Big New Changes in Texas Trucking Litigation: A Review of New House Bill 19

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Introduction

On May 21, 2021, House Bill 19 passed both houses of the Texas State Legislature. The bill has been sent to Governor Greg Abbott for signature. Governor Abbott signed the bill on June 21, 2021. The new law will become Chapter 72 of the Texas Civil Practices and Remedies Code and will be effective as of September 1, 2021.

Backdrop

The bill was sponsored by Texas State Representative Jeff Leach from Plano, Texas. Sponsors and supporters of the bill pointed out that while the number and frequency of trucking accidents have remained "steady" the last ten years, lawsuits surrounding trucking companies have increased 118%. Sponsors and supporters of the bill argue the bill is necessary to stem the tide of frivolous lawsuits and focus the litigation primarily on the actions of both the driver of the 18-wheeler and the passenger vehicle.

Those opposing the bill point out that fatalities caused by trucking accidents have more than doubled from 2009 to 2019. They also note that the State of Texas leads the nation in trucking vehicle accidents. Texas accounts for 1.26 fatalities on the road per 100,000,000 vehicle miles traveled as opposed to 1.10 deaths nationwide.

The Nuts and Bolts of House Bill 19

The Bifurcated Trial

Under House Bill 19, when an owner or operator of a commercial motor vehicle (hereinafter "employer') is sued for personal injuries or for wrongful death, on a motion by a defendant, the court shall provide for a bifurcated trial.[1] A bifurcated trial is a judicial proceeding that divides a trial into separate phases and each phase deals with a separate issue. A motion for a bifurcated trial shall be made on or before the 120th day after the date the defendant bringing the motion files the defendant's original answer; or the 30th day after a plaintiff files a pleading adding a claim or cause of action against the defendant bring the motion.[2]

[1] Relating to Civil Liability of a Commercial Motor Vehicle Owner or Operator, Tex.H.B. 19, 87th Leg., §75.052 (2021).
[2] *Id.*

In phase one, the trier of fact must find a driver, of the commercial motor vehicle, liable, before the plaintiff may bring a cause of action against the employer, in phase two. In phase one, the trier of fact is solely deciding the employee's liability and the amount in compensatory damages to be paid.[3] If a driver is found to be negligent in operating an employer's commercial motor vehicle this may serve as basis for the plaintiff to proceed in the second phase of the trial on a claim against the employer.[4] In phase two, the trier of fact shall determine the employer's liability and the amount of exemplary damages to be paid.[5]

What evidence is admissible in Phase One?

New Limits on Failure to Comply with Regulations or Standards

Under Section 72.053, a civil action involving a defendant's failure to comply with a regulation or standard would be admissible in phase one only if (1) the evidence tends to prove that the defendant's failure to comply with the regulation or standard was a proximate cause of the bodily injury or death which damages are sought; and (2) the regulation or standard is specific and governs, or is an element of a duty of care applicable to, the defendant, the defendant's employee, or the defendant 's property or equipment when any of those is at issue in the action.[6] HB 19 does not prevent a plaintiff from pursuing a claim for exemplary damages relating to the defendant's failure to comply with other applicable regulations or standards, or from presenting evidence on that claim in the second phase of a bifurcated trial.[7]

New Limits on Employer Defendant Liability in Phase One

Under Section 72.054, in a civil action involving a commercial motor vehicle, an employer's liability for damages caused by the ordinary negligence of a person operating the defendant's commercial motor vehicle shall be based only on respondeat superior if the defendant stipulates that, at the time of the accident, the person operating the vehicle was: (1) the defendant's employee; and (2) acting within the scope of employment.[8]

Under this subsection, if an employer defendant stipulates in accordance with subsection (a) and the trial is bifurcated, a plaintiff may **not**, in the first phase of the trial, present evidence on an ordinary negligence claim against the employer defendant that requires a finding by the trier of fact that the employer defendant's employee was negligent in operating a vehicle as a prerequisite to the employer defendant being found negligent in relation to the employee defendant's operation of the vehicle.[9]

[3] *Id*. at §72.052 (c)
[4] *Id*. at §72.052 (e)
[5] *Id*. at §72.052(d)
[6] *Id*. at §72.053(b)(1) & (2)
[7] *Id*. at §72.053(c)
[8] *Id*. at §72.054(a)
[9] *Id*. at §72.054 (b)

Phase One Evidence

Under Section 72.054(c), when an employer stipulates to liability and the trial is bifurcated, if an employer-defendant is regulated by the Motor Carrier Safety Improvement Act of 1999 or Chapter 644 of the Transportation Code, a party may present any of the following evidence in the first phase of a trial that is bifurcated if the evidence is applicable to the defendant:

> whether the employee who was operating the employer-defendant's commercial motor vehicle at the time of the accident that is the subject of the civil action: (A) was licensed to drive the vehicle at the time of the accident; (B) was disqualified from driving the vehicle under 49 C.F.R. Section 338.51, 383.12, or 391.15 at the time of the accident; (C) was subject to an out-of-service order, as defined by 49 C.F.R. Section 390.5 at the time of the accident; (D) was driving the vehicle in violation of a license restriction imposed under 49 C.F.R. Section 383.95 or Section 522.043 of the Transportation Code, at the time of the accident; (E) had received a certificate of driver's road test from the employer-defendant as required by 49 C.F.R. Section 391.33; (F) had been medically certified as physically qualified to operate the vehicle under 49 C.F.R. Section 391.41; (G) was operating the vehicle when prohibited from doing so under 49 C.F.R. Section 382.201, 382.205, 382.207, 382.215, 395.3, or 395.5 or 37 T.A.C. Section 4.12, as applicable, on the day of the accident; (H) was texting or using a handheld mobile telephone while driving the vehicle in violation of 49 C.F.R. Section 392.80 or 392.82 at the time of the accident; (I) provided the employer-defendant with an application for employment as required by 49 C.F.R. Section 391.21(a) if the accident occurred on or before the first anniversary of the date the employee began employment with the employer defendant; and (J) refused to submit to a controlled substance test as required by 49 C.F.R. Section 382.303, 382.305, 382.307, 382.309, or 382.311 during the two years preceding the date of the accident; and
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> whether the employer-defendant (A) allowed the employee to operate the employer's commercial motor vehicle on the day of the accident in violation of 49 C.F.R. Section 382.201, 382.205, 382.207, 382.215, 395.3, or 395.5 or 37 T.A.C. Section 4.12, as applicable, on the day of the accident; (B) had complied with 49 C.F.R. Section 382.301 in regard to controlled-substance testing of the employee-driver if: (i) the employee-drive was impaired because of the use of a controlled substance at the time of the accident; and (ii) the accident occurred on or before the 180th day after the date the employee began employment with the employer-defendant; (C) had made the investigations and inquiries as provided by 49 C.F.R. Section 391.23(a) in regard to the employee-driver if the accident occurred on or before the first anniversary of the date the employee driver began employment with the employer defendant; and (D) was subject to an out-of-service order, as defined by 49 C.F.R. Section 390.5.[10]

If a civil action is bifurcated under Section 72.052, evidence admissible under the bill would be: (1) admissible in the first phase of the trial **only** to prove ordinary negligent entrustment by the employer-defendant to the employee who was driving the employer-defendant's commercial

[10] *Id*. at §75.054(c)

motor vehicle at the time of the accident; and (2) the only evidence that may be presented by the claimant in the first phase of the trial on the negligent entrustment claim.[11]

Nothing under Section 72.054, prevents a plaintiff from pursuing: (1) an ordinary negligence claim against an employer defendant for negligence in maintaining the commercial motor vehicle involved in an accident; (2) an ordinary negligence claim against an employer defendant for another claim that does not require a finding of negligence by an employee as a prerequisite to an employer defendant being found negligent for its conduct or omission, or from presenting evidence on that claim in the first phase of a bifurcated trial; or (3) a claim for exemplary damages arising from an employer defendant's conduct or omissions in relation to the accident that is the subject of the action, or from presenting evidence on that claim in the second phase of a bifurcated trial.[12]

Other Changes Relating to the Enactment of House Bill 19

Under HB 19, a court may not require expert testimony for admission of evidence of a photograph or video of a vehicle or object involved in accident. If properly authenticated under the Texas Rules of Evidence, a photograph or video of a vehicle or object involved in an accident is presumed admissible, even if the photograph or video tends to support or refute an assertion regarding the severity of damages or injury to an object or person involved in the accident that is the subject of a civil action under HB 19.[13]

The Texas Department of Insurance will be required to conduct a study each biennium on House Bill 19's effect on premiums, deductibles, coverage, and availability of coverage for commercial automobile insurance.[14]

Practice Considerations

To Bifurcate or Not to Bifurcate

The first consideration of any defense counsel who is assigned to the defense of a truck driver and the trucking company, is to determine whether or not it is in the clients best interest to move for a bifurcated trial under the new law. Counsel should note that any motion to bifurcate trial needs to be made on or before the 120th day after the defendant's answer is filed.

Defense counsel should carefully examine the circumstances surrounding the accident, the claim file, including the driver's driving history, personnel file, and the ECM data that accompanies the accident before making a decision to bifurcate or not to bifurcate.

[11] *Id*. at §75.054(d)(1) & (2)
[12] *Id*. at §72.054(f)
[13] *Id*. at §72.055
[14] *Id*. at §38.005

If there is an issue as to whether or not the truck driver's actions were a proximate cause of the accident, then bifurcation could be an effective defense tool. In other words, if there is a very real issue as to whether or not your driver was negligent, then bifurcation could be effective in focusing the jury's attention solely on the actions of the drivers involved. Plaintiff's counsel are, generally, only too happy to "try the trucking company" for a variety of unrelated FMCSA violations, hiring practices involving other company drivers, etc. This new chapter of the Texas Civil Practices and Remedies Code with its limitations on Phase One evidence could be an effective tool for defense counsel in these circumstances.

On the other hand if, based on the facts, the negligence of the truck driver is a virtual certainty, then moving to bifurcate the trial will only add to defense and litigation costs by creating what are basically two separate jury trials. If the truck driver's negligence is a virtual certainty, every practitioner needs to examine whether or not it would be in the client's best interest not to bifurcate and try both the driver and the trucking company's liability in the same trial.

Each practitioner must examine the history and background of their trucking company and determine what kind of impression the company and how it is run will make on the jury. If the trucking company has a long history of violations involving equipment, FMCSA violations, and accident history, it may be in the clients best interest not to bifurcate and get all of this out in the open in one trial.

Without question, attorneys defending trucking companies and truck drivers in the Texas will need to have a thorough understanding of new Chapter 72 of the Texas Civil Practices and Remedies Code to effectively represent their defendant clients.