

David Nissenberg on Trucking in Adverse Weather Conditions: Preventing Asphalt Carnage

In November 1998, one of California's worst multiple-vehicle accidents occurred in dense fog on a one-mile stretch of Highway 99 in Tulare County. Seventy-four vehicles were involved, including 19 tractor-trailer rigs. Some 51 people were injured, 10 critically, and two died.

According to figures released by the Truck Safety Coalition, a total of 5,190 large-truck related fatalities were recorded nationwide in 2004 by the Fatality Analysis Reporting System. Of those 5,190 fatalities, 415 of them occurred in California—that number being the second-highest state total in the nation.

California is one state subject to extended periods of heavy fog that completely envelop lanes of travel and all the traffic on them. There are also other times that smoke or dust totally covers a highway or interstate, leading to catastrophic collisions between big rigs and cars. The California Highway Patrol states that, over a 10-year period (1996 to 2006), there have been a total of 370,558 truck-involved collisions due to bad weather conditions. From that total, 3,848 of them were fatal.

The driver who is unlucky enough to be behind the wheel of a large commercial motor vehicle when it has been enveloped in dust, smoke, or fog is often faced with a "Hobson's choice" of deciding whether to stop or to slow down when either may result in disaster. One of the best analyses of this classic situation can be found in the decision of the Washington Supreme Court in *Blaak v. Davidson*, 84 Wn.2d 882, 529 P.2d 1048 (1975). It involved a situation where the vision of the driver of a gasoline truck was completely obscured by a dust cloud. His response was to reduce the speed of the truck to 5 to 10 miles per hour. Why the decision to slow rather than stop? The court recited three reasons: (1) the driver's fear of being struck from behind if he stopped because large wheat trucks and petroleum tankers regularly traveled that road; (2) the fact that his truck was too large to fit on the shoulder; and (3) the driver's knowledge of a pull-out not too far ahead that he thought he could reach, and safely wait out the storm.

Unfortunately, the truck rear-ended a car that had slowed to only two or three miles per hour.

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The issue before the court was simply this: If a driver fails to stop when visibility becomes negligible because of atmospheric conditions, does that failure constitute negligence as a matter of law or is it a question for a jury to decide—taking into account the facts and circumstances of the situation? Opting for the less rigid rule, the court found that there was no absolute duty to stop because, "... it is at least debatable whether stopping on the highway for an indeterminate period of time would be safer, with respect to other users of the highway, than slowly proceeding to a known, safe, pull-out a short distance ahead." *Blaak v. Davidson*, 84 Wn.2d at 886, 529 P.2d at 1050) See also *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

While the fact that the numerous accidents caused by lack of visibility in California is alarming, even more frightening is that much of the asphalt carnage can be prevented, in large part, by new technology and safer truck-dispatching policies.

Though fog and other such visual impediments can never be eliminated, they are usually predictable, particularly in certain areas of the state. On the occasion of the 1998 Tulare County accident, the California Highway Patrol had been issuing statements about the dangers of dense fog for 48 hours before the pile-up.

Trucking-company dispatchers who send 18-wheelers across our interstates now are only a click away from up-to-date weather information covering all parts of the state and nation. A substantial number of tractor-trailers operating for major motor carriers have computers installed in their cabs and can receive e-mails from their home offices. When dense fog is predicted in an area through which a company rig will be traveling, is it too much to expect companies to direct their vehicles to a truck stop to wait out the fog or to re-route the truck through a less affected area?

In fact, drivers of heavy commercial motor vehicles, whether on an interstate or intra-state trip, must comply with a federal motor carrier safety regulation mandating the exercise of extreme caution when hazardous conditions such as those caused by snow, ice, sleet, mist, rain, dust, smoke, or fog adversely affect a driver's visibility or the traction of the vehicle. The regulation, 49 C.F.R. 392.14, also requires drivers to discontinue use of the rig if the conditions become so dangerous that safe operation is compromised. This federal regulation pre-empts a state's ordinary standard of care and creates a higher standard of care for commercial vehicle operators driving in the afore-listed adverse weather conditions. See 49 C.F.R.392.2.

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In *Weaver v. Chavez*, 133 Cal. App. 4th 1350, 35 Cal. Rptr. 3d 514 (Ct. App. 2d Dist. 2005), the California appellate court reversed a defense verdict in a traffic accident case involving a tractor-trailer that was traveling one mile over the speed limit in rain. Reversal was based on the fact that the trial judge had refused plaintiff's request for an instruction to the jury regarding the federal extreme caution standard. In fact, this regulation, 49 C.F.R. 392.14, has been adopted by 44 states and made a part of each of their laws. See Nissenberg, *The Law of Commercial Trucking*, Sec 6.05 [4][d]. Therefore, the standard would apply even where the truck was not engaged in interstate transportation at the time of the accident. For the appropriateness of giving the instruction, see also *Whitfield Tank Lines v. Navajo Freight Lines*, 90 N.M. 454, 564 P.2d 1336 (N.M. Ct. App. 1977).

The fallibility of the human response to driving in adverse conditions can never be overstated. So when technology offers an answer to the problems associated with driving in dense fog, no rational person or trucking company should turn a deaf ear. The advent of radar-based, collision-avoidance systems is now upon us. As of 2005, such systems were in use in more than 50,000 trucks operated in the United States.

With California's extreme climate conditions, it is imperative that an even greater number of trucks operating on the California roadways be outfitted with safety in mind. Given the new collision-avoidance technology, drivers can receive audio and visual warnings of objects up to 500 feet ahead, even around curves. The systems also check adjacent lanes for obstacles, helping drivers maintain a safe following distance between vehicles.

A 2005 National Transportation Safety Board report on the causes of a 22-vehicle, chain-reaction collision involving tractor-trailer rigs on a smoky Interstate 10 in north Florida concluded that, if the trucks had been fitted with available collision-avoidance systems, there was a strong potential the accident would have been prevented or been substantially less severe.

In the constantly evolving field of truck accident litigation, this new technology is bound to result in new theories of liability and new standards of care based on the availability and use of these systems. Whether liability will be imposed on motor carriers for failing to install such devices when they are available is a question that awaits a future decision.

In the meantime, commercial trucking companies owe it to the driving public to make sure they do everything possible to keep our highways safe. That includes obeying fed-

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eral laws, dispatching drivers off the roadways during adverse conditions and, most of all, taking advantage of technology that is here today and can save lives.

About the Author. David N. Nissenberg is a member of the California and Florida bars and is currently a practicing attorney in San Diego, California. He lectures frequently throughout the United States on the topic of truck-accident litigation and is the author of the widely-used book, *The Law of Commercial Trucking: Damages to Persons and Property* (LexisNexis Matthew Bender 2007). Mr. Nissenberg is a graduate of Brown University and the University of Miami School of Law. He may be contacted at dnnesq@yahoo.com. He may also be contacted through the Truck Litigation Resource Center, L.L.C. at www.truckaccidentexperts.com.