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Education for the Less Common Trucking Cases

The Pitfalls of Bus Crashes

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The Pitfalls of Handling Bus Crash Cases

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I. Introduction

As of 2012, the motor coach industry transported more than 700 million passengers a year in the U.S., roughly the same as the domestic airlines.¹ Intercity motor coach service has been described as the fastest growing passenger transportation mode during the past few years.² According to the American School Bus Council (an industry related organization), approximately 480,000 school buses transported an average of 26 million elementary and secondary students on a daily basis in 2010.³ In 2016, Americans took 10.4 billion trips on public transportation (although a portion of this ridership is on trains and light rail).⁴

However, despite this widespread reliance on bus transportation and the likelihood of injuries occurring during these bus trips, there are many obstacles to holding wrongdoers to full and proper account and ensuring victims are appropriately compensated. It takes ingenuity, creativity and tenacity to obtain justice for those injured or killed in bus incidents. Examining some of the complications that come along with the wide variety of bus operations is helpful in that daunting task.

As an initial practical matter, a bus is a commercial motor vehicle – only it hauls people and not widgets. Thus, because buses are considered generally in the same category as large commercial trucks, one must always start with the rules and regulations governing trucks which also govern buses.

However, because buses haul people and not widgets, the regulations surrounding that transport are as varied as the people they carry and the places they travel. So, one must move beyond the trucking rules and regulations. Buses are often covered by rules that provide greater protection and sometimes, rather bewilderingly, provide less. As a consequence, it is important to understanding these unique challenges, so that one can prepare for and overcome some of the more difficult hurdles.

¹ Peter J. Pantuso, President and CEO, American Bus Association, *Testimony Before the United States House of Representatives Transportation and Infrastructure Committee*, September 20, 2012

² J.P. Schwieterman and L. Fischer, *The Intercity Bus: America's Fastest Growing Transportation Mode: 2010 Update on Scheduled Bus Service* (Chicago: Chaddick Institute for Metropolitan Development, DePaul University, December 20, 2010)

³ <http://www.americanschoolbuscouncil.org/issues/environmental-benefits>

⁴ <http://www.apta.com/mediacenter/ptbenefits/Pages/FactSheet.aspx>

II. Starting Point: The Bus as a Commercial Motor Vehicle

Bus operations, like operating a fleet of large commercial trucks, are typically considered commercial motor carrier operations. Generally, such operations fall under the auspices of the Department of Transportation (“DOT”) and its Federal Motor Carrier Safety Administration (“FMCSA”). The FMCSA (according to its own website) is the “lead federal government agency responsible for regulating and providing safety oversight of commercial motor vehicles (CMVs), FMCSA's mission is to reduce crashes, injuries, and fatalities involving large trucks and buses.”⁵

This means minimum safety standards for the design, manufacture and even the maintenance of a bus (like a truck) can be found within the Federal Motor Vehicle Safety Standards (“FMVSS”) and the Federal Motor Carrier Safety Regulations (“FMCSR”). And just as litigation brought against passenger vehicle and truck manufacturers for design and manufacturing defects (such as a lack of seatbelts or poor roof strength), there is ample case law establishing that the standards set forth under the FMVSS (or lack thereof) do *not* preempt state claims for product liability based upon such theories.⁶ And regulations for how such vehicles are to be inspected and maintained, including important lighting and other devices also fall under federal mandates. This becomes pretty important when examining potential sources of liability in large scale accidents.

This also means the FMCSR’s governing fitness, qualifications, training and supervision of all commercial drivers also “generally” apply to bus drivers. Thus, much of the inquiry into a bus driver’s qualifications and fitness is identical to the investigation you would undertake for any commercial driver. The same questions regarding their personnel files, qualifications, background checks, training and ongoing safety instruction should be asked in discovery. However, in addition to the basic commercial driver’s license, most states, including Ohio, require a (P) passenger endorsement for bus drivers and Ohio requires an (S) endorsement to driver school buses.

Indeed, many of the topics being expounded upon in trucking cases can be applied, to one degree or another, to many bus cases. However, the gap between a truck case and a bus case widens from here. And, as will be addressed below, there are circumstances where buses in particular situations are specifically exempt from safety regulations - for unfathomable reasons. These re the types of loopholes that one must on the alert for, so that they can be analyzed and addressed early on.

⁵ <https://www.fmcsa.dot.gov/mission/policy>

⁶ See e.g. *Geier v. Am. Honda Motor Co., Inc.* (2000) 529 U.S. 861; *Doomes v. Best Transit Corp.* (2011) 17 N.Y.3d 594; *MCI Sales & Serv., Inc. v. Hinton* (Tex.App. 2008) 272 S.W.3d 17, aff’d, 329 S.W.3d 475 (Tex. 2010); *Lake v. Memphis Landsmen, LLC*, 405 S.W.3d 47 (2013)

III. Where the Rubber Meets the Road – The Dangerous Landscape of Bus Litigation

Buses come in myriad shapes and fulfill many purposes. Primary categories include:

- Private for-profit carriers that operate interstate (think Greyhound)
- Private for-profit carriers that operate *intrastate* (think local tour buses)
- Government carriers: school buses; municipal buses; medical transport
- Private non-commercial carriers (think church buses or non-profits that transport elderly or disabled persons).

Because of this wide variety in how and where buses operate, they are subject to a number of very different considerations that impact one's approach to any litigation. Here are some of the key issues.

A. Standard of Care

Where most vehicular cases, including trucking cases, use the basic standard of reasonable care (although there is authority for commercial drivers requiring a heightened standard for driving ability), buses carry people, not widgets. And there are a great variety of buses that operate in different ways. As a consequence, one of the most basic but important concepts in any bus litigation is that of the common versus private carrier. The basic definitions go like this:

- *Common Carrier*: holds itself out to the public as ready and willing to serve the public impartially – so it has a duty to receive **all** who buy a ticket, so long as there is room and no legal excuse for refusing⁷. This applies to municipal buses and to interstate motor carriers for hire.
- *Private Carrier*: one who undertakes to deliver passengers by special agreement or contract, to transport persons from one place to another, either gratuitously or for hire. This may apply to tour buses and in most states, including Ohio, this applies to school buses⁸.

Why is this important? Because it profoundly impacts the Standard of Care.

- A common carrier has a much higher of duty to its passengers: Most states require common carriers to exercise **the utmost diligence, skill, and foresight, to provide for their passengers' safety**.
- A private carrier, by contrast, need only use the ordinary, reasonable care under the circumstances.

While Ohio follows the majority of states in determining that school buses are private carriers who only owe an ordinary reasonable standard of care, there are some jurisdictions

⁷ 14 *Ohio Jur. 3d Carriers* § 1

⁸ *Ohio Rev. Code Ann.* § 4921.01

where school buses have been determined to be common carriers with a heightened duty of care.⁹ So, it is something to investigate if you get a call from out-of-state.

Even then, the lines can blur, and it is not always easy to determine if a carrier falls within the common or private carrier definition. Where a school hires a common carrier to take children on an excursion, particularly where they are traveling interstate which is not specifically defined in the statute, there may be some implication as to the standard of care. In states that consider school buses a private carrier, this does not necessarily raise the standard of care. However, if it is unclear whether a carrier is a common carrier, **plead both**.

Finally, even where a school or school bus driver is not held to the degree of care of a common carrier, the “ordinary” care required may be proportional to the age of the child or may even be mandated by statute.¹⁰ Being able to establish a statutory violation may be critical in overcoming immunities or establishing clear liability for the judge to even get your case to a jury.

B. Sources of Regulation

With buses that come in such wide varieties of shape and purpose, the sources of statutory regulations that provide more (and sometimes less) stringent standards, go well beyond basic FMCSA, DOT or state CDL regulations. For example, a municipal bus may be governed by municipal or state Government Codes. In cases where buses are utilized for people with medical needs, there may be regulations within the Health and Safety regulations or under federal ADA law. A school district’s bus services may be governed by the state Education Code regarding its practices. In Ohio, the medical certification requirements for school bus drivers is found under the Education Code, which is somewhat different than federal requirements for interstate motor carriers.

The various state Education, Government, Health & Safety or Vehicle Codes, as well as both federal and local municipal regulations or school district policies, are fertile ground for finding specific requirements for bus maintenance, bus stops, bus routes, as well as bus driver responsibilities and qualifications. For example, by identifying the policies that the law itself has determined are necessary for safety and then asking the Safety Director of a bus service to confirm them, you put them in the difficult position of either agreeing with you or looking as though they don’t care about their passengers.

And the scope of a bus driver is not always limited to simply driving or operating the bus, and there may be specific duties related to a bus stop found within specific regulations. For example, the primary doctrine related to selection of the location of a bus stop and the driver’s duties at the stop, is the place of safety. This means that **the child’s immediate path of travel** after leaving the bus must be safe. Many school districts mandate that bus stops must be on the

⁹ 57 Am. Jur. 2d, Municipal, School, and State Tort Liability § 577; *Hunt ex rel. Gende v. Clarendon Nat. Ins. Service, Inc.*, 278 Wis. 2d 439, 2005 WI App 11, 691 N.W.2d 904, 195 Ed. Law Rep. 293 (Ct. App. 2004).

¹⁰ 57A Am. Jur. 2d, Negligence §§ 204–206; *see e.g. Ohio Rev. Code Ann.* § 4511.75(E)

same side of the street as the child's residence or that the bus driver act as crossing guard. And this is pretty important. From 2004 to 2013, there were 116 school-age pedestrians (18 years old or younger) who died in school-transportation-related crashes. **Sixty-two percent were struck by school buses**, 5 percent by vehicles functioning as school buses, and 33 percent by other passing vehicles (passenger cars, light trucks and vans, large trucks, and motorcycles) involved in the crashes.¹¹ And that is only fatal crashes. In 2006, national data revealed school bus-related accidents send at least 17,000 US children to emergency rooms each year.

In Ohio, R.C. 4511.75(E) sets forth a specific requirement that a school bus driver shall not start his or her bus until the child "has reached a place of safety on the child's * * * residence side of the street." It leaves no room for considering what a reasonable person would do under a given set of circumstances. A case decided in 2014, *Sallee v. Watts*, found it was negligence *per se* for the bus driver to violate this statute, even as the court lamented that there was little the bus driver could have done in the particular circumstances of that case.

There is at least one case where a court has found a bus stop location dangerous despite the discretion a school district would typically have over such decisions, *because there was a specific statute dictating the location of a stop*.¹²

Sadly, these same statutes may, in some cases, provide carriers with **exemptions** to safety regulations that would otherwise apply. The Ohio CDL manual specifically *exempts* certain drivers from having to have the medical certificate required of most interstate motor carriers, including the transport of migrant workers.

However, knowing that you must look beyond the basic FMCSR's and finding out whether there are specific statutes with real teeth governing the type of bus you are dealing with, can save you from getting mired in litigation that turns out to be a one-way *cul de sac*. And this is not an unusual circumstance with bus cases.

C. The Compensation Picture

In addition to understanding the regulatory picture, it is critically important to understand what the insurance picture looks like as well as any damages issues concerning government run buses.

Despite the significant dependence and widespread use of bus transportation, the adequacy of protection afforded passengers and compensation for those injured or killed on buses has lagged far behind what should be considered minimally adequate. Here are the sad facts:

¹¹ NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., Traffic Safety Facts 2004–2013 Data, www.nrd.nhtsa.dot.gov/Pubs/812170.pdf.

¹² *Jong Ja Jun v. Chaffey Joint Union High Sch. Dist.*, No. E056054, 2014 WL 2433720, at *9 (Cal. Ct. App. May 30, 2014)

- Under the FMCSR and Ohio's Public Utilities Commission which governs intrastate carriers, any vehicle for hire with a seating capacity of 15 or less passengers must only carry \$1,500,000.00 in coverage while any vehicle for hire with seating capacity of 16 or more must only carry \$5,000,000.00. Those levels were set in 1982 and have remained unchanged.
- If the bus is a municipal bus or a school bus, Ohio limits non-economic damages to \$250,000.00 (except in death cases).
- Claims against the State of Ohio can only be filed in the Court of Claims *and there is no jury*
- Government entities are entitled to a substantial amount of discretionary immunity for their actions and evidentiary presumptions that work in their favor.
- Many private carriers are seriously underinsured for the volume of their business, operate in a highly dangerous fashion and conduct their businesses under a variety of shell companies to hide real ownership – making them hard to track down.

Given these obstacles, when reviewing a bus case, it is important to evaluate the causes of injury or death very specifically and think outside the box in terms of identifying wrongdoers.

There are ways to avoid the cap on damages, but they are not easy. One of the first and best ways is to find a non-governmental defendant who has substantial liability. Non-governmental defendants can be found in the manufacturer/supplier of a bus. There are also maintenance issues that may stem from an outside service. Finally, there are many private agencies which now provide drivers and other services to municipalities. However, if they are simply the agent of the municipality or school district the caps may still apply. Finding such independent negligence may be an avenue to ensuring a plaintiff is adequately compensated by a private entity that is, perhaps, the underlying cause of the incident, but it will require tenacious efforts to uncover.

Overcoming government immunities

It is worthwhile taking the time to see if there are any specific regulations that might overcome immunities where you come up against that very difficult hurdle. In addition, looking at statutes and regulations that govern how a municipal or school bus service is to operate is crucial in finding a way around government immunities that often loom over such cases. By showing a violation of statutory regulation, one can show it could not be subject to a discretionary choice that a municipal or school bus service can make.

At the same time, there have been cases where the courts have gone out of their way to find immunity, even in the most absurd circumstances. In a *very* recent decision in *Nicholson v. LoanMax, LLC*, --- N.E.3d ---- (2018), a school bus driver had parked the school bus in a parking lot immediately adjacent to what had to have been an *enormous* pothole right where the children had to alight from the bus. A child exiting the bus fell and was injured as a result. The majority decision, written by Justice Mary DeGenaro of the Seventh District found that a school bus driver's action of parking a school bus to unload children is not within the "operation" of a motor vehicle as used under *Ohio Rev. Code Ann.* § 2744.02(B)(1) because it wasn't moving when it was parked. The dissenting opinion by Justice Donofrio argued that in order to put the bus next

to the pothole, the bus had to be moved. Interestingly, this case did *not* raise the issue of the “place of safety” which a bus driver is required, under statute, to provide to a child.

D. The Product Case

Many of the deaths and injuries involved in these accidents could be avoided or, at least reduced, if the safety features of the buses were improved. The NTSB has issued numerous recommendations to improve motor coach safety. While some of them involve better driver qualification and oversight, many involve improvement to the safety features of the buses themselves, including:

- implementing crash avoidance technologies, such as forward collision warning systems and automatic braking;
- fire resistant interiors;
- strengthening roofs;
- *seatbelts on school buses*;
- revising window glazing requirements;
- and developing performance standards for luggage racks to prevent injury.

Indeed, in the Hurricane Rita litigation, plaintiffs named MCI, the bus manufacturer; ArvinMeritor Inc., the designer of the axle and rear wheel assembly; and SKF Industries, a component maker, all as defendants. And while counsel for the bus manufacturer disputed the claims that the bus was unsafe, it was part of the global settlement. Given the minimal insurance and the horrific collision – that had to have been a worthwhile pursuit.¹³

It should be noted that pursuing a products case might be an expensive proposition, but one should never work alone on a bus litigation with multiple victims and cost sharing is a critical way to proceed in any bus case.

Emerging Product Issues

There are a couple of emerging issues with respect to buses that should be touched upon, and I am hopeful they will become an important point of advocacy.

1. Child Check Alarms. In late 2016, the governor of California signed into law SB 1072 known as the “Paul Lee School Bus Safety Law.” Paul Lee was a severely autistic and nonverbal young man who was left behind on a school bus when the driver didn’t notice he was still on the bus. He died after being locked in the bus in the bus yard for hours when outside temperatures were near 100 degrees. Amazingly, such incidents have occurred multiple times in numerous states. This alarm at the back of the bus requires the driver to walk to the back of the bus at the end of the route to shut it off – thus ensuring they at least walk through the seats so they can see if anyone is left behind. It is a simple, inexpensive installation that saves lives and requiring the installation should be a no-brainer for most state legislators.

¹³ Terri Langford, *Settlement over Hurricane Rita bus fire brings closure*, (Houston Chronicle, Thursday, June 4, 2009)

2. Improving Fire Safety on Buses. From 2004 to 2013, 12 people died as the result of a school bus catching fire, according to a 2016 analysis by the John A. Volpe of the National Transportation Systems Center for the U.S. Department of Transportation. In the litigation arising out of the crash between a FedEx truck and a tour bus full of high school students in Orland, California, which left 10 people dead, the NTSB found several factors that contributed to the severity of the postcrash fire and the toxicity and thickness of the smoke which affected the egress of motorcoach passengers. These factors included an inadequate Federal Motor Vehicle Safety Standard (FMVSS) 302, which specifies the burn resistance requirements for materials used in the occupant compartments of passenger vehicles, trucks, and buses. Improving this standard should be a goal of advocacy.
3. Evacuation Times and FMVSS 217. On Tuesday, December 12, 2017, a 74-year-old school bus driver picked up his first passenger, a 16-year-old student, then accidentally backed into a 3 foot deep ditch. As the driver attempted to move the bus forward out of the ditch, a fire began in the engine compartment and spread into the passenger compartment. For unknown reasons, the driver and student passenger were unable to exit the school bus. Both occupants died as a result of the fire.¹⁴ That simply should not happen. Many school districts use elderly drivers to fill positions that are often underpaid for the importance of the work. Ohio permits medical waivers for such individuals. Medical events are *not* unforeseeable in these circumstances. And do we really believe that someone should be driving a bus and in charge of the possible safe evacuation of children in a crash situation when that individual would not even likely qualify to sit in the emergency row of an airplane?

School bus evacuation is getting some academic interest. Jerry Davis, an engineering professor at Auburn University, Alabama, with expertise in Safety Engineering has recently completed several research studies relating to school bus safety and the evacuation of children. Those studies found a significant mismatch between the physical & cognitive abilities of small children, and the design of current evacuation systems found in most school buses. Significantly, Dr. Davis found that the FMVSS 217 setting the standards for the rear door emergency exit currently uses a standard of an average adult male for the strength necessary to open that door - *even on school buses transporting very young elementary school age children*. At a minimum, this standard and the mechanics for opening an emergency door must be changed to allow children to be able to escape when necessary.¹⁵

IV. Discovery Tools & Tips

In practical terms, there are specific steps that are necessary to take early and an attention to particular items that are very important to pursue early and throughout the litigation. If you decide to represent bus crash victims, keep the following general guidelines in mind.

¹⁴ <https://www.nts.gov/investigations/AccidentReports/Pages/hwy18mh003-preliminary.aspx>

¹⁵ See *Safety Science* Volume 108, October 2018, Pages 203-208

1. **Investigate early and make the tough calls.** Given the hurdles in dealing with government entities and insurance levels, it's important to make hard decisions early. Thinking about other possible wrong-doers will help shape how you approach the rest of the case.

2. **Get the right expert.** A commercial driving expert who has a background in operating a commercial truck or a fleet safety expert with a background in overseeing commercial trucking operations are not typically helpful in a bus case. While they can provide some assistance if there are questions about vehicle maintenance or basic commercial driving standards, but they are not typically in the best position to evaluate the actions of drivers in buses. For example, as noted above, there may be an entirely different standard of care applicable in the case. There may be duties required of a bus driver, including passenger interactions and/or bus stop conduct, that a truck driver would not typically have substantial familiarity. In addition, since buses have so many different purposes (from carrying medically challenged passengers to party buses), the type of expertise required to opine as to the actions of the company, the school district or the driver may vary substantially from experts who generally opine on truck drivers and operations. Finally, as further noted below, many buses are subject to more far-ranging statutory governance and/or municipal or school district policies. And these vary widely from state to state, city to city, and school district to school district. Having an expert who has a background in such regulation is critical.

3. **Preserve the evidence.** One benefit to bus litigation is often the presence of federal agencies investigating large bus crashes. You will need to partner with those agencies early. The investigations can take a very long time, but there is a wealth of material that will result. However, despite any law enforcement agencies that may be investigating, it is very important that you take your own steps to ensure this happens and to examine it independently. Federal agencies can be influenced by larger carriers or be concerned with factors that do not focus on the points of liability with respect to your client.

4. **Video.** Most buses today have some type of video surveillance on board with multiple angles including inside and outside the bus. Make sure you get the video as early as possible, and make sure you get the entire trip. Oftentimes events earlier in the trip are key to how the incident occurred, and the bus company will only give you the minute before the crash.

5. **Inspect the scene.** As soon as you can, get to the crash site and get a feel for the road, the traffic, the terrain, the obstacles, any unusual features, and other aspects of the site. This is particularly true if the case involves a student getting on or off a bus. Look for possible nearby surveillance cameras.

6. Don't go it alone. With any large bus accident, the ensuing litigation will likely be complex and involve numerous attorneys representing multiple victims. Thus, it is important to utilize as many resources to pursue these cases as possible, including:

- * Joint Prosecution: Find the other claimants and work together with counsel to share the work and the substantial costs.

- * AAJ & other attorney organization resources: AAJ has established a bus litigation group, which provides a useful listserv and materials useful to litigators

pursuing bus crashes. If you need an expert, that listserv, as well as the trucking listserv, are good places to start.

V. Conclusion.

Buses have become a massive public transportation resource. However, it is important that safety and justice do not take a back seat. Despite brief spikes in media attention to the victims of tragic bus crashes, and the pleas of NTSB investigators for better regulation, funding, and increased oversight from regulators and investigators, it is often the battles in the courtrooms which bring change in Washington, DC and in statehouses across the country. Although bus accident cases can be difficult and complex, these strategies and tools, along with tenacity and some thinking outside the box, can help to win battles that are certainly worth fighting.