The Post Accident Response - How to Win (or Lose) Your Case in the First 12 Hours

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POST-ACCIDENT CHECKLIST

1. Interview company driver (and co-driver, if there was a team) immediately, if possible, to ascertain the following:
   a. Description of the accident
   b. Location of accident and weather conditions
   c. Extent of injuries for every party
   d. Names, contact information, and insurance information of all parties involved
   e. Description/make/model/photos of license plates of all vehicles involved
   f. Any other property damage (guardrails, buildings, etc.)
   g. Photos and/or video of claimants up walking around
   h. Verify whether driver will require post-accident drug and alcohol testing

2. Speak to all claimants and witnesses, if possible

3. Speak to law enforcement personnel on scene, if possible.

4. Dispatch an Independent Adjuster as quickly as possible to the scene with instructions to:
   a. Contact all parties and conduct interviews with recorded statements
   b. Obtain police report
   c. Photograph and/or video the scene
   d. Photograph all damaged vehicles
   e. Identify all potential contributing factors
   f. Request 911 records
5. Depending on magnitude of the accident and number of parties involved, consider the following:
   a. Retention of counsel to avoid later conflict if multiple parties are involved, especially other large trucking companies
   b. Retention of accident reconstructionist and drone usage
   c. Lockdown of tractor and/or trailer
   d. Download of tractor’s safety systems (ECM, lane departure, and forward collision mitigation)
   e. Secure a litigation hold to preserve pertinent records in anticipation of litigation. These records include the driver’s logs, Qualcomm messages, position history of the tractor, driver qualification file, trip-related documents, registrations and permits for the unit, and maintenance records.

6. Conduct news and social media searches to obtain additional information about the accident, including photos, video, and potential witnesses.
   a. Facebook – Check claimant profiles and Facebook pages of local news media regarding the accident. This can lead to identifying additional witnesses or passersby who may have posted about the accident or commented on others’ posts.
   b. Twitter - https://twitter.com/search-advanced?lang=en – This advanced search option on Twitter will locate all Twitter posts or “tweets” in a certain area and provide the content of those tweets.
RAPID RESPONSE CHECKLIST

• Identify the exact location of the accident;
• Determine the owner of the tractor, trailer and cargo;
• Identify the employer of the driver, and his status (employee, independent contractor);
• Ascertain whether any environmental or hazardous conditions exist;
• Retain an approved independent adjuster;
• Locate the driver and make sure he/she doesn't speak to anyone but you;
• Determine if the driver is out of service;
• Determine if a post-accident DOT test is required (or was performed);
• Determine whether law enforcement has directed post-accident testing;
• Determine whether the carrier has independent drug/alcohol testing requirements and learn what protocols must be met;
• Discuss retention of an accident reconstructionist with the carrier;
• Determine whether a biomechanical engineer and/or other experts (conspicuity?) should be retained for scene investigation and vehicle inspection;
• Determine what ECM or other data is maintained by the carrier and if it can be accessed remotely;
• Determine the location of the tractor and protect any data;
• Direct any necessary post-accident inspections;
• Determine a reasonable hold time for the tractor and any cargo, taking into account the type of cargo;
• Interview the driver (I would not suggest allowing the independent adjuster to speak with the driver);
• Determine whether the driver needs independent counsel;
• Determine whether the driver requires criminal counsel if charges are pending or imminent (likely with new CSA rules);
• Obtain any photographs taken by driver;
• Obtain any driver accident forms completed by driver;
• Obtain a copy of any citations issued to the driver;
• Obtain copies of any statements from third parties;
• Obtain HIPAA complaint release from the driver regarding test results pursuant to §382.405;
• Identify all claimants and nature and extent of injuries;
• Determine whether toxicology testing of claimants has/will occur;
• In fatality accidents, identify funeral home and coroner and learn whether autopsies will be conducted;
• Identify all witnesses, procure statements through independent adjuster (you don’t want to be a witness later);
• Consider using a court reporter for taking statements where appropriate;
• Interview the investigating law enforcement officer;
• Interview the responding DOT officer;
• Determine what, if any, level of DOT inspection will occur;
• Obtain law enforcement officers’ field notes, measurements and photographs;
• Obtain copy of post-crash inspection report (will likely take several days);
• Arrange for accident reconstructionist to meet with investigating officer where appropriate;
• Obtain all accident reports and supplemental reports;
• Obtain all 911 reports for the time period preceding and including the accident;
• Identify all emergency responders to accident;
• Obtain run reports and call logs for fire fighters and first responders;
• Obtain photographs of scene, tire marks, debris field, signage and vehicles through independent adjuster and/or accident reconstructionist (depending on the carrier);
• Identify applicable speed limits, signage or other posted warnings;
• Obtain the sequence and timing of all relevant traffic control devices;
• Consider whether aerial and/or video photography is appropriate;
INITIAL RFP TO TRUCKING CLIENT

1. A copy of driver’s qualification file (including any PSP which may have been pulled);

2. A copy of driver’s employee file (including all disciplinary actions, drug test results or commendations);

3. A copy of employer’s employee/driver handbook;

4. A copy of driver’s logs for the preceding 6 months;

5. ECM download, if any, taken from the vehicle after the accident;

6. A complete copy of driver’s statement and accident report, if any, prepared after the accident;

7. Any photographs taken by driver after the accident;

8. A copy of your accident register for the prior 3 years;

9. A copy of all BOL’s, trip receipts, fuel receipts, etc.;

10. A copy of all Qualcomm reports for this tractor for the 3 weeks prior to the collision, if available;

11. A copy of all maintenance records for the tractor and trailer for 1 year prior to the collision;

12. A copy of any Master Equipment Lease Agreement relevant to the accident;

13. All registration/title information for the tractor and/or trailer.
14. The name and address of any brokering service used in securing this load, and
the affiliation with the Defendant(s), if applicable;

15. A copy of driver’s medical certificate and long form if available;

16. A copy of any post-accident drug test results;

17. Address and cell phone number for driver;

18. Information regarding the employment status of driver—employee, independent
operator, etc.;

19. Information regarding how the driver is paid, including pay stubs for 6 months prior
to accident;

20. A copy of any DOT inspection report or citation issued to driver following accident;

21. A copy of carrier’s most recent DOT inspection report, if applicable; and

22. Any post-accident repair estimates, invoices, bills for the tractor and/or trailer.

Please note: if you opt to send the above documentation as one document and/or
package (as opposed to multiple files), please separate the driver qualification file
and/or employee file within the package, so that we can determine exactly how the
documentation is maintained by your company in these respective files.
DRIVER STATEMENT TEMPLATE

1. Address
   a. How long at this address?
   b. Previous addresses?

2. Education
   a. High school?
   b. College/Vocational?
   c. Truck driving school?

3. Occupation
   a. How long have you held a CDL?
      i. Any suspensions?
      ii. What states?
   b. Present employer?
      i. Training?
      ii. Discipline?
   c. Prior employers?
      i. Years?
      ii. Reasons for leaving?

4. Criminal History

5. Military History

6. Driving History
   a. When was your last moving violation in a commercial vehicle?
      i. What was it for?
      ii. Did you report it?
   b. When was your last roadside inspection?
      i. What were the results?

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c. When was your last clean roadside inspection?
   i. Where did it occur?

7. Cellphone
   a. Personal?
   b. Work?
   c. Number?
   d. Provider?
   e. What type?
   f. Were you using it prior to the accident?
   g. What is the cell phone policy at your company/company that owns your tractor?
   h. Do you have a hands free device?

8. Last reset prior to accident?
   a. When was it?
   b. How long had you been driving at the time of the accident?
   c. How long did you drive each day from your last reset until the time of the accident?
   d. How do you keep your logs (electronic vs. paper)

9. Alcohol/Drugs
   a. Did you consume any on the date of the accident?
   b. Did you submit to post-accident testing?
   c. Have you ever failed or refused to take a test?

10. Sleep
    a. When is the last time you slept prior to the accident?
    b. For how long?
    c. Any medical conditions (sleep apnea)?
d. Fitbit?

11. Wake up
   a. What time did you wake up?
   b. What did you do?

12. Meals
   a. Did you eat prior to getting in the truck?
   b. What did you eat?
   c. When did you eat?
   d. Take any medication?

13. Calls
   a. Did you make any calls prior to getting in the truck?
   b. To whom?
   c. Did you receive any calls?
   d. From whom?

14. Dispatch
   a. How are you dispatched?
   b. Does the dispatch include the route?
   c. Are you on a dedicated route?
   d. Are you free to choose your own route?

15. Pre-trip
   a. Was this the truck you always drove?
   b. When was the last time you had it in for maintenance?
   c. Pre-trip Inspection
      i. How long does it take?
      ii. What do you do?
      iii. Do you chart/record inspections anywhere?

16. Load
a. Where were you last loaded?

b. What were you carrying at the time of MVA?
   i. What was total weight?

c. When did you last weigh?

d. Were you overweight?

17. Destination
   a. Where were you headed?
   b. What time were you required to arrive?
   c. Where were you ahead/behind schedule at the time of the accident?
   d. Had you been to this particular facility before?
   e. Would you be required to assist in unloading?

18. Route
   a. What goes into planning your route?
      i. Tolls, weigh stations, traffic
   b. GPS?
   c. What route were you taking?
   d. Did you make any changes in your route after the trip started?

19. What happened?
   a. How did the accident occur?
   b. What did you try to do to avoid the accident?
   c. Did you consider what types of accidents could happen?
   d. What was your estimated speed at the time of impact?
   e. Where were you looking at the time of impact?
   f. What, if anything, could you have done to prevent the accident?
   g. If you could go back and do it over again what, if anything, would you change?
   h. When did you first see plaintiff’s vehicle?
   i. Were your trailer lights on?
j. Were your flashers on?
k. Did you exit the truck to check on traffic/blind spots?
l. What were you taught about backing across a highway?
m. What were traffic conditions?
n. What were lighting conditions?
o. Did you consider any other course of action?
   i. Were there other options available?
p. What was the speed limit?
q. Were there any signs in the area?
r. Did you stop at all prior to the MVA?
s. Did you sound your horn?

20. Impact?
   a. Where was the impact?
   b. Did you take photographs?
   c. Was your truck/trailer clearly visible?
   d. Describe the force of the impact.
   e. What, if anything, did you see immediately prior to impact?
   f. Was the tractor/trailer pushed in any direction?
   g. Did you see any skid marks at the scene?
      i. Did you take any measurements or photographs?
   h. Did you hear any squealing tires, screeching brakes, or anything else?
   i. What do you think caused the accident?

21. Who did you talk to?
   a. Plaintiff(s)?
      i. Did you attempt to render aid to plaintiff(s)?
      ii. Did you ask him what happened?
   b. Police?
      i. How many officers arrived?
ii. How many did you talk to?
iii. What did you say?
iv. What did they say to you?
v. Were you issued a citation?
c. EMT?
   i. How many EMT/paramedics arrived?
   ii. How many did you talk to?
   iii. What did you say?
   iv. What did they say to you?
d. 3rd party Witnesses?
   i. How many witnesses did you see?
   ii. How many did you talk to?
   iii. What did you say?
   iv. What did they say to you?
e. Did you call dispatch or anyone else before the police arrived?
   i. What did you say?
   ii. What did they say to you?
f. Did you overhear anyone else talking?
   i. What did they say?

22. Did you receive any citations?

23. Did you see any injuries?
   a. Did anyone leave in an ambulance?
   b. Were they conscious?
   c. What else did you observe?

24. Post-Accident?
   a. Did you take pictures?
   b. Draw a diagram?
c. Take any measurements?

d. Did you have an accident package in the truck?

e. What does your training tell you about what to do when involved in an accident?

f. Have you seen the police report?

g. Did anyone else come out to perform an investigation while you were there?

h. Has anyone else tried to contact you about the accident?

i. Were you disciplined as a result of the accident?

j. Was this a chargeable/preventable accident?

k. Was there an inspection of your tractor/trailer/paperwork?

l. Were any citations documented?

25. How did you get home?

26. When did you last drive?
   a. Have you been involved in any subsequent accidents?
   b. Have you received any subsequent citations?
LITIGATION HOLD LETTER

Dear [PLAINTIFF’S ATTORNEY],

As you may be aware, my law firm represents [DEFENDANT(S)] in defense of anticipated litigation arising from a motor vehicle accident which occurred on or about [DATE] in/at [LOCATION]. We specifically request that the following information, documents, and potential evidence be maintained and preserved and not be destroyed, modified, altered, repaired, or changed in any matter:

1. The vehicle you or your client was operating or was riding in as a passenger at the time of the accident (“vehicle”);

2. Maintenance, inspection, and/or repair records or work orders on the vehicle and for a six-month period preceding the accident;

3. Photographs of the vehicle and any other vehicles involved in this accident, or of the accident scene;

4. Any post-accident alcohol and/or drug testing results;

5. Any data or printout from on-board recording devices on the vehicle, including but not limited to ECM (electronic control module), EDR (event data recorder), ACM (air-bag control module), SDM (sensing and diagnostic module), PCM (power train control module), or other device;

6. Any post-accident maintenance, inspection, or repair records or invoices with regard to the vehicle;

7. Any emails, electronic messages, text messages, voice mails, voice mails converted to text or electronic messages, letters, memos, or other documents concerning this accident;

8. Any driver manuals, guidelines, rules or regulations in the possession of your client prior to the accident;

9. Any medication, prescription or over-the-counter, bottle(s) in your client’s possession on the date of the accident;

10. Any and all items in or upon the vehicle at the time of this accident, including but not limited to receipts, medications or medication dispensing containers (including any warnings or labels), liquid containers of any sort, clothing, shoes, documents, electronic devices, radar detectors, GPS/navigation systems, prescription or non-prescription eyewear, traffic or parking violations, vehicle registration, licenses plates, or other tangible items.

We would like to set up a mutually convenient time for our expert to inspect, examine, and conduct tests on the vehicle. We specifically request that you make no repairs or adjustments to the vehicle until this inspection is completed. Kindly respond within ten (10) days of your receipt of this letter to set up an inspection time.

Courtesy of David Soldo of Morris James LLP
A DISPATCHER CALLS

You just received a call from a dispatcher, one of your trucks was just involved in a moderate to major collision. What now? Having your “Go Team” selected prior to this call is crucial in getting the right people to the scene to collect information and evidence that will be needed down the road.

Collision Reconstructionist Perspective

In cases where there is moderate to major property damage and/or personal injury, it is extremely important to get a collision reconstructionist to the scene as soon as possible. Evidence can dissipate quickly and a qualified trucking collision reconstructionist can collect and preserve this evidence for later use in reconstructing the collision.

If the reconstructionist is able to arrive at the active collision scene, he or she has the opportunity to talk with the investigation officer about his findings and observations while it is still fresh in their mind. It may also be possible to get a copy of any photographs the police took or at least who the contact person is to obtain the photographs at a later date.

Scene Evidence

Scene evidence can deteriorate rapidly, depending on traffic volume, road conditions, weather and other factors. Scene evidence can include;

- tire marks,
- fluid stains,
- roadway gouge and scrape marks,
- off road tire ruts and gouges in the ground,
• vehicle parts,
• damage to poles, guardrails, and other structures, and
• video from surrounding surveillance cameras.

The collision reconstructionist uses traditional and more modern technology to collect the scene evidence. A digital camera is the first item used to collect information, especially at an active collision scene. Once the scene has been cleared and it is daylight, other methods; total station, 3D scanner or an Unmanned Aerial Vehicle (UAV or drone) are used to document the scene evidence. Drones are the newest technology in collection of collision scene evidence. Drones take great overhead photographs of the scene (Photograph 1), and those photographs can be used to make a 3-dimensional point cloud (Photograph 2). One issue with drones is getting the paperwork FAA NOTAM’s, submitted to the FAA for approval to operate the drone at the collision site. Preparation of the NOTAM’s and FAA approval can typically be obtained within 1 to 1.5 hours. Initial FAA approval may be denied if the collision site is within 5 miles of an active airport, within restricted flight zones, or military operating area. Approval may be obtained but will require a waiver, which can require more time to obtain. The other major issue with drones is the limitation that drones cannot be flown over anybody not associated with the flight. Therefore, great care has to be taken when flying drones around roadways not to fly over moving vehicles on the roadway. The pilot will fly next to the roadway and only cross the roadway when no vehicles are passing by.

Photograph 1
Drone photograph of collision site.
Photograph 2

3D point cloud from drone photographs.

Vehicle Data

Vehicles also record data that can be lost or overwritten. The engine control units (ECUs) in commercial vehicles can record event data. Most ECUs record data during sudden
decelerations. Detroit Diesel, Mercedes-Benz, Mack, Volvo, and International ECUs record last stop data. Last stop data will be overwritten if the truck is started and driven. Many times the only data recorded during the collision is the last stop data; therefore, it is recommended to have the commercial vehicle towed from the scene and not driven until a qualified reconstructionist can download the ECU(s).

In addition to ECUs, data can be recorded by collision warning / mitigation systems such as the Bendix’s Wingman Advanced and Wingman Fusion systems, and Meritor-WABCO’s OnGuardACTIVE and OnLane systems. Again, this data can be collected by a qualified reconstructionist with the proper hardware and software.

The vehicle may be equipped with an aftermarket drive cam system. That video can be extremely important in determining what happened in the seconds before the collision. The video may be forward looking only or include a cab view. The cab view can give an indication of when the driver started to perceive and react to a hazard.

Aftermarket GPS systems such as Garmin record data regarding the last several trips. This data may include ‘breadcrumbs” that have GPS location and speed along the path of the vehicle.

Fleet management systems also record data that can be useful in evaluating a collision. This data is typically provided to the reconstructionist by the trucking company.