

# *Driving the Preventability Determination* **Out of Court: PRACTICAL GUIDANCE ON EXCLUDING THE PREVENTABILITY DETERMINATION FROM TRIAL WHEN THE COMMERCIAL DRIVER'S NEGLIGENCE IS CONTESTED**

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Preventability determinations are a common practice for motor carriers. After an accident or other incident, the motor carrier makes a determination as to whether its driver could have prevented the accident. A company representative conducts an investigation into the accident, which often includes a review of police reports, witness statements and interviews with the commercial driver and possibly the driver of the other vehicle or vehicles involved in the accident. A decision is then made as to whether the accident was "preventable" or "non-preventable."

The assessment is made for several reasons. For many motor carriers, the primary reason is to determine whether the accident is one that was within their driver's control. This allows the carrier to evaluate and possibly change company policies and procedures with the goal of preventing similar accidents from occurring in the future. Other reasons may be to determine whether discipline should be imposed on the company driver or to address the techniques used by the driver with the goal of safer driving in the future. A preventability determination promotes driver accountability and helps to reduce the frequency of vehicle accidents. It may also be used as the basis for Safe Driver Award programs, safety incentives and other accident prevention programs.

A preventability determination is meant to be a positive, safety-oriented process. Yet, issues can arise for a motor carrier when a preventability determination is introduced during a trial in which an injured party is attempting to prove the commercial driver's negligence. In most states, the plaintiff in the personal injury suit must prove the commercial driver was negligent. Negligence is typically defined as the failure to act as a reasonably careful person. This standard is different than the one employed by motor carriers when determining preventability. Often, the standard for preventability is much lower. A commercial driver may not have been negligent under the state law negligence standard, yet the driver's conduct may still be deemed preventable under the preventability standard used by the motor carrier. In other words, even when there is no legal liability, an accident may have been preventable.

Where the negligence of the commercial driver is disputed, evidence of a preventability determination may potentially have a negative impact at trial, as the jury may construe a preventability determination as an admission of negligence. This article explores the standards used by motor carriers to define preventability, identifies two primary reasons for

the exclusion of the preventability determination at trial, and provides practical guidance on what motor carriers can do before an accident occurs to prepare for a situation in which a plaintiff seeks to introduce a preventability determination at trial.

## **Preventability Standards**

In defining "preventability," motor carriers rely on one or more, or a hybrid of, three sources: the National Safety Council ([www.nsc.org](http://www.nsc.org)), the American Trucking Associations (ATA) ([www.truckline.com](http://www.truckline.com)), and the Federal Motor Carrier Safety Regulations (FMCSRs) ([www.fmcsa.gov](http://www.fmcsa.gov)). These three standards are similar but distinct. The National Safety Council defines preventability as follows:

A preventable collision is one in which the driver failed to do everything that reasonably could have been done to avoid the accident.

The ATA defines preventability by asking the following:

Was the vehicle driven in such a way to make due allowance for the conditions of the road, weather, and traffic and also

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to assure that the mistakes of other drivers did not involve the driver in a collision?

The FMCSA defines preventability as follows:

Preventable accident on the part of a motor carrier means an accident (1) that involved a commercial motor vehicle, and (2) that could have been averted but for an act, or failure to act, by the motor carrier or the driver.<sup>1</sup>

Despite the distinctions, the focus of all three of these standards is on the commercial driver's conduct - setting the bar high for the driver. These standards emphasize accident avoidance and are not concerned with whether the driver acted reasonably or with ordinary care. Instead, the inquiry is whether the driver did everything within his or her control to avoid an accident.

The focus of the negligence standard employed in most state court civil lawsuits, on the other hand, is on whether the driver failed to perform in a manner that a reasonably prudent person would under the same or similar circumstances. For instance, in Missouri, negligence is defined as "the duty of ordinary or reasonable care."<sup>2</sup> In Ohio, negligence is defined as "the degree of care that is ordinarily exercised by a reasonable and prudent person under the same or similar circumstances to avoid injuring others."<sup>3</sup> Under Colorado negligence law, a defendant owes a plaintiff a duty of reasonable care.<sup>4</sup>

While the preventability standard and the negligence standard may appear to be similar, they are not. The National Safety Council clarifies that its preventability standard "is not solely based on or determined by legal liability." The preventability standard has nothing to do with concepts of legal liability, violation of traffic laws or negligence. Although another party may have been the primary cause of the accident, the preventability standard evaluates whether, *despite the negligence*

*of any other person*, the accident could have been avoided by the driver.

### Arguments for Inadmissibility

The preventability standard and the negligence standard are different and yet the distinction may not be readily understood by an average juror. This combination is dangerous. It can confuse the jury as to the proper standard to apply to the commercial driver's conduct, or could even lead the jury to believe the motor carrier admitted its driver was at fault. Further, the preventability determination is often made soon after an accident occurs, before all of the evidence is gathered. The jury may be aware of facts that the motor carrier did not have at its disposal when it made the preventability determination. The potential negative effects in this regard could also have the effect of discouraging motor carriers from making preventability determinations, when motor carriers should in fact be *encouraged* to engage in a practice designed to improve safety. The following arguments against admission of the preventability determination at trial seek to address these concerns.

### Danger of Unfair Prejudice

Rule 403 of the Federal Rules of Evidence permits the exclusion of evidence, although relevant, "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."<sup>5</sup> Most state courts have a rule similar, if not identical, to Rule 403. Several of the dangers listed in Rule 403 are presented with admission of a motor carrier's preventability determination.

A Federal Court in Illinois tackled this precise issue in *Villalba v. Consol. Freightways Corp. of Delaware*.<sup>6</sup> There, the Court explained that the motor carrier's accident review "was conducted pursuant to the company's fleet safety

program for the sole purpose of increasing the driver's understanding of how to prevent accidents."<sup>7</sup> Yet, the plaintiff "clearly wants the jury to infer from the results of the accident review that [the commercial driver] was negligent."<sup>8</sup> The Court explained the "problem with that inference is that the standard for determining preventability and the standard for determining negligence under Illinois law are not necessarily the same."<sup>9</sup> The two standards - negligence and preventability - "may confuse and mislead the jury and result in a mini-trial regarding the different standards and the significance of the preventability finding, diverting attention away from the real issue of negligence."<sup>10</sup> Likewise, there exists a danger that the proposed evidence could suggest a decision to the jury on an improper basis.<sup>11</sup> The motor carrier's finding of preventability "could lead the jury to decide the issue of negligence by improper reference to the preventability standard and [the motor carrier's] finding of preventability."<sup>12</sup>

In *Inman v. Sacramento Regional Transit Dist.*, a California appellate court excluded a preventability determination based on the dangers of undue prejudice, confusion of the issue, and misleading the jury.<sup>13</sup> In *Inman*, a Sacramento Regional Transit District bus rear-ended the plaintiff's vehicle on a rainy day with heavy traffic in the area. After an investigation, the Regional Transit District recommended the accident be graded "preventable." The trial court excluded the preventability determination, noting that "[i]t doesn't appear to me that the same standards have been applied as could apply in this situation" and "[t]he jury's going to give undue emphasis to that, in my view, potentially which would have prejudicial effect."<sup>14</sup> Further, "[a]ll the circumstances which were considered in making the determination would have to be explored by independent witnesses ... result[ing] in undue consumption of time and confus[ing] the jury and hav[ing] the prejudicial effect."<sup>15</sup> The appellate court affirmed

this ruling, explaining that “[g]iven the differing standards of care, the excluded evidence was only marginally relevant.”<sup>16</sup> Further, the Court found that the jury may place undue emphasis on the preventable grading.<sup>17</sup>

In *Tyson v. Old Dominion Freight Line, Inc.*, the mere fact that the motor carrier’s definition of preventable is different from the standard of liability was sufficient for the Georgia Court of Appeals to exclude the preventability determination at trial.<sup>18</sup> The difference between the two standards, and the potential confusion and prejudice created by the difference, lies at the heart of exclusion under Rule 403.

### Subsequent Remedial Measures

Another basis for the exclusion of the preventability determination at trial is Rule 407 of the Federal Rules of Evidence and its state court counterparts. Rule 407 excludes subsequent remedial measures, which are defined as measures taken “that would have made an earlier injury or harm less likely to occur.”<sup>19</sup> Subsequent remedial measures have also been defined as measures that, if conducted previously, would have reduced the likelihood of an accident.<sup>20</sup> Under Rule 407, evidence of subsequent measures is not admissible to prove negligence or culpable conduct.<sup>21</sup>

The Western District of Kentucky has employed a careful analysis of Rule 407 with respect to a motor carrier’s post-accident investigation, including its preventability determination.<sup>22</sup> In *Harper v. Griggs*, the motor carrier conducted an investigation following the accident and issued what it calls a “preventable accident ruling.”<sup>23</sup> The motor carrier sought to exclude all evidence related to its investigation.<sup>24</sup> The District Court examined Rule 407 and related case law and concluded that all investigatory evidence “of a conclusory nature is inadmissible as evidence in this case.”<sup>25</sup> Such evidence “includes the [motor carrier’s] thoughts, analyses, inferences, or deductions based on the factual circumstances of [the] accident,

and their recommendations, changes in policy, or employment decisions in light of the accident.”<sup>26</sup> It included the motor carrier’s preventability determination.<sup>27</sup>

The highest court of Massachusetts has also excluded a preventability determination based on its conclusion that the determination was a subsequent remedial measure.<sup>28</sup> The *Martel* case involves a pedestrian-bus collision. A transportation authority employee conducted an investigation after the accident and concluded that the accident could have been prevented had the bus driver looked into his right front mirror as he was making the turn.<sup>29</sup> The trial court excluded evidence of this determination at trial, and the Supreme Judicial Court of Massachusetts affirmed. The Massachusetts Court provided the following sensible and articulate explanation:

Evidence of post-accident safety improvements is not admissible to prove negligence. The predominant reason for this exclusionary rule derives from public policy unrelated to the fact-finding process, that “a contrary rule would discourage owners from making repairs to dangerous property.” ... [G]ood public policy [] requires the exclusion of the results of the defendant’s investigation into the causes of an accident involving its bus. ... [T]he investigation is the prerequisite to any remedial safety measure. Without discovering the cause of the accident, the defendant can scarcely hope to prevent its recurrence. The investigation is inextricably bound up with the subsequent remedial measures to which it may lead, and questions of admissibility of evidence as to each should be analyzed in conjunction and answered consistently. If, as a result of the investigation, the defendant had discharged the bus driver, or required

him to undergo additional safety training, evidence of these steps would fall squarely within the rule excluding evidence of subsequent remedial measures. The investigation cannot sensibly be treated differently. To do so would discourage potential defendants from conducting such investigations, and so preclude safety improvements, and frustrate the salutary public policy underlying the rule.<sup>30</sup>

The preventability determination’s function as a forward-looking, safety improvement process lies at the heart of its exclusion at trial under Rule 407. This also means that if the motor carrier does not make the preventability determination for this purpose, or its purpose is not clear, the likelihood that the determination will be excluded as a subsequent remedial measure at trial will be reduced. This leads to the final part of this article, setting up the arguments for excluding the preventability determination long before the motion is drafted.

### **Before the Motion Is Drafted**

The ability to succeed in arguing that a preventability determination is unduly prejudicial, or that a subsequent remedial measure will depend largely on specific facts related to the motor carrier’s preventability determination and process. For instance, if the preventability standard employed by the motor carrier is the same or substantially the same as a negligence standard, then courts are less likely to exclude the preventability determination. Likewise, if the motor carrier engages in a preventability determination primarily to place blame on the specific accident, detached from any recommendation or changes in future policy to promote safety, then courts are less likely to exclude the determination as subsequent remedial measure.

A motor carrier should have a specific definition of preventability that it applies to its review of accidents. The definition could be one crafted by the National Safety Council, ATA or FMCSA, or could be created by the motor carrier staff. Either way, the motor carrier should adopt a written, defined standard for preventability.

If the preventability determination is to be excluded based on Rule 403, the definition of preventability should not be similar to a negligence standard of ordinary care. For instance, in *Ward v. Jones Motor Group, Inc.*, the company safety director explained during a deposition that he would assess an accident as "preventable" if the driver was one percent negligent.<sup>31</sup> If the safety director had deemed the subject accident preventable, a court may construe this as an admission of negligence. However, there may still be a basis for exclusion under Rule 403. Should the jury be asked to compare fault with the injured party or other tortfeasors, then an admission of one percent negligence could mislead the jury as to the nature of the admission of negligence. Remember, a preventability definition that focuses on defensive driving and accident prevention is more likely to be excluded under Rule 403 than a preventability definition that uses a negligence standard.

Second, if the motor carrier uses the preventability determination to make recommendations and changes with respect to company policy on driver conduct, as many motor carriers do, that purpose should be abundantly clear from an outsider's perspective. That "outsider" may be a judge, determining whether to apply the subsequent remedial measure rule to the motor carrier's preventability determination. Documentation related to the preventability determination process should expressly state the purpose and use of the determination as a means of evaluating company policy and recommending changes. It should be clear that the focus of the preventability determination is part of

an overall safety-conscious effort by the carrier and not to assign fault.

Not only should motor carriers have a definition and documentation in place prior to an accident, the motor carrier's representative should be prepared to accurately explain and articulate the company's preventability determination during a deposition. It will be largely that person's testimony, along with any documentation related to the preventability process, that will support the motion to exclude the determination. For instance, if the motor carrier has adopted the ATA's definition of preventability, the motor carrier's representative should be prepared to recite that definition during his or her deposition, should the topic arise. The representative should be prepared to explain how the preventability standard is different from the negligence standard that applies to the tort claim in the lawsuit.

The following are portions of an actual deposition transcript that provide a great illustration of a motor carrier representative who skillfully addressed questions related to the motor carrier's preventability determination:

Q. Is it a policy of [Motor Carrier] to make its own determination as to whether an accident was preventable or not?

A. Yes.

Q. Do you know who established the guidelines for determining whether or not an accident -- specific responsibilities I'm talking at [Motor Carrier], for determining whether an accident was preventable or not?

A. The ATA ... American Trucking Association, we follow those guidelines.

Q. All right. So [Motor Carrier] does not have any separate guidelines of its own that it follows in determining whether an accident is or was not preventable, right?

A. Not to my knowledge, no.

Q. When a driver's been involved in a collision and it's determined to be preventable, what does that mean?

A. The driver failed to do everything reasonably expected to avoid the accident.

Q. As part of its safety plan, does [Motor Carrier] convene an accident review board for determining whether an accident was preventable and to determine what countermeasures should be taken?

A. No.

Q. Why not?

A. We review each accident on an individual basis. Once the risk department has made the determination in the system that it is preventable or unknown, then safety would subsequently counsel the driver and identify any plans for improvement.

Q. And that's kind of what I was asking. As part of its safety plan, -- when it's determined that an accident is a preventable accident, will [Motor Carrier] meet and convene and try to determine what countermeasures should be taken to prevent future accidents under similar circumstances from occurring?

A. Right. And my answer stands the same. There isn't an accident review board, if you will. Safety reviews, just as risk reviews, each accident and research associated with that or the investigation. Then safety also reviews with the driver any counseling or training that may be necessary to prevent that from happening in the future. And depending on that driver's history or experience, the counseling or training may be different. So there is no set -- there's guidelines would be a better way to answer that. ...

Q. One of the reasons all of those accidents are investigated is because [Motor Carrier] wants to determine if additional -- if anything can be done in the future to prevent similar accidents from occurring in the future?


- A. That would be one of the reasons we determine preventability, yes.
- Q. Right. Can you tell me this: When determining preventability, what areas does [Motor Carrier] look at to make the determination?
- A. [Motor Carrier] review[s] a variety of factors. In general, police reports, witness statements, they may talk with the driver or the other driver of the vehicles. Those would be the key steps, I guess, or primary steps I can think of.

During this deposition, the motor carrier representative was able to articulate the company's definition of preventability. He explained the factors assessed by the motor carrier in determining whether an accident was

preventable. He could also explain the motor carrier's purpose in determining preventability. This testimony could form the basis for exclusion of the preventability determination under both Rule 403, as unduly prejudicial, and Rule 407 as a subsequent remedial measure.

### Conclusion

When a motor carrier makes a preventability determination after an accident in an effort to reduce accidents and assess company policy, that determination can unfortunately have a negative impact when introduced in a lawsuit in which the commercial driver's negligence is in dispute. The primary problem lies in the fact that a motor carrier's definition of preventability

and the standard for negligence are often drastically different. Fortunately, there are arguments that support the exclusion of the preventability determination from trial and courts have excluded the determination for these reasons. Long before the motion to exclude is drafted, however, efforts must be made to define preventability and determine its purpose and use. A company representative then must be prepared to articulate that definition and purpose during the discovery phase of the lawsuit. These efforts will put the motor carrier in a position to hopefully avoid a jury verdict potentially based on an improper standard or misleading evidence. 

### Endnotes

- 1 49 C.F.R. § 385.3
- 2 *Chavez v. Cedar Fair, LP*, 2014 WL 5856696 at \*3 (Mo. Nov. 12, 2014).
- 3 *Gauci v. Ryan's Family Steak Houses, Inc.*, 2004 WL 1595132 at ¶ 10 (6th App. Dist. 2004) (citing *Mussivand v. David*, 45 Ohio St.3d 314, 318-319 (1989)).
- 4 *Engeman Enterprises, LLC v. Tolin Mech. Sys. Co.*, 2013 COA 34, ¶ 24, 320 P.3d 364, 370 (Colo. App. 2013).
- 5 Fed.Evid.R. 403.
- 6 2000 WL 1154073 at \*6 (N.D. Ill. Aug. 14, 2000).
- 7 *Id.*
- 8 *Id.*
- 9 *Id.*
- 10 *Id.*
- 11 *Id.*
- 12 *Id.*
- 13 2003 WL 1611214 (Cal. 3rd Dist. 2003).
- 14 *Id.*
- 15 *Id.*
- 16 *Id.*
- 17 *Id.*
- 18 270 Ga. App. 897, 901, 608 S.E.2d 266, 270 (2004).
- 19 Fed.Evid.R. 407.
- 20 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence Manual* § 7.04[1] (2006).
- 21 Fed.Evid.R. 407.
- 22 *Harper v. Griggs*, 2006 WL 2604663 at \*2 (W.D. Ky. Sept. 11, 2006).
- 23 *Id.* at \*1.
- 24 *Id.* at \*2.
- 25 *Id.*
- 26 *Id.*
- 27 *Id.*
- 28 *Martel v. Massachusetts Bay Transp. Auth.*, 403 Mass. 1, 525 N.E.2d 662 (1988).
- 29 *Id.*
- 30 *Id.* at 664 (internal citations omitted).
- 31 2002 WL 34098014 (Pa. Com. Pl. June 28, 2002).