



Truck Accident Litigation

by R. Lewis Van Blois

More than 5,000 men, women and children die each year in accidents involving large trucks. When an 80,000 pound tractor trailer collides with a 4,000 pound car, the car occupants will suffer catastrophic consequences. A truck accident case cannot be treated like a simple car crash case. Often important issues in trucking cases are not addressed and the real deficiency of the trucking company is not discovered or remedied. A truck accident lawyer must know the state and federal safety regulations that apply, must know what documents to obtain, must know where to find all of the insurance coverage, not just the obvious coverage, and must know industry jargon. Much of the increased value in trucking cases comes from finding evidence of corporate misconduct. Truck accident lawyers must act quickly to preserve, obtain and analyze the evidence to successfully represent their clients. This article only touches upon the important knowledge a truck accident lawyer should have to be able to competently represent a seriously injured person in a truck accident case.

THE DEFENSE STARTS OUT AHEAD

Insurance companies that insure trucking companies throughout the U.S. have created crash response teams to immediately investigate the accident within minutes after the accident occurs. The first thing that a truck driver does after the dust settles from a collision is to notify his dispatch center. A defense crash response team is called and usually gets to the accident scene before the police investigation is completed. The defense team identifies, accumulates and preserves evidence that is helpful to the defense. They download and review the data from the truck's on-board technology including the Engine Control Module (ECM), remove unfavorable evidence, rectify the driver's log, delete calls from the driver's

cell phone and take statements from witnesses at the scene to support the defense trial strategy. They purchase the plaintiff's vehicle and analyze data from the Event Data Recorder. Often unfavorable and incriminating evidence becomes "lost" or deleted. The plaintiff starts from way behind unless the plaintiff's expert can quickly respond to an accident scene and have access to the accident vehicles before crucial evidence is lost or destroyed. When a lawyer is contacted by a client seriously injured in a collision with a truck, he/she should take immediate action to get the case handled by an experienced truck accident lawyer who has truck accident reconstruction experts and investigators available to immediately go to the scene of the accident and inspect all vehicles. In

one of our firm's cases, our accident reconstruction expert discovered that an air brake hose to the trailer was unattached. The defense claimed the hose came off in the collision. The accident photographs showed there were no skid marks attributed to the trailer, indicating the air hose had not been properly connected by the driver. All witnesses should be contacted and favorable statements taken as soon as possible. In another of our firm's cases, the CHP officer found our decedent was the cause of the accident, based on the truck's position off the road, when he arrived at the scene. We found eye witnesses who saw the truck driver move the truck from the number 2 lane of I-5 before the officer arrived at the scene and were able to change the officer's initial opinion of causation.

THE PRESERVATION LETTER

It is important that the truck accident lawyer force the trucking companies to save and preserve electronic data and all documents. A spoliation letter must be sent immediately upon retention. The letter must demand preservation of all electronic data and reports from all prior downloads. Some of the categories the request should include are retention of all documents, leases, brokerage agreements, maintenance and inspection records, documents of the trip from the originating yard through each pickup and delivery point, driver's log, time cards, audits, driver's personnel file, company policies and other items. The letter should request that no repairs, removal, destruction, alteration or cleaning should occur to the accident vehicles and that they should be removed from service until they can be inspected, photographed and documented by plaintiff's attorney. The letter should be sent by Certified Mail.

In certain cases where the destruction of evidence is likely, a lawsuit should be filed immediately and include a request for a temporary order to preserve vital evidence. Federal regulations require certain records to be saved for only a limited time. For example, drivers' logs are allowed to be destroyed after six months and vehicle inspection reports need to be kept for a minimum of only ninety days.

REGULATIONS

The Federal Motor Carrier Safety Regulations (FMCSR) contain a set of safety rules that trucking companies must follow. These regulations include alcohol and drug testing, preservation of records, driver qualifications and disqualifications, hours of service rules, inspection and maintenance rules, driving rules and other important rules. The truck accident lawyer must become familiar with these regulations

and get all records required by the regulations. Truck accident lawyers should get the FMCSR Pocketbook to have on their desk for easy reference.

ELECTRONIC DATA

Most modern tractors are equipped with an ECM device which generates data including average speed, percentage of time truck is driven over 65 MPH and 71 MPH, and highest speed of the truck. Many trucking companies download the data on a regular basis but do nothing about obvious safety violations. The QUALCOMM is like an email in the truck and GPS systems keep track of vehicle movements and often its speed. The dispatch of the company communicates with the driver with this computer system. Companies maintain these records for only a short period of time so the Preservation of Evidence letter must be sent early in the case or a temporary court order obtained to prevent destruction of pertinent electronic data.

HOURS OF SERVICE AND DRIVER FATIGUE

A driver must take time off to rest after driving certain periods of time. The driver must record what he is doing in a log book. Many drivers falsify their records to be able to drive more hours. Many times a driver can't physically complete his haul on time unless he violates hours of service rules. This results in driver fatigue which is a primary cause of truck accidents. Fatigue problems are made worse because of pressure on motor carriers from shippers and receivers to make deliveries quickly rather than safely.

The lawyer needs to establish the details of the trip and map out where the drivers were on the Google Map. You are looking for proof of driver fatigue and what the driver was doing that he did not share data with the company safety department.

The driver gets paid by the mile and does not get paid for loading and unloading or doing safety checks.

It is important to determine if the driver has prior log book falsifications. If the company has not addressed them with the driver, it is a good argument to prove corporate wrongdoing. Lawyers should be familiar with the 11 Hour Rule, the 14 Hour Rule, the 60-70 Hour Rule and the 34 Hour Reset Rule (all contained in FMCSR §395.3) and then determine whether logs are consistent with requirements of other regulations. Take into consideration time for the pre-trip inspection, the post-trip inspection and the cargo inspections.

OTHER RECORDS TO OBTAIN

In addition to the above records, drivers create other records which are important to obtain. These records include fuel purchase receipts, bills of lading describing the loads and when they were picked up and dropped off, toll receipts, scale tickets, driver call in records, driver inspection reports, phone records and other records.

The written application of the driver submitted to the company must be kept along with the company's driver qualification file. Federal rules require certain information submitted under oath. The information should be investigated to find out if the driver provided false information or if the company failed to follow the Federal regulations for driver investigation and qualification. The trucking company must keep investigation of the driver's safety performance history in the driver qualification file. The motor carrier must check the driving record every 12 months and keep a copy of the record in the driver qualification file. You should also get the driver's record from the State that issued his driver's license.

Truckers regularly undergo roadside inspections and these records are main- ►

tained. These records may reveal patterns of violations and knowledge of dangerous driving or equipment. The trucking company is made aware of these violations and has a duty to address them. These records should be obtained. In reviewing data on the FMCSA website, look beyond the ratings because a company may meet the rating threshold, yet have a serious pattern of violations.

After getting all relevant and required records of the driver, the lawyer must evaluate the information to determine if he is legally disqualified from operating a commercial vehicle. The driver's record may show negligence if he is not disqualified by Federal regulations. Here the company rules and guidelines should be obtained to see if all guidelines have been met.

HAVE ALL POTENTIAL DEFENDANTS BEEN SUED?

The obvious defendants are the owners/operators of the tractor and trailer. Often trailers are leased to the trucking company and liability of the trailer owner can be based on lease violations or negligent entrustment. The shipper and/or loader of the trailer's freight can be held liable if the freight is improperly loaded. A property broker for the load will claim it is not liable because they do not own or lease the vehicle used to transport the

load. However, the broker can be held liable if it also has motor carrier authority, was acting as a motor carrier for the shipment, and guarantees delivery of the load. A broker may also be liable if it is engaged in a joint venture or for negligent selection of an historically unsafe carrier.

The general rule in most cases is that the employer has no liability for torts of its independent contractor. However, in cases involving interstate motor carriers, the motor carrier is vicariously liable for the negligence of the driver under the statutory employment doctrine regardless of whether the driver is an employee or an independent contractor. Where the owner-operator leases his truck and driver to an ICC certified carrier the provisions of the Federal Leasing Regulations are incorporated. The regulations require that every lease entered into by a motor carrier must contain a provision that the motor carrier maintain exclusive possession, control and use of the equipment and complete responsibility for the operation of the equipment for the duration of the lease. The lease must be in writing and carried in the vehicle and the carrier's insignia must be placed on the truck. The effect is that the owner-operator and his employees are deemed to be statutory employees of the carrier, making it vicariously liable for their wrongful acts without regard to whether they were

acting within the scope of employment at the time of the accident. A truck displaying the placard or identifying sign of a carrier is presumptively under the control and lease of that carrier.

Federal Safety Regulations impose a non-delegable duty on the carrier to secure the load safely. There is shipper liability when the truck is improperly loaded. A third party may be liable if it is involved in loading.

PRODUCTS LIABILITY IN TRUCKING CASES

The complexities inherent in the make-up of a heavy duty truck, the modifications, frequency of use and number of manufacturers involved in providing component parts and assembling the finished product make a product liability case difficult. Some of the more common product defects may include failure to install backup alarms, failure to provide safe ingress and egress to the top of a truck, mismatched tires, failure to properly illuminate the sides and rears of tractor-trailers and failure to install underride protection to the rear and sides of a trailer. Because of the height of most tractor-trailers, a passenger car can underride them in a collision. The energy absorption capability of the car is greatly reduced and underride cases result in decapitation, traumatic brain injury and facial disfigurement. Our firm has handled several of these cases where workers traveling to work in the dark fail to see the tractor-trailer blocking the road because of lack of conspicuity tape and inadequate lighting on the big rig. Gradually, regulations have been enacted that require the use of reflex reflectors or retroreflective materials. The rear of the trailer must have an alternating red and white stripe at required locations. Rear underride bars are required and the truck lawyer must be familiar with issues involving lighting and reflection.

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SPECIAL DRIVING SITUATIONS

Nighttime driving can cause truck driver errors in judging safe stopping and turning distances. Winter driving, mountain driving and driving in the fog require a driver to be more cautious and follow the rules for safe driving in these conditions. Our firm has been successful in several underride collision cases occurring in the dark or in the fog. We showed driver negligence in a fog accident case by providing evidence of the extent of the fog that made it unsafe for a truck driver to operate his vehicle with limited visibility. In several nighttime cases, we have used human factors experts as well as photo engineering experts to show a driver did not have adequate vision for a distance necessary to complete a safe turning maneuver.

MCS-90 ENDORSEMENTS

Interstate carriers must have a bond or insurance policy sufficient to pay any judgment for injury or death arising out of the operation or use of its vehicles (49 U.S.C. § 13906(a)(1)). If the carrier elects to provide this coverage by an insurance policy, the policy must contain an MCS-90 (Motor Carrier Safety-90) endorsement which becomes part of the policy. The carrier's insurer must pay final judgments against its insured, whether or not the insurance policy provides such coverage. There are, however, limitations to the application of MCS-90 that should be familiar to a truck accident lawyer.

MCS-90 endorsements only come into play when the carrier's insurance policy does not cover the loss. But the endorsement does not have the usual obligations of an insurance company, such as duty to defend a claim. Once the MCS-90 insurer has paid a judgment, it has the right to recover the amount from its insured. The limits of MCS-90 are no less than

\$750,000 and it does not act as an umbrella policy. Federal law determines the operation and effect of this coverage.

TRIAL OF THE TRUCK ACCIDENT CASE

A trucking case must be prepared from the beginning as though it is going to trial. Before any depositions are taken, all important documents must be obtained, compared and evaluated. Documents previously mentioned as well as all policies and procedures of the company, employment handbooks and manuals, maintenance and repair records should be reviewed. It is important to take a video deposition of the driver because by the time of trial, the defense will be sure the driver has new clothes and looks like a professional responsible person. Often the truck driver appears at his deposition early in the case and is evasive, unprofessional and appears to be incompetent. In a deposition taken in Oregon in one of our firm's cases, the negligent truck driver appeared at his deposition with a dark navy watch cap covering much of his face, was slouched down, was evasive and acted crazy. Often the trucking company's safety director is also vulnerable, based on past performances of the companies' drivers. Video depositions of key company persons can help prove a case of corporate wrongdoing.

If the truck driver has a bad driving history, has falsified his logs or inspections or is otherwise untruthful, this conduct can increase the damages at trial by getting a jury mad. Jurors know the rules of the road and get upset when a safe driving rule is violated. The "Reptile" key to jurors' hearts and minds arises when trucking companies allow fatigued drivers to drive, hire dangerous drivers, tolerate drug or alcohol use or allow drivers to falsify records. Trial themes related to safety will resonate with the jury and maximize the damages in the case. Sometimes a CB

handle like "Captain Crunch" or "The Grim Reaper" can increase damages. In one of our firm's cases, the truck driver fell asleep and caused a collision and the words written in the tractor window were "I swerve and hit people at random." In another case a photograph at the accident scene showed our client's crushed vehicle underriding the side of the trailer and directly above it on the side of the trailer were the words, "We deliver your future." Finding items in the truck such as beer cans, pornography or evidence of drug use can maximize damages at trial.

CONCLUSION

Accidents involving tractor-trailers require a command of the special rules and regulations that apply to the case and the ability to discover the violations and apply them to the case. Investigation and accident reconstruction must be done at the first opportunity and be thorough and complete before crucial evidence is lost. The case will be defended by experienced defense attorneys who specialize in truck accidents and are thoroughly prepared. Juries, however, often find for the plaintiff if the case is well prepared and violations of safety rules by the truck driver can be demonstrated. Then juries are willing to reinforce safety rules with a substantial verdict. ♦

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