Discovery & Proof of Driver Fatigue

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Everyone in this room knows that the trucking industry is an ultra-competitive industry. When the industry was deregulated in 1980, there were fewer than 26,000 interstate motor carriers operating in the United States. At the turn of the century there were over 500,000, and the latest estimates put the number at something above 700,000. Although there are several large companies, no one company can be said to have a significant market share of the total industry. The fragmented market is a boon to shippers and receivers, and ultimately to consumers in terms of the price paid for shipping goods. Deregulation, however, has not been a boon for drivers. Well-run, safe companies are competing with companies willing to cut corners to obtain or keep business. As carriers compete for the shrinking profit margin, working conditions for many drivers may continue to worsen, training in some companies has become virtually nonexistent, attrition rates are at an all time high, and many who are attracted into the industry are not as qualified as the "knights of the road" of the past**.** Real wages for drivers have decreased and the required lifestyle has become harder.

This downward competitive spiral has caused what some have described as a "driver shortage". The reality is there are plenty of people who could be drivers, but there is a shortage of people who want to go into this occupation because of the difficult lifestyle and low pay. My guess is that no one reading this paper wants his or her child to grow up to be a truck driver. The bottom line is that even "well run" companies have difficulty hiring and retaining qualified, competent drivers.

When a catastrophic crash occurs, and people are dead and/or seriously injured, there are at least three broad possibilities regarding driver fault for the crash: (1) the driver was well trained and supervised and did everything possible that could be done to try to avoid the crash; (2) the driver was qualified and well trained and supervised, but simply made a mistake in a particular situation; or (3) the driver should never have been put behind the wheel in the first place and was never given adequate skills or knowledge to make the right choices and take the right actions so that the crash would never be a significant risk in the first place. What many term "scorched earth" discovery by the plaintiff is often an attempt to determine which of the three broad categories might apply, or how they might be intermixed.

When I initiate discovery in a case, I can usually get a good idea, at the outset, what to expect to find by the response from defense counsel. When defense counsel becomes extremely agitated, indignant, and "personally outraged" at the extent of discovery I am requesting, I can usually count on one of three things: either (1) he or she doesn't understand the safety issues confronting the trucking industry; (2) the trucking company has utterly failed in its hiring, training and/or supervisory duties and they don't

have the proper documentation; or (3) the company has failed in its hiring, training and supervisory duties and they have the documents, but the documents are really bad for the company. Good defense counsel representing trucking companies with appropriate hiring, training and supervisory practices are rarely "outraged" by fairly extensive discovery requests. They know that the company will have the proper records and that the answers to the discovery will prove that the company has a safe operation and will lead to negotiations based on simple operator error.

As soon as I am hired in a truck crash case, I try to send some variation of the following "spoliation" letter to the trucking company, requesting that they keep from destroying a variety of documents:

> *Dear President Smith:*
>
> *I represent Bereaved Person with regard to his/her claim against your company. He/she is the widow(er) of Motorist Person, who was killed when your driver, Left Lane Jones, crashed your tractor trailer into the car driven by Motorist Person in Atlanta, Georgia on January 1, 2005.*
>
> *Please take all steps necessary to preserve anything that might be evidence with regard to these claims. Specifically, you are instructed that the following documents and data are deemed relevant to these claims and should not be destroyed because they are relevant to this matter and may constitute evidence in this case or lead to other evidence in this case.*
>
> - *All records and information (however stored) relating to any driving or other work performed by Left Lane Jones (the "Subject Driver"), at least covering the three-month period before the crash. This includes **BUT IS NOT LIMITED TO** all driving logs, trip reports, vehicle inspections, fuel receipts, fuel billings, scale tickets, reimbursement receipts or records, bills of lading, loading tickets, lumper receipts, records of communication, dispatcher's notes, electronic control modules ("ECM") and data from the ECM, the sensing and diagnostic module ("SDM") and data from the SDM, all data from any data logging, collection or storage unit on any part of the tractor or trailer, dispatching notes or records, vehicle location information, payroll/settlement records and information, etc.*
>
> - *Any and all information (however stored) relating to the location of any vehicle driven and/or any trailer towed by the Subject Driver relating in any way to the three-month period preceding the crash. This includes **BUT IS NOT LIMITED TO** any on-board recording device, electronic data interchange, satellite data or transmissions, computer*

data or transmissions, communication records, tracking device information, etc.

- *The entire employment/qualification file (or files) of the Subject Driver.*

- *All training materials that were used to train the Subject Driver.*

- *Your driver's manual and any other information given to the Subject Driver at any time regarding any duties he may have and/or relating to any policies or procedures of your company.*

- *The results of any drug or alcohol testing performed on the Subject Driver before and/or after the crash.*

- *The damaged tractor/trailer and any other physical evidence of the crash itself.*

- *The maintenance records relating to the tractor/trailer involved.*

In the event there was a co-driver or team driver with the subject Driver at any time within the three months preceding the subject crash, this request is for any information that would pertain to both drivers.

Your duty to preserve evidence extends to all evidence, even if not specifically listed above. Destruction of evidence may subject you and your company to sanctions and/or adverse instructions in any action that may arise out of this matter. ***Your duty to preserve evidence extends to evidence that may not be on your physical premises, but is within or under your control****. For example, if you use a satellite tracking device or other high-tech communication or tracking device, but you contract with another company to download or store your data, I believe you are required to take, and I hereby request that you take all steps necessary, within your power, to make sure that such information is not destroyed due to the passage of time or otherwise.*

In addition to the above-mentioned sanctions and spoliation charges that may be a consequence of a failure to preserve evidence, there may be other civil and/or criminal penalties relating to destruction of evidence. This letter is not intended to provide you with legal advice; it is intended to put you on notice of the existence of very serious claims against your driver and your company and to alert you so that you do not allow evidence to be destroyed. Your insurance carrier may be able to help you with regard to understanding your duties regarding evidence and/or you may want to hire independent counsel to assist you.

We would like to arrange an inspection of the tractor/trailer and obtain a readout from the electronic control module (ECM) and any other electronic device that was on the subject tractor or the trailer at the time of the crash at your earliest convenience as well as an examination of other relevant parts of the tractor/trailer. Please contact me to work out a mutually agreeable schedule for this. If you are represented by counsel with regard to this matter, please advise and I will work through your counsel. Please note that failure to preserve the information stored in the ECM will be considered to be intentional destruction of such data.

Please contact me at your earliest convenience, or have your insurance carrier or lawyer contact me.

Sincerely,

Essentially, I want the company to keep all records having anything to do with the work of that driver within the three months prior to the crash available for inspection. In the actual discovery request, unless I know something that would indicate otherwise, I will typically limit my request to the 30 (or 60) days prior to the crash. For a company that has proper documentation of its activities, this is not an overburdensome request. 49 CFR §379.3 requires invoices and bills and supporting data to be retained for three years after the account is paid; requires dispatcher's sheets and other records pertaining to movement of transportation equipment for three years; and records of loading and unloading of transportation equipment to be kept for two years. The fact is, if a motor carrier operates properly and has any kind of organization for its record keeping, pulling the documents relating to 30 days of work and to the training, hiring and supervision of the driver should be a relatively easy task for the defendant. There are times when the circumstances found within the 30 (or 60) day period will justify going back further, but the 30 (or 60) days should give a plaintiff's lawyer a good starting point and a reasonable basis to make a decision whether additional documents are needed.

Many factors can cause or contribute to a crash. Each needs to be examined. For purposes of illustrating how the inquiry into causation requires a fairly extensive inquiry, I will use the issue of driver fatigue.

Frequently, one hears the complaint that a request for documents is unnecessary or unwarranted because the driver "couldn't possibly have been fatigued or over hours" because he had just come back from two or three days off and the crash happened within nine hours of the time he started work. This complaint demonstrates a lack of understanding of the science and research relating to driver fatigue. The fact is, depending upon the type of schedule a driver has, a driver just coming back to work after two days off has almost two times the risk of being involved in a crash during his first work period than having a crash later in the week. If a truck company safety director doesn't know this and hasn't trained his drivers about how to avoid this risk, he is simply not doing his job and is exposing his employees and innocent motorists to unnecessary risk of death or serious injury.

Comprehensive discovery will allow counsel on both sides to evaluate whether the subject crash was due to a momentary lapse of judgment by the driver or whether the operations of the company were essentially "a catastrophe waiting to happen." This evaluation requires an understanding of the demands placed on the driver by the company (and the industry), the limitations of the human condition (based on what we know from science and research) and the practices of the driver, based on his preferences, habits, training and knowledge. For example, 49 CFR §379.3 prohibits a driver (even a driver who is operating within his proper hours of service limitations) from continuing to drive when he is fatigued to the point that continuing to drive is unsafe. The regulation, however, is not only a prohibition of the driver continuing to drive. Section 392.3 also ***prohibits a motor carrier from permitting*** a driver to continue driving under such circumstances. Unless the motor carrier hires a "driver watcher" and puts the driver in the cab to prohibit the driver from driving when he is fatigued, the motor carrier must comply with this prohibition in some other way. The only other way effectively to comply with the letter and the spirit of this regulation is to have a fatigue training program encompassing training for the drivers, dispatchers and managers of the company. A driver must be able to identify what causes fatigue, when fatigue is dangerous, and how to make the appropriate choices in his lifestyle and when driving to accommodate the schedule required by the company of the driver. It is never enough simply to train drivers about fatigue and its causes and effects. Such training is required for everyone in management. A company dispatcher, manager or officer who believes that "fatigue is not a problem in our company" is just a crash waiting to happen and a serious problem for the company and a potential source of aggravated liability.

I have had many opposing counsel attempt to take the position that fatigue can be ruled out by providing the logs for two or three days prior to the crash. This position ignores the vast amount of scientific evidence showing that fatigue can be the result of "sleep debt" accumulated over a long period of time. Once a crash is connected to fatigue, of course, one must also look to see what the company did to ameliorate or exacerbate the condition. Fatigue has been recognized by industry experts as the number one safety issue facing the trucking industry since at least 1995. Any trucking company that doesn't have an effective fatigue training program is inviting a disaster and has reason to know it.