In the 1977 classic film *Smokey and the Bandit*, Sheriff Buford T. Justice witnessed a speeding trucker shear the open driver's door off his patrol car. In a slow, southern drawl, he immediately admonished his son to “put the evidence in the car, Junior.” The evidence, of course, was the door that lay in the middle of the road, detached after the collision. Justice planned to use it as evidence to put the “sombitch” trucker away until he was gray.

So went Justice’s official evidence collection and preservation from a truck collision on the silver screen. Today, our response to a commercial vehicle accident is a little different. Each collision involving a commercial vehicle is unique and complex due to the range of truck sizes, weights, and configurations. Updated technology allows many vehicles to be tracked and events to be recreated down to the second. Therefore, successfully defending a commercial trucking client after an accident presents many unique challenges.

In commercial vehicle accidents, especially those involving serious injury or death, litigation is often foreseeable from the outset, and proper response to the accident is essential. You may get only one opportunity to collect critical evidence from the scene and the vehicles before it is compromised. This article provides an overview of some best practices to make the most of that opportunity.

Responding quickly, hiring an appropriate reconstructionist, collecting and preserving Event Data Recorder and Electronic Control Module data, and making the best use of available accident reports are all key steps that must be executed properly. Additionally, awareness of the potential for evidence spoliation resulting from improper handling or destructive testing procedures is essential. Maintaining contact with opposing counsel and witnesses, such as drivers who may leave the company, is also a must. Ultimately, a thorough knowledge of proper post-accident investigation procedures and data collection techniques may allow the careful practitioner to put the brakes on an otherwise costly commercial trucking lawsuit.

**Respond quickly to the scene, preferably with an accident reconstructionist.**

Much of the critical evidence necessary to recreate the events leading up to an accident is perishable within hours or even minutes after the event. Physical evidence, such as debris fields, tire skid marks, fluid puddles, and stains on the roadway are all subject to rapid degradation caused by cleanup efforts of first responders, subsequent traffic passage, and weather. The braking and traction conditions of the roadway surface can change with fluctuations in weather. Further, determining the exact distance between accident vehicles and other objects may be difficult once the wreckage has been moved.

In serious accidents, especially those involving personal injury, the company owning or operating the commercial vehicle is well-advised to notify legal counsel immediately. When the severity of the accident warrants, it is also advisable to arrange for an accident reconstructionist to inspect the scene and the vehicles as soon as possible, preferably on the same day as the accident. Counsel should have a working library of experienced reconstructionists who can be called on short notice, preferably with an understanding of each reconstructionist’s background and specialties. While accident reconstructionists can be expensive and may not be appropriate in all cases, the reconstructed accident models can be invaluable. Ideally, counsel should accompany the reconstructionist. If a same-day inspection is not possible, the inspection should be conducted soon thereafter, preferably at the same time of day as the accident.

Accurate accident reconstruction is critical in litigation, and it requires the analysis of a multitude of variables by a reconstructionist well-versed in the mechanics of tractor-trailer collisions. The foundation of reconstruction begins with accurate data for the reconstructionist. Accordingly, the collection and preservation of physical evidence is the lynchpin of effective commercial vehicle accident reconstruction, and thus, the key to successfully defending your client.

Ideally, an accident reconstructionist should have
an engineering degree and extensive experience with commercial vehicle accidents. His or her primary role is to determine the cause of the accident through his analysis of the scene, the vehicles, photographs, and relevant documents, including measurements taken at the scene. The reconstruction should speak with first responders and examine and document the entire scene. Specific attention should be given to each vehicle's tire marks, gouge marks, accident debris, and, of course, the final rest position of the vehicles involved. The reconstruction should also recommend additional investigation work that may need to be done. In due course, the reconstruction should assist counsel in developing a narrative of the accident which accurately reflects the events leading up to the incident.

In serious accidents, the client may hire an adjuster or third party administrator to be on site quickly. Adjusters and TPAs can provide a valuable preliminary assessment, including a general description of the scene and the availability of eyewitnesses. However, hiring an adjuster or TPA to perform a preliminary assessment should not replace having legal counsel respond to the scene with a reconstruction expert. A good reconstructionist brings to the table a greater degree of knowledge, skill, training, education, and experience that is essential in assessing how an accident occurred and which vehicles contributed to the collision. We have seen adjusters’ assessments of accident scenes prove to be inconsistent with the observations of an experienced, knowledgeable reconstructionist. For example, recently an adjuster was retained to respond to an accident scene. He photographed the scene within a few hours after the accident, documented tire marks, and took measurements from the tire marks to the point of impact. However, when the reconstructionist arrived later the same day, he made additional observations proving that the adjuster had documented and measured the wrong tire marks, which was a crucial fact showing that the truck driver had almost no time to react or avoid the collision.

**Avoid spoliation by documenting the condition of all vehicles and preserving all relevant records.**

When it comes to documenting the condition of each of the accident vehicles, “more is better.” A complete record of each vehicle’s condition begins with a comprehensive catalog of photographs. The photographer should document the interior of each vehicle involved, including snapshots of the dash gauges and digital readouts. (Be mindful, however, of the possible implications of turning the ignition key to the “on” position, as mentioned below). It may be important to capture the view from the driver’s seat, both where the vehicle came to rest and, if possible, the view that existed around the time of impact. Additionally, the exteriors of the vehicles should be photographed from a perspective that clearly captures the location, as well as the extent of any damage or points of contact as evidenced by dents, scratches, or foreign paint. Due to the myriad loading configurations present in commercial vehicles, photos should be taken of all cargo areas while they are still loaded, including the interiors of any trailers or boxes.

Exact measurements should be recorded of the size of the trailer, wheels, and tires, specifically noting each tire's tread depth and air pressure. These measurements may be compared with applicable regulations to show compliance with statutory vehicle restrictions. The condition of the brake system should be noted, as well as the wear on the shoes and pads. On heavy trucks, the slack adjusters should be examined by a professional mechanic or mechanical engineer to determine if they were set to correctly transmit the driver's brake application force and compensate for brake lining wear. Precise distances and angular measurements between vehicles, objects, and debris may be ascertained by employing a Total Station device, which can often be used, if necessary, to recreate a three-dimensional model of the vehicles and accident scene. Modern GPS equipment (and, potentially, GPS data recorded by a vehicle’s on-board computer) may also aid in determining the exact location of each vehicle after the accident.

A comprehensive inspection of all exterior lighting, including a function test of brake lights and turn signals, should be completed promptly. When relevant, an inspection of the entire electrical system of the vehicle by an authorized mechanic may also prove worthwhile. The placement and effectiveness of DOT-required reflective conspicuity tape should also be noted when poor visibility or darkness may be at issue.

In addition, the client should be advised to take appropriate steps to preserve relevant documentation regarding the commercial vehicle, the driver(s), the incident, and the company's response to the incident. Identifying, collecting, and preserving the appropriate documents may require coordinating with third parties, including rental or leasing companies, service centers, drug and alcohol testing facilities, and the driver. Ideally, a copy of pertinent documents should be sent to counsel.

Depending on the circumstances, categories of documents related to the vehicle may include all applicable permits and licenses, inspection and maintenance records, event data recorder and/or electronic control module data (see below), records of the dispatch instructions applicable at the time of the incident and the load being transported, data from the vehicle's satellite tracking system, if applicable, and records related to the post-accident condition of the vehicle. Categories of documents related to the driver may include the driver qualification file (including training records, pre-employment inquiries, and driving history reports or MVRs), daily driver logs and/or time cards for the thirty-day
Collect as much data as possible from each vehicle.

Modern Event Data Recorders (EDR) and Electronic Control Module (ECM) equipment are programmed to record a wealth of important pre-crash data such as vehicle speed, braking application, engine speed, throttle position, and seat belt usage, much like the “black box” on a commercial aircraft. The National Transportation Safety Board supports the use of data recorders as a means of helping determine the factors leading up to a crash, and also the determination of the magnitude and direction of forces sustained during the crash. Such recorders are now commonplace on many modern commercial vehicles, and the parameters they measure may be admissible in South Carolina courts.

If any of the vehicles in the collision have such modules, they can be a valuable source of information. After an accident, an automotive engineer can download all data stored in an EDR by using special software. Alternatively, local truck services are typically available on short notice for this type of service. Once the data is collected, an accident reconstructionist can utilize the information to create a timeline of events leading up to the incident and calculate forces generated during the crash. Ultimately, this tool may assist counsel in telling the story of the accident.

The investigation of a December 1999 motorcoach crash in Colorado illustrates the type of information obtainable from a diesel engine ECM. The recorder indicated the motorcoach had been on the verge of losing control for nearly a mile before the actual crash occurred. The following parameters were recorded:

- At :47 seconds prior to going off the roadway, the drive wheels slipped on the slick roadway due to transmission retarder forces;
- At :44 seconds the transmission went into neutral and at :41 seconds the engine speed went to idle;
- Between :35 and :15 seconds prior to the crash several brake applications were made in an attempt to arrest the speed of the bus;
- At :15 seconds a throttle application sent the engine RPM to its governed speed; and,
- At :05 seconds the vehicle began rotating, prior to exiting the roadway and overturning.

At the time of the report, the investigation into this incident was incomplete and the NTSB had not published its findings; however, the data recorder provided valuable information which would have been otherwise unavailable.

Electronic data is not stored indefinitely on the EDR or ECM, and failing to recover the data prior to moving the vehicle may contaminate the recorded parameters or delete them entirely. In some instances, even turning the key in the ignition can erase valuable data stored in the truck's databanks. Therefore, the accident vehicles should not be moved any more than necessary prior to collection of ECM and EDR data.

For example, some trucks record data based on a “last stop record.” In this mode, when the vehicle's ignition is in the “on” position, measurements are taken each time the truck’s motion stops. Generally, the data from the prior “last stop” is overwritten each time the truck stops anew. A problem may arise when such a vehicle is towed or moved to the side of the road after an accident because information about the accident may be overwritten by a new last stop record. Other EDRs record data based on a hard-braking or sudden deceleration event. This event recording mode is less susceptible to accidental erasure, although the data may be dumped after a few days, weeks, or months following the accident due to the limited storage capacity of the recording device. In all cases, it is prudent to download the EDR data as soon as possible and before any subsequent movement of the accident vehicle. As a preventive measure, counselors are wise to advise their trucking clients of the importance of not moving a vehicle any more than necessary until the electronic data is collected.

A recent Louisiana case highlights the necessity of knowledgeable handling of an EDR. There, an event data recorder from an accident vehicle was not removed until two weeks after the crash. The vehicle was not secured in a police impound yard but was stored by a towing business following the accident. The officer who removed the event data recorder from the vehicle had no training on how to properly remove the recorder. An expert testified the vehicle should have been photographed, the recorder exposed and photographed in its place before it was removed, and the recorder’s serial number captured for identification purposes. Additionally, an officer kept the recorder in his vehicle's trunk for two weeks before it was brought to a state police office for downloading. The expert testified that since the data file within the recorder was electronic, it was possible the data could have been altered or corrupted by improper handling. In sum, the recorder was not treated as evidence, as a proper chain of custody was not maintained. The trial court granted a motion in limine to exclude the EDR data from evidence, and this decision was ultimately affirmed by the state’s high court.

Establish protocols prior to destructive testing.

When litigation ensues—and often in pre-suit investigations—the plaintiff’s lawyer is likely to request an inspection of the commercial vehicle. Most aspects of an inspection will usually not be destructive, consisting instead of photographs and measurements of various aspects of the vehicle.
Sometimes, however, a party may request an inspection that requires destruction of certain component parts of the vehicle. Of course, this raises immediate concerns with potential spoliation of evidence.

Destructive testing should never be conducted without a protocol agreed upon by all parties and consistent with applicable law, which provides a framework for each party to conduct and document the needed inspection(s) and avoids potential claims of spoliation. You should consult with your expert to develop an appropriate protocol before any destructive testing is performed. Often, we will first coordinate a non-destructive inspection to observe and photograph the equipment. This allows the experts to identify whether any destructive testing is needed and to create the appropriate protocol for such testing.

A protocol must be customized to the needs of the case and the equipment to be inspected. For example, when accidents occur at night, visibility is often an issue, and the commercial vehicle’s lighting and other visibility markers may come into play. Destructive testing of lighting components is a distinct process from destructive testing of other components such as brake systems. The goals are to be thorough and methodical, because once the destructive inspection has occurred, the equipment may no longer be available in the condition that existed at the time of the accident. At a minimum, a protocol should include photographing and videotaping the entire testing process, including the pre-testing and post-testing conditions of the vehicle and parts. Importantly, all parties should be given ample notice, time to inspect the parts to be tested, and be permitted to be present for the testing.

To avoid spoliation, a conservative approach should be taken to preservation of evidence. Any action by one of the parties that modifies the condition of the vehicles or the accident scene could be considered destructive and lead to a spoliation claim.

If the MAIT team is involved, obtain a MAIT report from SC Highway Patrol.

The Multi-disciplinary Accident Investigation Team (MAIT) is a specialized unit within the South Carolina Highway Patrol. According to the Department of Public Safety, the MAIT team investigates complicated vehicle crashes using state-of-the-art technology and analysis to reconstruct the scene. The Highway Patrol established the MAIT team in 1995 not only to assess responsibility in accidents, but also to determine the subtle contributory and injury causes in wrecks and, in turn, to use these factors to prevent collisions of a similar nature in the future. The MAIT team consists of highly trained state troopers who have specific skills in accident reconstruction, traffic engineering, and automotive engineering. The MAIT team does not investigate all accidents but will generally be called to investigate the following types of collisions or incidents:

- Prosecutable collisions where multiple fatalities occur.
- Prosecutable felony driving under the influence collisions with death or great bodily injury.
- Fatalities involving commercial vehicles where mechanical failure is suspected or any collision where a manufacturer defect of a vehicle is a possible contributor.
- A collision with multiple fatalities involving hazardous materials or a collision involving spillage or leakage of a significant amount of hazardous material that threatens life or property.
- Any fatal collision investigated by Department of Public Safety (DPS) involving a law enforcement officer.
- A collision involving a fatality or great bodily injury where a contributing factor may be a possible road defect.
- Hit-and-run fatalities.
- Collisions investigated by DPS involving a pursuit resulting in
informed of the potential legal consequences of a trucking or transportation company should be fully in service is likely to modify the evidence in the case, because the act of putting a commercial vehicle back in service would be economically unfeasible for one or more parties. In the absence of such guidance, because the act of putting a commercial vehicle back into service is likely to modify the evidence in the case, a trucking or transportation company should be fully informed of the potential legal consequences of destruction or modification of evidence and should make informed business decisions considering this information. Counsel may provide notice to opposing counsel and give them an opportunity to respond before the company puts a truck or trailer back in service and keep the lines of communication open to avoid a claim that evidence was destroyed or modified without an opportunity for all interested parties to inspect and document the evidence. Failure to do so may prevent a party’s inspection of the evidence in its original state. It is also prudent to consider whether any other parties need notice of the accident or may have an interest in examining the vehicle, such as trailer or chassis companies, recently visited truck service centers, fleet financiers, and the like.

Maintain contact with witnesses.

In recent years, we have seen a trend where a plaintiff's lawyer attempts to negotiate with a trucking company before filing suit but is unable to reach a resolution; sometime during this process, the driver leaves the company and may even move out of state. The plaintiff then files suit only against the driver, without notifying the company. The driver does not inform his former employer about the suit and goes into default. The plaintiff then seeks to enforce the default against the former employer under a theory of vicarious liability, even though the employer had no notice of the suit.

The South Carolina Supreme Court recently examined this same issue in McClurg v. Deaton. In McClurg, the defendant truck driver was involved in an auto accident while employed and driving for a company called New Prime, Inc. (“New Prime”). Within days after the accident, New Prime’s insurer commenced an investigation. New Prime communicated numerous times with the plaintiffs regarding the accident and potential resolution of their claims. Shortly before the statute of limitations ran, the plaintiffs filed suit only against the driver, who was no longer employed by New Prime. The plaintiffs did not notify New Prime or its insurer of the lawsuit. The driver failed to respond to the complaint, and an $800,000 default judgment was entered against the driver.

New Prime did not learn of the lawsuit until after the default judgment was entered. New Prime had an insurance policy with a $2,000,000 deductible, creating the possibility that New Prime could be responsible for the entire amount of the judgment entered against its former employee. New Prime filed a motion to intervene, which the circuit court granted. New Prime simultaneously filed a motion to set aside the default judgment under Rule 60(b), SCRCP, which the circuit court denied on the basis that the plaintiff had no duty to notify New Prime of the lawsuit.

On appeal, the Court of Appeals held that the
circuit court erred because the plaintiff had a duty to notify New Prime of the lawsuit. Therefore, the failure to notify New Prime of the lawsuit constituted both surprise and excusable neglect under Rule 60(b)(1) and misrepresentation and misconduct under Rule 60(b)(3). However, the Court of Appeals affirmed the decision not to set aside the default judgment on procedural grounds, finding that the defendants failed to argue that they had a meritorious defense under Rule 60(b)(2), so the issue was not preserved for appeal.

On grant of certiorari, the Supreme Court agreed that the issue of a meritorious defense was not properly preserved for appeal and affirmed the Court of Appeals’ ruling. However, Chief Justice Toal issued a separate dissenting opinion, asserting that the motion to set aside the default judgment should have been granted based on surprise and misconduct, observing that the default judgment in that case was “obtained, in [her] opinion, by [the plaintiffs’] trickery and deception.”

Conclusion

Successfully defending a commercial trucking client after an accident requires a particular skill set that differs in composition from that used for a common automobile accident. The complexity and variety of commercial vehicles on the road today dictates that the practitioner is well-versed in evidence collection and preservation in a multitude of environments, including on the side of the road. Ultimately, the successful defense of a commercial trucking client oftentimes rides on the skill and experience of the litigator, who must make sure that the investigation is done correctly to ensure that the critical information is properly secured and the evidence is not altered, leaving the client to defend against spoliation claims.

Footnotes

1 Chris Daniels and Tim McKissock are equity partners and Jay Thompson is an associate in the Columbia, SC office of Nelson Mullins Riley & Scarborough, LLP. They have represented commercial carriers and other businesses in all aspects of the trucking and transportation industry.

2 Yes, Smokey and the Bandit does qualify as a classic film. If you doubt this, ask any trucker or NASCAR fan.

3 Because every commercial vehicle case is unique and complex, all suggestions in this article may not be appropriate in all cases. These suggested best practices should be taken as guidelines to be applied according to the needs of each case.

4 Event Data Recorders, Summary of Findings by the NHTSA EDR Working Group, Volume II Supplemental Findings for Trucks, Motorcoaches, and School Buses, DOT HS 809 432 (May 2002).

5 Id. § 2.3.


7 Id.


15 Id. at 88, 716 S.E.2d at 889.