Emerging Safety Technology and Related Liability Theories in Trucking Cases

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New driving and safety features appear in new models of automobiles every year. For example, during the 2020 NFL Superbowl, Hyundai aired a commercial where celebrities, such as David "Big Papi" Ortiz and Chris Evans, aka Captain America, watched in amazement as the driver of the newest Hyundai Sonata got out of the car and clicked a button for the car to park itself in a tight space.[1] A trip to any popular car dealership in Kansas will provide opportunities to test drive vehicles with cameras to assist with backing up, emergency braking systems, and features to prevent accidental lane changes. These technological features are often standard in new models, and all the features aim to reduce the risk of injury to both the driver and nearby individuals.[2]

While new driving technology appears on a yearly basis, common safety features, such as lane departure warnings and emergency braking, have been available since the early 2000s in common brands of vehicles.[3] In fact, the federal government has long recognized the ability of these driving features "to reduce the number of crashes and save thousands of lives a year," given that most "vehicle crashes are tied to human error" that driving technologies serve to mitigate.[4] Given the widespread knowledge regarding the value of technological driving systems, it is shocking to realize that the most dangerous vehicles on the road – tractor trailers weighing up to 80,000 lbs. – often have no safety features whatsoever.

The trucking industry has long been slow to adopt new technological systems. Indeed, it was only in December 2019 that the Electronic Logging Device (ELD) rule from the Federal Motor Carrier Safety Administration (FMCSA) went into full effect to require truck drivers to use electronic systems to record service hours and, thereby, monitor compliance with hourly driving limits in an electronic format.[5] And, there are a wide variety of exemptions to the ELD rule and other safety measures that apply to – ironically – older tractor trailers and those operated by drivers who drive infrequently.[6]

Addressing the lack of common safety features is at the center of the emerging wave of cases involving negligence and product liability claims against manufacturers for failing to include common safety devices in modern tractor trailers. If a manufacturer fails to install common safety devices, and a tractor trailer is later involved in a crash that could have been prevented with the missing safety systems, then the issue is if the manufacturer is liable under a negligence or product liability theory, regardless of any concurrent liability of the truck driver or trucking company on a pure negligence theory. This article examines recent developments, emerging legal issues, and pending cases that address the current wave of

safety device – specifically design defect – litigation against trucking manufacturers.

Background

Product liability claims against tractor-trailer manufacturers are nothing new. In the past, the product claims typically involved claims that a design defect in a trailer or component part caused a crash and resulting injury.[7] The key difference with the recent wave of products claims is that liability is premised on what a manufacturer *failed to include* in the vehicle instead of claiming that an *existing* part or design contained a defect. More specifically, the recent wave of product claims involves tractor trailers that lack safety systems found in comparable vehicles; sometimes even a tractor trailer of the same make, model, and year that was sold in a different location or county.

To be sure, cases against vehicle manufacturers for failing to utilize safer designs or components have been around for decades. For example, a California court approved of products liability claims against a car manufacturer where the Ford Pinto's design was allegedly dangerous based on Ford's conscious choice to disregard known dangers and avoid additional production costs by maintaining a defective design in later Pinto models, such as the one the plaintiff was driving when the vehicle caught on fire.[8] But the current wave of trucking cases do not deal with making changes to the location of a part or vehicle structure; rather, recent cases suggest that trucking manufacturers should make inclusion of basic safety systems standard in tractor trailers and, thereby, minimize driver errors. Different from previous, similar cases against vehicle manufacturers,[9] the emerging wave of cases involve safety systems and devices that *often already exist* in comparable vehicles sold throughout the world.

The question for courts to answer is whether common safety systems should be installed in all tractor trailers, or whether omission of such systems may be 'optional' and, as a result, not subject manufacturers to defective design claims. Only a few courts have addressed this question, and several pending cases will clarify the legal landscape as litigation unfolds. Perhaps the most on-point case, based on the factual background and legal theories involved, is *Butler v. Daimler Trucks N. Am., LLC*, which is pending in the District of Kansas federal court and involves claims arising under Kansas law. *Butler* will be discussed extensively later in this article.

While a general framework is available to navigate the key legal and factual considerations in these safety-device cases, this is an emerging area that will undoubtedly be changed and solidified from rulings in pending and future cases. This article examines the core legal and factual issues that arise in these cases, and issues that are presently unresolved are identified as well.

1. Early Court Rulings Suggest Product Use and the Party Injured are Key Factors

How a product is used and who was injured are two factors that can influence how a court applies the applicable law in a case. For example, in one of the earlier product cases against a truck manufacturer for failing to include a safety device, the court rejected the claims of an injured diesel mechanic.[10] The mechanic was working on a 2004 tractor trailer when the driver "absent mindedly" moved the truck forward and onto the plaintiff's leg during routine repair work. The plaintiff argued the truck had a design defect because there was no "neutral safety switch" installed to prevent the truck from moving while in neutral. But the court found that proximate cause was lacking because "unforeseeable operator error" caused the truck to move onto the mechanic's leg, not a design defect.[11]

There are two key items to consider about this "safety switch" case. First, the truck was a 2004 model, meaning several trucks sold during that time did not have many safety features installed that are common on vehicles today. Second, the injury did not result from human error *while driving* the truck. The driver was the one who accidentally put the truck into motion during a service stop, but that conduct is different from the foreseeable conduct that causes most traffic crashes, such as crossing into the opposing lane, hitting someone while backing up, or failing to pay attention to surroundings in order to brake before a crash occurs. In other words, a safety switch may prevent an injury, but the case did not involve a common and, thereby, foreseeable injury mechanism from driving.

Ultimately, the injured mechanic could still proceed against the truck driver and seek payment from the applicable insurance policy, which the law requires provide a minimum of $750,000 in coverage. And at least one court has approved of using the absence of a safety feature, such as a safety switch, as evidence of the truck driver's negligence in taking actions that could not be prevented by a safety feature that the driver knew did not exist on the truck at issue.[12]

A different outcome appears to exist when a bystander or driver of a typical automobile is injured by a tractor trailer that was being driven at the time of the injury. For example, when those factors were present in *Brewer*, the Indiana Supreme Court held that even a component-part manufacturer has a duty to offer safety devices that prevent foreseeable harm, and the manufacturer has a duty to install said features when the product cannot be operated safely without them.[13] The truck in that case was being driven when the plaintiff was killed, and the plaintiff was an innocent bystander on a construction project. The truck had been built from a "glider kit," which is a hollow shell that can be placed onto an old drivetrain to restore a tractor trailer to full use. The glider kit, however, did not include a safety system to avoid hitting objects while backing into the 40-foot blind spot behind the

restored truck. The court held that the manufacturer of the kit was liable under a design defect theory because there was no evidence that the truck could be driven safely while backing up into the blind spots without the use of safety systems that were readily available in similar truck models at the time.

The Texas case of *Greene v. Toyota et al.* reached a similar conclusion for design defect claims arising under Texas law that are brought directly against the tractor trailer manufacturer itself.[14] The plaintiffs in *Greene* brought negligence and product liability claims against Volvo based on the absence of "brake technology, a collision warning system, and certain modifications to the front end" of a Volvo tractor trailer that killed multiple individuals when the truck failed to stop before crashing into the back of a string of vehicles on a Texas highway.[15]

Highly summarized, the central premise for plaintiffs' claims was that Volvo's tractor trailer contained a design defect because common driving and safety features, which would have allegedly prevented the crash, were missing from the tractor trailer at issue. Plaintiffs argued that it was economically feasible to include such safety systems; in fact, there was evidence that Volvo had already been selling the same tractor trailer models in Europe with the very same safety systems that plaintiffs alleged were missing in the pending lawsuit.

Based on the available evidence, the *Greene* court found that Volvo was aware of foreseeable injury risks that common safety systems seek to prevent, but Volvo consciously disregarded those risks when designing and selling tractor trailers without those systems in the United States. Indeed, the court emphasized that tractor trailers are responsible for thousands of deaths in the United States every year, common driving and safety systems have been proven to significantly reduce the number of injuries and deaths, and Volvo already designed and built tractor trailers with the same types of safety systems in Europe but "chose not to use that technology in [America]."[16] Given those facts, the court found that Volvo's conduct not only provided the foundational basis for plaintiffs' negligence and product liability claims but also supported a claim for exemplary damages under Texas law because Volvo's decision to omit the safety systems at issue came with an "extreme degree of risk" that serious, preventable injuries were likely to occur.[17]

The lesson from these early cases appears to be that courts are more receptive to design defect theories when the truck is being driven at the time of the injury, and the injury could have been prevented by readily available safety systems that were missing from the tractor trailer.

2. The Latest Pending Case Highlights Jurisdictional Issues and Important Factual Items to Investigate

The central case involving tort claims against a manufacturer for failing to install common safety equipment is *Butler*, which is currently pending in the District of Kansas federal court. The case includes both negligence and product liability claims, but the core issue is whether a design defect exists. A summary of the factual background is particularly important to multiple legal issues that are discussed following the background section below.

a. Factual Background

Butler involves a crash in Leavenworth County on the Kansas Turnpike (I-70) where the driver of a Freightliner truck was looking at his cell phone, failed to notice a group of vehicles ahead of him, crashed into the rear end of an SUV, and continued forward until seven cars were pushed into a pile-up. Five people died in the crash and 22 individuals submitted damage claims to the truck driver's insurance carrier. Unfortunately, the driver worked for a smaller trucking company that only had $1million in insurance coverage and no other meaningful assets.

A deeper investigation into the crash revealed concerns about the Freightliner truck itself. Specifically, the truck did not have a forward collision warning system ("FCW") or automatic emergency brakes ("AEB") to prevent precisely the type of crash that occurred.[18] The Kansas City Star investigated the matter further and uncovered the following information:

> "Forward crash warning systems have been available on large trucks for about 20 years. Automatic braking systems in various forms have been around for about a decade"
>
> The 2015 Freightliner Cascadia did not have an FCW system or an AEB system
>
> The missing FCW and AEB systems are standard features on the same Daimler trucks that were sold in Europe in 2015
>
> Freightliner has the ability to install FCW and AEB systems in tractor trailers but gives buyers a price reduction of $1,500 (on the usual price of $150,000) to omit the safety systems before purchasing the tractor trailer
>
> Most trucking companies only carry the minimum required insurance coverage of $750,000, meaning "most truckers don't carry enough insurance to fully compensate people for all the damage that an 80,000-pound semi can do"

> Legislation to raise insurance minimums has continually stalled, which makes the role of Courts critical and provides the "most promise" for protecting victims' rights against all responsible parties
>
> Similarly, no legislation has gained momentum to require the installation of FCW, AEB, or other safety systems on tractor trailers
>
> The *Butler* case is one of "a new class of lawsuits that could end up doing more than providing greater compensation for victims of crashes like these and their families. If successful, the litigation could conceivably force safety improvements that could lead to fewer truck crashes, which killed more than 4,761 people in 2017."[19]

These findings are troubling, to be sure, and illustrate the importance of holding manufacturers liable for failing to include common safety equipment in tractor trailers. It is difficult to imagine an acceptable justification for failing to include a $1,500 safety device on a $150,000 tractor trailer that has the capacity to inflict serious injuries and death when the exact same devices are already installed in the same model of trucks sold in Europe. Nevertheless, litigation and discovery are just beginning in the case, so all the facts are unknown at the present. The *Butler* court has already ruled on a few legal issues that are likely to re-appear in similar cases in the future. These issues are discussed below.

b. Personal Jurisdiction as a Threshold Issue

The central barrier in product liability cases like *Butler* is personal jurisdiction over the manufacturer. The defendant in *Butler* filed a Motion to Dismiss claiming a lack of personal jurisdiction, and the defendant alleged that the product claims were preempted by federal laws regulating motor carriers. The court rejected both arguments.

Regarding personal jurisdiction, the court first found that specific jurisdiction was lacking for plaintiffs' claims. Essentially, while plaintiffs alleged that the crash occurred in Kansas, there was insufficient evidence to show that the defendant had targeted Kansas for distribution of a defective product. The court concluded there was no specific jurisdiction because the complaint did not allege "that the defendant intended to cause injury, or cause consequences that the defendant knew would lead to injury, in the forum state," which was what the Tenth Circuit required to establish specific personal jurisdiction.[20]

The court then turned to the issue of general personal jurisdiction. General personal jurisdiction exists in "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."[21] The court found such extensive conduct missing from Kansas as compared to all other locations where the defendant conducted business.

Despite the lack of targeted or extensive conduct relating to Kansas, the court ultimately found that personal jurisdiction existed based on a Kansas business-registration statute that provided "consent-based general personal jurisdiction."[22] Specifically, the defendant was registered with the Kansas Secretary of State to do business within the state. Such registration activates K.S.A. § 17-7931(g), which provides "irrevocable written consent" by the registered entity to be sued in Kansas courts. The court found the statute provided an independent basis for jurisdiction based on current, controlling precedent, and the court concluded that the statute provided a constitutional basis for finding consent-based jurisdiction over the defendant.[23]

c. Preemption and Related Arguments are Unpersuasive

Finally, the court rejected the preemption and Separation of Powers arguments by the Defendant. Both of the defendant's arguments involved the common premise that the product claims at issue would interfere with a federal objective or otherwise interrupt the legislature's authority over motor carriers.[24] The court examined the history of various statutory and agency bodies involved in regulating motor carriers and concluded that no conflict existed between a federal objective or rule and Plaintiffs' design defect claims. Repeating an earlier ruling from the Supreme Court, the *Butler* court emphasized that agency or legislative "inaction does not convey any authoritative message of a federal policy against FCW or AEB systems" in tractor trailers.[25]

The court quickly rejected defendant's Separation of Powers arguments for the same reasons. There was no regulation or guidance from an agency or the legislature regarding installation of the safety devices at issue in the case. Even if some regulation eventually was implemented, such a change would not retroactively eliminate the Defendant's duty to install safety devices before the regulation existed. It is interesting to note that, while no regulation in the United States concerns safety devices, the same type of devices are mandatory in Europe, and defendant sells the same model of tractor trailers in Europe but does not provide an option to forego safety systems. Moreover, the federal legislation that the defendant cited still preserved "liability at common law," which encompasses the product liability claims that the plaintiff asserted against the defendants.[26]

3. Conclusion

The *Butler* case will likely set the stage for future product liability claims against tractor trailer manufacturers that fail to install common safety devices in the future. The technology is effective, already included in identical models

sold in Europe, and could single-handedly reduce the thousands of deaths that result from preventable errors by tractor trailer drivers every year in the United States. Though an emerging legal theory, the courts are the only governmental entity able to address defective designs in tractor trailers and resulting injuries and deaths. The need for safety devices on tractor trailers is clear, and the framework established by the current wave of product liability claims against manufacturers will be critical for injured victims to obtain full compensation for damages from all responsible parties.

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1 *Smaht Park—2020 Hyundai Sonata*, Hyundai USA, Jan. 27, 2020, available at: https://www.youtube.com/watch?v=85iRQdjCzj0

2 *See, e.g.*, *How Does Toyota's Pre-Collision System Work?*, Toyota of Decatur Online Blog (Aug. 22, 2016), https://www.toyotaofdecatur.com/blog/how-does-toyotas-pre-collision-system-work/ (noting that "automatic braking will come standard on almost every [Toyota] model by the end of 2017).

3 The Automobile Association, *The Evolution of Car Safety Features*, https://www.theaa.com/breakdown-cover/advice/evolution-of-car-safety-features

4 National Highway Traffic Safety Administration, *Driver Assistance Technologies* (2017), https://www.nhtsa.gov/equipment/driver-assistance-technologies

5 *See* 49 CFR 395.8(a)(1)(ii). The ELD Rule became active on December 18, 2017, but there was a grace period for truckers using other types of on-board logging devices. *Id.* That grace period expired on December 16, 2019, which served as the date when carriers had to comply with the full ELD requirements. *Id.*

6 *See* 49 CFR § 395.1(a)(1)(iii) (listing exemptions to the ELD rule).

7 *See, e.g.*, *Mitchell v. Fruehauf Corp.*, 568 F.2d 1139 (5th Cir. 1978) (upholding jury verdict against manufacturer on product liability claims under Texas law for defective design of a meat trailer that caused a weight imbalance and resulting flip off the road and onto the Plaintiff's vehicle, which paralyzed the Plaintiff).

8 *See, e.g.*, *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 361 (Cal. Ct. App. 1981), *overruled on other grounds* (approving liability theory based on Ford's failure to adapt to industry custom after initial Pinto testing and design to move fuel tank location to different place in vehicle to avoid punctures and resulting fires after crashes).

9 *See, e.g.*, *Garst v. General Motors Corp.*, 484 P.2d 47 (Kan. 1971) (requiring evidence that allegedly safer product design actually existed and could have prevented the injury when it occurred).

10 *Weaver v. PACCAR, Inc.*, 614 F. App'x 991, 993 (11th Cir. 2015) (applying Georgia law).

11 *Id.*

12 *See Stanley v. Star Transp., Inc*., No. 1:10CV00010, 2010 WL 3433774 (W.D. Va. Sept. 1, 2010) (approving of argument that tractor trailer driver was negligent by driving in dangerous conditions when the driver knew that the truck did not have a crash avoidance system).

13 *Brewer v. PACCAR, Inc.*, 124 N.E.3d 616, 626 (Ind. 2019).

14 *Greene v. Toyota Motor Corp.*, No. 3:11-CV-207-N, 2014 WL 12575716 (N.D. Tex., June 2, 2014).

15 *Id.* at *1.

16 *Id.* at *6.

17 *Id.* at *6 (quoting *Gen. Motors Corp. v. Sanchez*, 997 S.W.2d 584, 595 (Tex. 1999))

18 It is important to understand that Daimler owns Freightliner, making the names interchangeable to a large extent.

19 Mike Hendricks, *Truck Safety Systems That Could Save Lives Go Unused. New Legal Tactic May Change That*, Kansas City Star (Sept. 29, 2019), https://www.kansascity.com/news/local/article235481007.html

20 *Butler v. Daimler Trucks N. Am., LLC*, No. 2:19-CV-2377-JAR-JPO, 2020 WL 128055, at *7 (D. Kan. Jan. 10, 2020).

21 *Id.* (quoting *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915, 924 (2011).

22 *Id.* at *10.

23 *Id.* at *9-10 (citing *Merriman v. Crompton Corp.*, 146 P.3d 162, 171 (Kan. 2006)).

24 *Id.* at *14 (summarizing the Defendant's arguments concerning authority and regulation from the "National Traffic and Motor Vehicle Safety Act, the Federal Motor Vehicle Safety Standards, the Federal Motor Carrier Safety Regulations, and pending agency rulemaking.")

25 *Id.* at *15.

26 *Id.* at *16 (citing 49 U.S.C. § 30103(e)).