

# LAWYERS WEEKLY USA

THE NATIONAL NEWSPAPER FOR SMALL-FIRM LAWYERS

REPRINTED FROM FEBRUARY 19, 2001

A BI-WEEKLY NEWSPAPER FROM LAWYERS WEEKLY INC.

## Tired Trucker Litigation Is On the Rise But Inexperienced Lawyers 'Leave Dollars on the Table'

By Michael Bowden

Lawsuits involving truck driver fatigue are on the increase, riding a groundswell of large verdicts and settlements, grassroots outrage and impending regulatory changes.

But because most plaintiffs' lawyers have never handled a tired-trucker case, they're often unaware of many tricks of the trade – and their clients may pay for that ignorance.

"The plaintiffs' lawyer who treats a truck-crash case in the same manner as any other vehicle collision case is at risk of leaving settlement dollars on the table," says Kansas City attorney Jeffrey Burns, one of the country's leading authorities on the subject. "The defense lawyer will almost always be reasonably up-to-date on trucking law and trucking issues."

Statistics show that 14 people die every day in truck-related crashes and more truck drivers are killed on the job than any other

type of employee.

"The number of fatalities is the equivalent of an airliner going down every week," says Burns.

But growing awareness of

**Jeffrey Burns predicts that future lawsuits will also hold the shipper and receiver liable for tired-trucker crashes, since they often are a prime source of pressure for truckers to exceed federal hours restrictions.**

those fatalities appears to have done little to persuade truckers, or their employers, to cut down on driving hours.

When you are paid by the mile, there is one law of the road and one law only, said Robert Strong, a road-worn Cajun truck driver from Shreveport, La., in a recent *New York Times* article. "If the wheels ain't turning, you ain't making money."

### Exhaustion Breeds Carnage

Gerald and Dagan Campbell were driving home to South Carolina early one morning, along U.S. 220 in

injuries within 24 hours.

The investigation later revealed that the truck driver, who survived the crash with minor injuries, had accelerated when he momentarily dozed off. Understandably so: He'd been on duty a total of 92 hours during the eight days prior to the accident. And he hadn't been given a day off in more than two months, despite repeatedly telling his employers that he needed one.

The driver's fatigue was a "huge factor" in the accident, according to small-firm lawyer Richard Harpootlian, who represented Patricia Campbell in her subsequent wrongful death lawsuit against Raven Transportation.

Harpootlian built his case using satellite data routinely collected by the company to track its trucks' movements. He also used other documents to reconstruct the driver's movements. Taken together, the evidence proved that the trucker's written log, which showed him dutifully adhering to federally mandated work-rest ratios, was false. Based on this evidence,



North Carolina, when the tractor-trailer that was traveling in the same lane behind them accelerated suddenly. The truck slammed into the back of their pickup truck, causing it to roll over several times and explode. The Campbells were thrown from the wreck, and were still alive by the road – on fire, writhing and screaming in pain – when the first eyewitnesses arrived. But it was too late: Both died of their

the carrier agreed to a structured settlement and cash payment worth \$7.25 million.

In another case shortly afterward, a Texas jury awarded more than \$7.5 million in a case with a similar set of facts, but only one victim. Again, the secret of the plaintiffs' success was a painstaking reconstruction of the driver's movements during the time leading up to the accident – using receipts, bills of lading, and other documents to prove that the driver had falsified his log to evade federal regulations limiting hours worked.

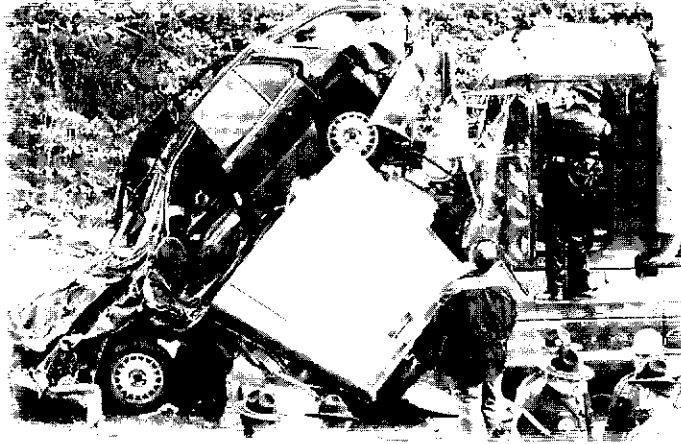
"We found him, in his log, in suburban New Orleans when he was [actually] buying fuel in Texas," plaintiffs' attorney Dale Felton of Houston told reporters following the verdict.

#### A New Deep Pocket?

Burns cited the manufacturing economy's increased dependence on "just-in-time delivery" as one reason for trucker fatigue. Just-in-time delivery allows the manufacturer or retailer to avoid warehousing goods or parts by timing the delivery to coincide with the time the goods are needed.

"Deregulation in the '80s and the fact that anyone can get into the industry by getting a truck and a license has led to fierce competition, and demands on the trucking companies by shippers and receivers are increasingly stringent. Also prices have stayed low," says Burns.

Burns predicts that future lawsuits will also hold the shipper and receiver liable for tired trucker crashes, since they often are a prime source of pressure for truckers to exceed federal hours



restrictions.

"Under the ever-increasing use of 'just-in-time' delivery scheduling, shippers and receivers have turned trucks into rolling warehouses," says Burns. "Drivers know that late delivery can cause an entire factory or assembly line to be shut down. The tension between the legal requirement to pull over when tired, and the economic requirement to deliver on time, has not been addressed by the industry."

Although Burns doesn't know of any such cases reaching the courts, he believes it's "only a matter of time." He notes that Department of Transportation regulation 49 CFR Sect. 390.13 provides that "no person shall aid, abet, encourage, or require a motor carrier or its employees to violate the rules of this chapter" including the hours of service and fatigued driver provisions.

Harpootlian notes that lawyers taking on the trucking industry need to immerse themselves not just in federal regulations, but in state regulations as well.

"Different rules may apply, depending on whether the case involves interstate or intrastate commerce," he notes, adding that the inter-

play of rules can become very complex.

"It's not as simple as it looks at first glance," he warns.

Burns agrees.

"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," he says.

#### Constructing a Case

There does appear 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 it.

Most plaintiffs' lawyers, on the other hand, don't spend a lot of time keeping up with trucking issues, because (a) they're not the kind of case you see every day; and (b) most lawyers do not consider trucker cases to be a unique field.

"A typical truck crash initially may not seem to raise the specialized issues that would require referral to a specializing lawyer – as in a

specialized tax or medical malpractice case," Burns explains.

So lawyers faced with a trucker suit often treat it as a standard-issue automobile accident case, without regard to the special trucking issues that may be present. Burns offers several suggestions for plaintiffs' lawyers to help identify and deal with these special issues.

#### • Intervene early to stop spoliation of evidence.

Immediately write a certified letter to the motor-carrier's president or owner to inform him or her that a claim is being made. The letter should instruct the carrier to preserve any information regarding the operation of the truck by the driver for the 30-day period prior to the crash, and warn that failure to preserve such information will constitute spoliation of evidence.

This will be an especially important step, as electronic information becomes more pivotal in these cases. For instance, motor carriers are required by Department of Transportation regulations to keep *written* log information for six months. However, there is currently no federal requirement to keep information gathered by on-board recording devices, and communication or satellite-location devices. (Many shipping companies use satellite tracking to keep track of their fleet – enabling them to be fully apprised of a truck's movements, any mechanical trouble it may be experiencing, accidents, etc.)

But time is of the essence because most companies routinely destroy this data after a short time. Harpootlian, who used satellite

data to coax a carrier into a multi-million-dollar settlement, says the company he retrieved it from had a 30-day cycle of replacing data.

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, weigh-station reports, etc. Without such documentation, it may be impossible to discover an hours-of-service violation that may constitute an aggravating circumstance crucial to punitive-damages claim.

- *Bone up on record-keeping requirements.*

The Department of Labor requires motor carriers to keep a record of the hours worked by their employees. Carriers are also 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.

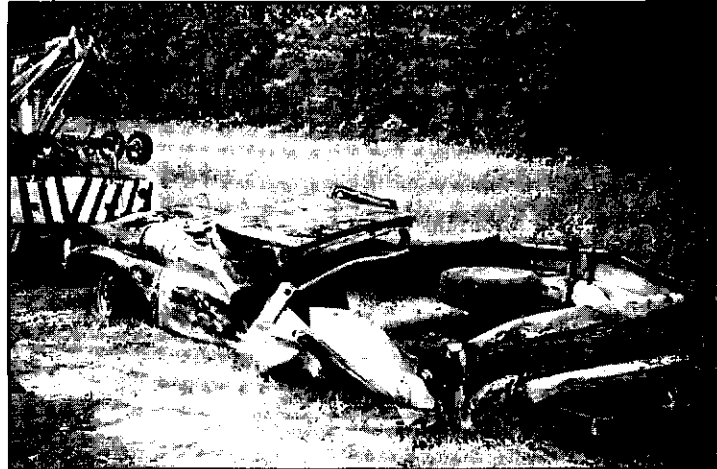
Generally, those regulations provide that the records shall be preserved for two years, but Burns says this regulation is rarely followed in practice. Defense lawyers often contend that this general labor regulation is trumped by the more-specific D.O.T regulations (requiring motor carriers to preserve logs for only six months).

When a defendant carrier withholds important logs because they're more than six months old, Burns recommends pushing for production based on the Department of Labor's two-year retention requirement.

Also beware the common

defense position that only log entries for the day of or the day preceding the crash are relevant to the case.

"This position is ludi-



**This pickup exploded in flames after a trucker fell asleep and rammed it off the highway. Witnesses found the father and son on fire and screaming in pain beside the truck. They both died. Plaintiff's lawyer Richard Harpootlian (below) settled the suit for \$7.25 million after proving that the trucker had driven 92 hours in eight days and hadn't had a day off in two months.**



crous, because of the weekly limitations on driving and the cumulative effect of fatigue," Burns argues.

- *Obtain public record documents about the defendant.*

Early in the case, order a motor-carrier profile. For instance, you can get one for less than \$30 from Computing Technologies, Inc., P. O. Box 3248, Merrifield, Vir-

ginia 22116-3248; (703) 280-4001. The motor-carrier profile can give you information going back two years regarding violations by the compa-

ny and any reportable accidents.

Frequently, Burns says, these reports reveal that the carrier has had other crashes, some with fatalities, and may well have a long list of regulatory violations.

Others carrier issues to look out for include the reasonableness of a company's-dispatching procedures, use of available technology to

- *Hire a reconstruction expert.*

It's important for plaintiffs' lawyers to put together an accurate and reliable picture of the accident, so they can intelligently and successfully challenge the defense's model.

"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," Burns says. "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," Burns warns.

- *Look beyond obvious sources.*

It's a mistake to rely solely on police reports to gather your witnesses and reconstruction information.

"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," Burns notes.

So 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 – if he was, say, 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 tail-lights off. Because we preserved the car, Burns was able to disprove this claim and keep the company from "having something to talk about." The cost of storage fees for the car, in the context of the overall picture, are insignificant.

**A Boost for Plaintiffs?**

Regulatory changes, which would strengthen a plaintiff's case, may be on the horizon.

The Department of Transportation is planning major revisions to the 60-year-old regulations that govern, among other things, the number of hours truckers are allowed to drive each week.

The revisions may also include requirements that tractor-trailers carry a "black box" similar to those carried on all commercial airliners. These devices would track drivers' movements and hours of operations, and provide other essential data such as speed, throttle position, the use of brakes, the steering wheel and signaling devices during the five seconds before the crash. If the vehicle is involved in a collision, the data is "frozen" for future analysis, right down to the essential "Delta V" (loss of velocity) numbers – a vital measure of the severity of an impact.

Such black boxes are already available in many vehicles, but their existence is not yet widely known

among attorneys.

"Very few [lawyers understand] the extent, quantity, quality, and parameters of the data saved after a crash," says William Rosenbluth of Automotive Systems Analysis, Inc., in Reston, Va., who specializes in retrieving black-box data. "It's like suddenly having a word processor if you always used a typewriter. It's just so much more valuable."

If these devices become standard equipment on all tractor-trailers, their content may eventually augment – and in some cases replace – traditional expert and lay testimony.

"Ultimately, [black boxes] will change the way cases are litigated," says John Rupp, a Chicago defense lawyer and co-chair of the DRI's Auto Products Specialty Litigation Group. (For a full discussion of the potential value of black-box technology in litigation, see, "Black Box Will Revolutionize Auto Litigation – But Few Lawyers Know These Data Recorders Already Exist," 99 LWUSA 729; Search words:

Bowden and Rosenbluth.)

So far, the regulatory revisions are still in the planning stages.

"They talk and talk, but they don't do anything," says Daphne Izer of Lisbon Falls, Maine, an organizer for Parents Against Tired Truckers.

But Burns believes the growing number of big verdicts and settlements, coupled with pressure from groups like Parents Against Tired Truckers and Citizens for Reliable and Safe Highways, may soon begin to bear fruit.

"I think [the political momentum] is partly because trucking is the last sweatshop industry we have," says Burns. "The drivers have little protection from abusive employment practices, which is one of the reasons fatigue is becoming increasingly investigated."

The biggest wild card, according to Burns, is the new, commerce-friendly Bush administration, which is more likely to side with the trucking industry than the previous administration had been.

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