 2014. The term "bulge" or "bulging" refers to generalized extension of disc tissue beyond the edges of the apophysis (the outside edges of the vertebrae). Such bulging involves greater than 25% of the circumference of the disc and typically extends a relatively short distance, usually less than 3 mm, beyond the edges of the apophysis. "Herniation" means that the disc material is displaced from its normal location. This refers to a displacement of the nucleus, cartilage, fragmented bone, fragmented annular tissue beyond the entire vertebral disk space.

PRACTICE TIP: But do not always go down the Defendant's prim rose path; The accident can cause injury to the spinal cord or nerve roots without injury to the disc or vertebrae. Cauda equine syndrome, for example, is caused by an injury to the end of the spinal cord which branches off into a broom like or horse tail like arrangement. The discs and vertebrae are not necessarily damaged in this syndrome and yet the injury is severe.

[16] *Doyle v. Graske*, 565 F.Supp.2d 1069 (D. Neb. 2008).

PRACTICE TIP:

a) Review and summarize past medical records
b) Send current films to radiologist for consultation
c) A picture is worth 1000 words. Enlarge, print, and mount the best frame on the MRI of the back if it shows a protruding or herniated disc.

CAUSATION: TRAUMATIC BRAIN INJURY

PRACTICE TIP:

a) Retain a biomechanical expert to testify that the forces in the accident were capable of causing traumatic brain injury.[17]
b) Send the client to undergo a diffusion tensor image MRI. This type of MRI can detect certain white matter lesions indicative of axonal shearing, the microscopic injury to the axons of the nerves in the brain.

CAUSATION: COMPLEX REGIONAL PAIN SYNDROME

Complex Regional Pain Syndrome (CRPS, formally known as RSD or Reflex Sympathetic Dystrophy) is an abnormality of the autonomic nervous system. This results from injury to a limb following typically the trauma of surgery. There is no one test for CRPS. A bone density test can indicate whether CRPS is present.

CRPS is diagnosed clinically. The symptoms according to The National Institute of Neurological Disorders and Stroke, a division of the National Institutes of Health of the US Government, include prolonged pain that may be constant and in some people extremely uncomfortable. The pain may feel like burning, pins and needles sensation or as if someone is squeezing the affected limb. But there is often increased sensitivity to the affected area, such that even light touch or contact is painful (allodynia). Other features include changes in skin texture to shiny thin, abnormal sweating pattern, changes in nail or hair growth, stiffness and affected joints, problems coordinating muscle movement, abnormal movement of the affected limb.

CONCLUSION.

These are some defenses to anticipate and to prepare for. For every defense, however, there is an answer. For every move, there is a countermove.

[17] See, for example, *Berner v. Carnival Corporation*, 632 F Supp.2d 1208 (S.D. Fla. 2009).