

Special Feature

Truck Crash Cases -- The Unlevel Playing Field

By Jeffrey A. Burns

Through my close involvement with two national truck-safety advocacy groups (P.A.T.T. - Parents Against Tired Truckers and CRASH - Citizens for Reliable and Safe Highways) I have frequently heard from crash victims and survivors that their case was hurt because their lawyers didn't know something about truck-industry-specific statutes or regulations. And it is true that there appears to be an imbalance in truck-litigation expertise between defense and plaintiffs' lawyers. Lawyers who *defend* truck cases frequently have a regular diet of truck-crash litigation and can justify spending significant time each year attending CLE programs on truck-crash litigation.

Most plaintiffs' lawyers, on the other hand, don't spend a lot of time keeping up with trucking issues. Additionally, a typical truck-crash initially may not seem to raise specialized issues that would require referral to a specializing lawyer, as in a specialized tax or medical malpractice case. They are treated as standard automobile accident cases, without regard to the special trucking issues that *may* be present. Often, the attorney succeeds in getting a "reasonable" result that satisfies both him and his client. But the defendant and the defendant's insurer are happier by far because important issues were not even addressed.

The following steps can help identify whether there are any trucking issues that should be considered before finalizing a truck crash case:

Immediately stop default spoliation. Immediately write a certified letter to the motor-carrier's president or owner informing him that a claim is being made, instructing him to preserve any information regarding operation of the truck or driving by the driver for the thirty day period prior to the crash, and warning that failure to preserve such information will constitute destruction and spoliation of evidence. Motor carriers are required to keep log information for six months under 49 CFR 395.8. However, there is no D.O.T. requirement to keep, in addition to written logs, information gathered by on-board recording devices and communication or satellite-location devices. Satellite data, available to the carrier from the satellite communication company, may only be available for a matter of days. It is routinely destroyed as a matter of course.

Record Keeping

Motor carriers are required by the Department of Labor to keep a record of the hours worked by their employees. Motor carriers are subject to the minimum wage provisions of the Fair Labor Standards Act and to the record-keeping requirements for persons subject to the minimum wage laws. A description of documentation required to be kept by employers subject to the minimum wage provisions can be found at 29 CFR 516.2. Section 516.6 provides that the records shall be preserved for two years. This regulation is rarely followed.

Lawyers for the trucking companies contend that the motor carrier is only

required to preserve logs for six months. They also sometimes argue that only the log entries for the day of or the day preceding the crash are relevant. Because of the weekly limitations on driving and the cumulative effect of fatigue, this position is ludicrous. The companies also try to evade a spoliation charge by arguing that the Department of Transportation does not require them to keep log books longer than six months. Although this argument is specious (spoliation arguments apply even where there is no requirement to retain documents for *any* length of time), trucking companies often try to use the six month "regular policy" in an attempt to convince the jury not to hold it against them, even in the face of a spoliation argument and instruction. The two year Department of Labor retention requirement should be used to rebut that argument.

The letter to the carrier should also include a request to preserve documentation that can be used to corroborate or disprove log entries, such as scale tickets, trip reports, bills of lading, inspection reports, com-checks, etc. Without such documentation, it may be impossible to discover an hours of service violation that may constitute an aggravating circumstance crucial to a punitive damages claim..

Obtain Public Record Documents About the Defendant. Early in the case, order a motor carrier profile. You can get one for less than \$30 from Computing Technologies, Inc., P. O. Box 3248, Merrifield, Virginia 22116-3248; (703) 280-4001. The motor carrier profile can give you information going back two years regarding violations by the company and any reportable accidents. Frequently, the carrier has had other crashes, some with fatalities, and may well have a long list of regulatory violations.

Prepare For Trial

Hire An Expert Reconstructionist. Even though most cases settle, it is important to prepare as if you are going to trial and spend the money necessary to preserve the evidence. Also consider hiring an investigator. Remember that the insurance carrier will prepare aggressively for trial, and probably had an investigator at the scene before the vehicles were moved. Truck companies and their insurers have "go-teams" throughout the country who can be on the scene, literally, within hours of a crash. Even if you begin an immediate investigation, you are already far behind.

Don't Rely Solely on the Police Report For Witnesses or For a Reconstruction. The police or highway patrol investigate to determine whether there has been a violation of a law that resulted in a chargeable offense, and often neglect "redundant" witnesses whose testimony may be crucial or extremely helpful to your case. Go to the scene and interview any witness you can find. Try to find out where they took the driver to wait for further contact by his carrier. If the driver was not placed under arrest, and was taken to a restaurant or truck stop to wait for someone to pick him up, chances are he talked to someone about the crash. Interview the emergency personnel. You may find that a member of the police department, fire department or EMS team took pictures or even a video that may not be part of the official file.

Preserve the Car. Do *not* settle the property damage issues immediately, without an agreement to preserve the car. Evidence from the car may eventually become irrelevant, but you can't be sure of this immediately after a crash. For example, in one "clear-liability" case, the trucking company took the position that the plaintiff's deceased husband was driving with his taillights off.