

DISCOVERABILITY AND ADMISSIBILITY  
OF “PREVENTABLE” DETERMINATIONS  
BY TRANSPORTATION COMPANIES

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The procedure is routine. An accident happens. The trucking company’s designated person collects the information—driver’s report, police report, maybe even a reconstruction report in the most severe cases. Sometimes the review is performed by a committee rather than a single adjudicator.

The limited information is reviewed and an opinion rendered—“preventable accident”. A letter is sent to the driver informing him of the company’s sanction. He is also told of the tripwires for future sanctions and what the sanctions will/may be.

The letter goes in the file. The next accident is reviewed, the process is repeated.

Routine. Until suit is filed and discovery propounded. The plaintiff’s document request, perhaps a canned form off the web or from a trial lawyer seminar, asks for any “internal investigations, reviews, determinations, correspondence, or any other writings with regard to ‘the accident’, including but not limited to any determinations as to whether the accident was ‘preventable’ and any sanctions, penalties, or warnings to the Defendant-driver.”

Is this information discoverable? If so, is it admissible? The answers to either or both may be crucial to your defense.

In Ward v. Rickrode, 849 A.2d 619; 2004 Pa. Super. LEXIS 113(2004)(without published opinion), appeal denied 578 Pa. 710, 853 A.2d 363, 2004 Pa. LEXIS 1325 (2004) this issue confronted the Defendants. The driver was employed by a lessor of the trucking company. The lease provided that the trucking company would provide insurance coverage. It also contained a provision for indemnification of the company by the lessor/driver.

One night while making a left turn from a drop lot onto a dark, rural road, a car headed in the other direction appeared. The car crested a dip in the road about 700 feet from the turning truck and proceeded into its rear tandems that had not yet cleared the car’s lane. The car’s occupants were injured.

The trucking company's safety director performed a review and declared it a "preventable accident". His letter notified the driver of his determination.

The car's occupants sued. Discovery was commenced.

The Plaintiffs' discovery requests encompassed the "preventable" letter. Defendants produced a redacted version of the letter. The issue was briefed and argued. The Court ordered the unredacted letter be produced to it at the hearing for an *in camera* review.

The Court ruled that the letter was discoverable. Any thought of taking an immediate appeal by permission was undermined by the Court's quotation of the redacted portions of the letter in its opinion.

During the ensuing discovery, the safety director was deposed. By the time of his deposition, the safety director no longer worked for the trucking company.

The safety director testified that the company had no written criteria for the determination. However, he testified that he would assess an accident as "preventable" if the driver was one percent (1%) negligent. As the case was proceeding at a time of pure joint and several liability, this admission was of significant import.

The case proceeded to trial. The trial was trifurcated. Phase I dealt with the liability of the truck driver and the driver of the car. If the truck driver was found liable, the case would proceed to Phase II (compensatory damages) and Phase III (punitive damages of the corporate defendants).

Plaintiffs called the safety director as their last witness in the liability phase. An offer of proof was requested before he testified. Plaintiffs proffered that he would authenticate the "preventable" letter.

Defendants objected to the letter's admission. The Court sustained the objection.

The jury entered a verdict that the driver was not negligent. The verdict was appealed to the Pennsylvania Superior Court which sustained the verdict in an unrecorded opinion. The Pennsylvania Supreme Court denied the Petition for Appeal.

A review of the legal arguments applicable to this case and a comparison to other cases and arguments is instructive. It provides insight into the discoverability and admissibility of a determination of preventability. More importantly, it provides a means of developing or utilizing a review system that avoids the problem in the first place.

## DISCOVERABILITY

Is a letter finding an accident “preventable” discoverable?

The first determinative facts are the nature of the letter’s creation. Many companies perform a review and issue a determination of “preventability” on all accidents. They do so in the normal course of business. They do so whether or not there is litigation. They do so as part of their routine safety program.

In Ward, several objections were raised by Defendants to discovery of the “preventable” determination. First, it was argued that the letter was an opinion of a representative of a party as to the merits of the case. The Pennsylvania Rules of Civil Procedure, at Pa.R.C.P. Rule 4003.3 exclude such opinions from discovery.

The weakness of this argument is that the opinion was not rendered as part of the litigation process. The evaluation was not made as part of the response to or preparation for the litigation. Instead, it was a routine determination performed in virtually all accidents, whether or not litigation was commenced.

Other Courts have considered the discoverability of determinations of preventability. These Courts have come to a similar conclusion.

In Tyson v. Old Dominion Freight Line, Inc., 270 Ga. App. 897, 608 S.E.2d 266 (Ga.Ct. App., 2004), the Court addressed the discoverability of the “preventable” determination. Following the accident at issue, the Defendant’s Accident Review Committee performed an internal investigation to determine if it was “preventable” for purposes of employee discipline.

The company standard for “preventability” was not whether the driver was legally liable, but was instead whether the driver could have done anything to prevent the accident. The opinion quoted the company standard in part as follows:

Responsibility for accidents is based on whether or not the accident was preventable and not on who was primarily responsible or at fault. Responsibility to prevent accidents goes beyond careful observance of traffic rules and regulations. Drivers must drive in a manner to prevent accidents, regardless of the other fellow’s faulty driving or failure to observe traffic regulations.

Tyson, 270 Ga. App. At 897-8. The company noted that the standard was for internal purposes only. The standard did not impose a greater burden of blame than that required by law in the event of an accident whose cause is disputed or where litigation arises.

During discovery, Tyson propounded an interrogatory requesting defendant's version of how the incident occurred and each report setting forth their version of the accident. Defendants objected on the basis it was inadmissible evidence of subsequent remedial measures and constituted confidential work-product information.

Tyson moved to compel the production of any reports or statements responsive to this interrogatory. In response to the motion to compel, defendants also asserted that the documents were protected from discovery by 49 U.S.C. § 504(f) because they were required by the FMCSA.

The trial court denied the motion to compel. It held that the internal review was not discoverable based on federal law.

After the verdict, Tyson moved for a new trial. Subsequent to the motion, but before the decision, defendants produced the internal review to the court for its in camera review. The appellate court surmised that this was done to show that any error was harmless. The trial court granted the motion for in camera review for the purpose of including the documents in the record.

The Georgia Court of Appeals held that the trial court incorrectly applied 49 U.S.C. § 504(f). "There is simply no evidence in the record that the documents in question were prepared to satisfy the requirements of the FMCSA."

The defendants had cited 49 C.F.R. § 385.7 providing that a carrier must determine the "preventable accident rate per million miles." Defendants argued that to determine that rate, a carrier must make a determination if a particular accident was in fact preventable. Thus, it argued, the determination of preventability fit within the provisions of 49 U.S.C. § 504(f).

The Court of Appeals rejected the argument. It held that defendants did not submit any evidence in support of its argument that the review was conducted to comply with 49 C.F.R. § 385.7. It noted that no affidavit to this effect was submitted with the documents for in camera review.

The Court of Appeals then turned to the argument that the determination of “preventability” constituted a subsequent remedial measure. While recognizing that subsequent remedial measures, including employee disciplines after an event, are inadmissible, it held that such information is discoverable. It noted that even inadmissible documents are discoverable so long as they appear reasonably calculated to lead to the discovery of admissible evidence.

The Court of Appeals held that the trial court abused its discretion by precluding all discovery in connection with the defendant company’s internal review. It vacated the denial of plaintiff’s motion for a new trial and remanded of the purpose of granting plaintiff’s motion to compel.

The appellate court directed the trial court to then conduct a new hearing as to the admissibility of the discovered information as an exception to the subsequent remedial measure doctrine and in accordance with the rules of evidence. Depending on these findings, the trial court was to then consider plaintiff’s motion for a new trial.

## ADMISSIBILITY

Even if discoverable, the determination of “preventability” may be excluded from evidence. There are several bases for excluding evidence that the company found the accident “preventable”.

First, the determination can be considered a “subsequent remedial measure” pursuant to Federal Rule of Evidence 407. This was the holding in Harper v. Griggs, 2006 U.S. Dist. LEXIS 64691 (W.D.Ky., 2006).

In Harper, the defendant sought to exclude all evidence relating to the company’s accident review board (“ARB”) and its consideration of the accident at issue. It asserted that it was inadmissible pursuant to Rule 407 as a “subsequent remedial measure.” The Court reviewed the authority and stated, “This authority suggests that ARB evidence relating to the factual causes or circumstances of the accident should be admitted, but ARB evidence dealing with procedures or actions taken after the accident to render it less probable is inadmissible.” (note omitted).

The Court then considered defendant's assertion of the "critical self-analysis" doctrine, noting that it provided theoretical support for this interpretation of Rule 407. The Court noted that in Granger v. Nat'l R.R. Passenger Corp., 116 F.R.D. 507 (E.D.Pa. 1987) the court concluded that the defendant's analysis and recommendations were protected by the "critical self-analysis" doctrine as production of such evidence would hamper honest, candid self-evaluation geared towards the prevention of future accidents.

"Based on this precedent, the court concludes that ARB evidence of a conclusory nature is inadmissible as evidence in this case." (p. 7). The excluded evidence included the ARB's "thoughts, analyses, inferences, or deductions based on the factual circumstances of [the driver's] accident, and their recommendations, changes in policy, or employment decisions in light of the accident." While factual evidence was held admissible, the conclusionary and analytical evidence was excluded.

A similar result was reached in Martel v. Massachusetts Bay Transp. Auth., 403 Mass. 1, 525 N.E.2d 662 (1988). In that case, the plaintiff sued for injuries sustained when she was "run over by a bus owned and operated by the defendant." 525 N.E.2d at 663. The accident was investigated by one of defendant's employees. His investigation consisted of interviews with the bus driver and an inspection of the bus. The employee concluded that the accident could have been prevented had the bus driver looked into his right front mirror as he was making the turn.

The defendant filed a motion in limine to exclude the employee's opinion that the driver could have prevented the accident. The court granted the motion.

"[W]e conclude that the evidence was properly excludable as evidence of a subsequent remedial measure..." 525 N.E.2d at 664. The court stated that postaccident safety improvements are not admissible to prove negligence.

It noted that, although this was not a "repair" of a dangerous condition, a prerequisite to any such repair is an investigation to determine the cause, whether future such occurrences could be prevented, and, if so, how. To treat the investigation otherwise would discourage potential defendants from conducting such investigations, and, in turn, preclude safety improvements, "and frustrate the salutary public policy underlying the rule." 525 N.E.2d at 664.

The case was complicated by the defendant's inquiry at trial as to whether the employee had an opinion whether the bus driver exercised good judgment in commencing the route before the scheduled departure time and whether the driver's testimony as to how he made a right turn was in accordance with good safety precautions.

The plaintiff argued that these questions opened the door for cross-examination as to the determination that the accident was preventable. The appellate court disagreed.

First, it held that the evidence was not relevant to the bus driver's early departure. Second, defense counsel's questions went to the employee's opinion based upon the driver's testimony without making a determination of the driver's credibility. It ruled that the trial court did not error in excluding the proffered evidence.

The evidence may also be excluded pursuant to Federal Rule of Evidence Rule 403 as misleading to the jury. This was the holding in Villalba v. Consolidated Freightways Corp., 2000 U.S. Dist. LEXIS 11773 (D.Ill., 2000).

In Villalba, defendants moved to exclude three documents generated as a result of the company's review of the accident. Defendants also moved to exclude any mention of these documents by the plaintiff.

The first document was the report of the accident review committee. This report indicated that the driver's supervisor found that the accident was preventable because the driver made an improper lane change.

The second document was the letter of investigation directed to the driver. It informed the driver that the accident was under investigation and that at the conclusion of the investigation, he would be informed of the results.

The final document was the disciplinary letter to the driver. The letter to the driver indicated that he had been involved in a preventable accident as a result of an improper lane change. It also informed the driver that this was a final warning and that subsequent similar infractions could result in more severe disciplinary action, potentially including dismissal.

Defendants first asserted that the documents constituted a subsequent remedial measure pursuant to Federal Rule of Evidence 407. That Rule provides in pertinent part as follows:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct,...or a need for a warning or instruction....

Fed.R.Evid. 407.

Defendants further asserted that the documents were excluded pursuant to Federal Rule of Evidence 403. That Rule provides that even relevant evidence may be excluded if its “probative value is substantially outweighed by the danger of unfair prejudice.”

The Court first held, “Post-accident disciplinary action taken by [the employer] with respect to [the driver] constitutes a remedial measure and such evidence is inadmissible under Rule 407.” (citations omitted).

The Court then noted that there was a split of authority as to whether the investigation findings are admissible pursuant to Fed.R.Evid. 407. However, the Court held that the investigations were inadmissible pursuant to Fed.R.Evid. 403.

The key to the Court’s decision was the standard of “preventability” employed by the defendant company. The defendant utilized the National Safety Council Rules to determine accident preventability. Those rules define “preventable” as follows:

A preventable accident is one in which the driver failed to do everything that reasonably could have been done to avoid the accident. In other words, when a driver commits errors and/or fails to react reasonably to the errors of others, the National Safety Council considers an accident to be preventable.

The Court noted that the National Safety Standard makes clear that its definition of preventability is not solely based on or determined by legal liability.

Accordingly, the Court held that the jury could be improperly confused by the company’s determination utilizing a standard that is not the standard for legal liability. This could result in a determination by the jury on an improper basis.

The determination of “preventability” may also be excluded if the qualifications are not established as to the person making the determination. Similarly, in Chesler v. Trinity Industries, Inc., 2002 U.S.Distr. LEXIS 14559 (N.D. Ill.E.D. 2002), parties filed numerous Motions in Limine. Among them was a motion to exclude testimony that the accident was “preventable”.

The opinion is unclear as to the position of the individual intending to render an opinion as to “preventability”. It appears that the witness intending to proffer the opinion was an expert with experience in truck driving.

The Court permitted the witness to testify based on her experience as a truck driver as to how long it takes to stop a truck, as to practices in the trucking industry, as to what the entries in the driver’s log’s indicate, and as to whether the driver was traveling too fast for conditions.

Other bases for exclusion of the determination of “preventability” may arise based upon the particular facts of a case. In Ward, the driver was leased to Jones. The determination of “preventable” was made by the then safety director of Jones.

When the case was tried, it was trifurcated. Phase I of the trial was to determine whether the driver was negligent.

In Ward, the Court held that the letter was not admissible in the Phase I. First, the statement by a Jones employee was not an “admission” by the driver pursuant to Pa.R.Evid. 803(25).

For Rule 803(25) to apply, the “statement” must be one of the following:

- a.) a party’s own statement in either an individual or representative capacity, or;
- b.) a statement of which the party has manifested an adoption or belief in its truth, or;
- c.) a statement by a person authorized by the party to make a statement concerning the subject, or;
- d.) a statement made by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or,
- e.) a statement by a con-conspirator of a party during the course and in furtherance of the conspiracy.

Pa.R.Evid. 803(25). The letter stating the accident was “preventable” did not meet any of these requirements.

First, the letter was by the trucking company’s safety director, not the driver. Thus it was not the driver’s statement. The leased driver was not an employee of the trucking company. Saying someone else is at fault is not an admission. It is an accusation.

Second, there was no evidence that the driver adopted the statement or manifested a belief in its truth. Thus, that subsection did not apply.

Third, there was similarly no evidence, or even an argument, that the safety director was authorized by driver to make the statement. Again, this subsection did not apply.

Fourth, there was no evidence that the safety director was the driver's agent. Accordingly, that provision did not apply.

Fifth, the final subsection was inapplicable. The matter did not involve a conspiracy.

None of the subsections were applicable to the letter. Accordingly, the letter was not admissible pursuant to Rule 803(25).

Further, the "preventable" letter was not relevant to Phase I of the case. In that phase, the only issue was whether the accident was caused by the negligence of the truck driver and/or the driver of the car. The trucking company's liability was not an issue in that phase.

Evidence which is not relevant is not admissible. Pa.R.Evid. 402. "Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Pa.R.Evid. 401.

In Phase I, the issue was the negligence of the truck driver, not the trucking company. Accordingly, the letter was not relevant to Phase I of the trial.

Even if relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Pa.R.Evid. 403. "Unfair prejudice" means a tendency to suggest decision on an improper basis or to divert the jury's attention away from the duty of weighing the evidence impartially. Pa.R.Evid. 403 (Comment—1998).

Unlike the federal rule, the Pennsylvania rule does not require that the value be "substantially outweighed" by the prejudice. Pa.R.Evid. 403 (Comment—1998). The elimination of the word "substantially" was to conform the text of the rule more closely to Pennsylvania law. *Id.*

Admission of the letter in Phase I, limited to the driver's liability, would have been extremely prejudicial to him. The trucking company stipulated that it would be vicariously liable for any ordinary negligence of the leased driver. However, the driver always remained liable pursuant to the terms of the lease for indemnification to the trucking company for any payment it would have had to make if it had been found vicariously liable due to the negligence of the leased driver.

Pennsylvania case law has long excluded admissions by one party that are prejudicial to another. The admission by a party is not admissible where it would unduly prejudice another party against whom the statement is inadmissible. Havasy v. Resnick, 415 Pa.Super. 480, 609 A.2d 1326 (1992).

“[T]here is abundant authority to the effect that the declaration should be excluded entirely so as to protect those whom its admission would harm, even though the party offering it is thus precluded from the exercise of a right he would have had if the proceeding were against the declarant alone.” McShain v. Indemnity Insurance Company of North America, 338 Pa. 113, 12 A.2d 59 (1940). Thus, the testimony was not admissible.

In Durkin v. Equine Clinics, Inc., 376 Pa. Super. 557, 546 A.2d 665 (1988), plaintiffs argued that a statement was admissible as an admission by a party opponent. This Court held that the statement was properly excluded by the trial court.

The Superior Court held that while the statement may have been admissible against their maker as an admission by a party opponent, they were not admissible against the other defendant. “To attempt to caution the jury to use those statements only against [the maker], and not consider them when determining the liability of [the other defendant] would be to attempt the impossible.” Id. at 669.

As the liability of both defendants was inextricably intertwined, the statement was too prejudicial to the other defendant. The statement was properly excluded.

Similarly, in Havasy v. Resnick, 415 Pa. Super. 480, 609 A.2d 1326 (1992), plaintiffs tried to admit a statement by a party defendant that another party defendant was negligent. The Superior Court again affirmed the exclusion of the statement.

The court noted that an out of court admission may be used against a party at trial as an exception to the hearsay rule. “This exception, however, will not render an extra

judicial statement admissible where the admission of a party would unduly prejudice another party against whom the statement is inadmissible.” Id. at 1329.

The Court, in Ward, held that the “preventable” letter was not admissible. Further, it was unduly prejudicial to the driver. The determination of “preventability” was the opinion of the trucking company as to the potential fault of the leased driver against whom it had a potential indemnification claim. As such, in this phase dealing only with the driver’s liability, it was not an admission by the driver, but an accusation by the company.

In Gonzales v. Castillo, 2000 Tex. App. LEXIS 530 (Tex. App. 2000), the electrical supervisor for the city, a supervisor of one of the defendant drivers, testified for the Plaintiff. He stated that he filled out a Supervisor’s Report of Vehicle Accident Investigation. In that document, he classified the accident as “preventable”, stating in the document that the defendant should have adjusted to weather conditions.

In his testimony, he admitted that he was unsure if this defendant driver was driving too fast for conditions at the time of the accident. As he could not exclude the possibility that he was mistaken about the defendant driver’s rate of speed, his finding would not be such a clear and unequivocal expression so as to amount to a judicial admission.

The Court then held that as his statements were not judicial admissions, they were not conclusive evidence of the negligence of the defendant driver or his employer.

#### WHAT DOES THIS MEAN?

Several considerations are raised by these cases. First, do you really have to make such a determination? There is no federal requirement that you determine “preventability”. Do any internal bases for such a determination warrant the potential downside of declaring the accident preventable—potential admissibility (even if unlikely), unfavorable settlement position, potential for the Court to determine the finding an admission of negligence?

Second, review your definition of “preventable”. If your definition of “preventable” is in effect the same as the definition of “negligence”, it increases the argument by the opposition that the determination is an admission against interest. If the definition employs other factors or may include instances that are not negligent, you have

a better argument that the determination is excludable as unduly prejudicial and prone to mislead the jury.

Third, do you have to render the determination immediately? More importantly, should you? Is a determination prior to the collection of all facts, expert reviews, and hearing the statements of all involved in the accident fair to your company or your driver?

In serious vehicle accidents, including those from which litigation is likely to arise, shouldn't you avoid a "rush to judgment" on the limited facts available in the first few hours or days after the accident? Doesn't fairness to your driver suggest that a final determination await the full investigation and review of evidence, particularly in a serious accident case that is likely to go to litigation?

Such a case is likely to entail extensive investigation, numerous depositions, and accident reconstruction. The question of "preventability" should be the product of weighing the entirety of this body of evidence, not just the few documents generated within the first several days after the accident. Otherwise, the case could result in the unfortunate anomaly that the jury finds the driver not negligent, but the company has found the accident preventable.

Wouldn't it be fair to adopt an objective standard for determining cases in which the determination will be deferred pending the full development of the facts? The standard could parallel the standard for "recordable" accidents set by the federal government.

This would be objective and deal with the most serious cases. The trucking company, and its driver, would be able to have the benefit of the full investigation before a judgment is reached.

The determination that an accident is "preventable" poses issues as to discoverability and admissibility. The necessity, process, and basis should be carefully considered in light of the potential consequences.