



CATASTROPHIC LOSSES NOT CATASTROPHIC LITIGATION: A PROCESS TO GUIDE MOTOR CARRIERS THROUGH THE FIRST CRITICAL HOURS AFTER A WRECK

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Truck and mini-van on its way to a Little League game. Significant injuries, police at the scene. Obviously there is a family out there that is in both physical and emotional pain. However, we can forget that our client and its driver are dealing with many of the same fears and emotions. All too often our minds leap forward into advanced “anticipation of litigation” mode and miss the fundamentals of establishing a foundation of both compassion and consulting that can result in an early resolution of a potential catastrophic claim.

The last thing the real client (the transportation company owner, the guy that pays the premiums) wants to hear is that “a lawyer is on the phone” and the word litigation is being discussed. What the client needs to know at the outset is an answer to straightforward and not too complex question: what really happened. This question is answered by the rapid response team (“RRT”).

Once the RRT answers the question, the company, its claims personnel, and its insurers collaborate to consider the possibility of pre-suit resolution to avoid the resource drain and uncertainties of litigation. This approach is smart. There is a better way than waiting for the complaint to be filed, answering the same interrogatories, deposing the same types of individuals, collecting the same medical records, filing motions to compel discovery, and then settling the case two to three to four years after the collision: pre-suit settlement, which can take place within hours or days of the collision.

Pre-suit settlement meetings are not easy. The value of a person’s injuries or life hours or days after the collision is a difficult subject to discuss. Grief, sorrow, anger and resentment can interfere. It takes a special approach to maneuver around these settlement

Phone call. Collision.

roadblocks to get a “Yes” answer from the injured to a settlement offer. Though no two settlement meetings are alike, certain factors predominate that motor carrier claims personnel should consider and employ to increase the likelihood of a successful early settlement.

1. What types of cases should be mediated

Most industry claims professionals will tell you that they start thinking about pre-suit mediation once they have a handle on the injuries, or they can tell early on in the investigation that they are facing a high six figure to seven figure matter. However, industry professionals should be careful not to downplay injuries that appear to be soft tissue or garden variety based on the police accident investigation report or emergency room records. Too often medical records several months after the collision reveal bulging discs, herniated discs, pain management and other injuries. These types of injuries are appropriate for early settlement discussions as well because it would be foolish not to consider a herniated disc a life-compromising injury. A phone call or two to the attorney representing the claimant *before suit is filed*

may resolve the suit and save considerable expenses and attorneys’ fees.

2. Preparation

Preparation starts once the driver’s call reporting the collision is received. Trucking company personnel must identify the issues involved and what evidence will have to be collected at the scene immediately. Preparation takes several forms, but can include:

- **“Physics First”:** obtain as much information, as soon as possible, within the first 24 hours to reconstruct how the collision happened. Hire

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preventability to mean that “but for” the actions or inactions of us or our driver the accident could have been avoided.

It is strongly recommended that the motor carrier keep completely separate all information collected and data recovered which is strictly objective from any subjective, opinion or other entries. The preventability file should include two separate and distinct data collections: (1) the factual file; and (2) the opinion or causation file. It is hoped that segregating these two distinct collections of data will make it clear to someone who is later reviewing the files that the subjective file should be inadmissible and not discoverable.

Motor carriers are encouraged to work with legal counsel to determine the following:

1. Whether a preventability determination should even be engaged in?

2. What purpose does it serve? Are union, discipline, safety bonus or other considerations paramount?
3. How best should the preventability process be conducted? What records should be kept? Who will control the process?
4. Will the analysis in fact lead to changes in the motor carrier’s operation, training, and hiring/retention of personnel, which will have beneficial effects?

Obviously, judicial determinations of the admissibility of preventability determinations will be up to individual state and federal judges. However, it is hoped that this article will shed some insight as to arguments for and against admissibility. It is expected that the body of reported decisions will increase as trucking litigation, and the attendant admissibility arguments, increase. ⚖️

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an accident reconstructionist to gather road and vehicle data, skid marks, and weather data before it changes or is destroyed. Further, leave the accident reconstructionist alone to recreate the collision. Though outside counsel are important members of the RRT, accident reconstructionists must arrive at their conclusions *independently*. Consider separating counsel and the reconstructionist, or limiting their involvement, during these first hours. Secure, examine and document the vehicles, ECM, GPS and other technological data. Trucking companies cannot hide from this evidence and other data that might reveal that the driver caused the wreck.

- **Speak to the Trooper:** troopers, whether state or local, will almost never speak to you over the phone; “when the report is ready” is the typical response you get. Get in front of the trooper, face-to-face, within a day or two to ask questions, in order to obtain a sense of the trooper’s preliminary fact findings. If the accident reconstructionist has developed a video, diagram, or model of the collision scene, share it with the trooper if you believe that you will share this information with the claimant (which you almost always do).
- **Talk to witnesses:** eyewitness testimony has to be obtained and contained as soon as possible, *before* a plaintiff’s attorney identifies and speaks to the witnesses. Eyewitnesses include 911 callers. These witnesses have some of the most important information about how the collision occurred, how the drivers reacted, the position of the vehicles, etc. The interviewer, whether counsel or a claims investigator, must prepare for the interview. The interviewer must understand how the collision occurred in order to understand the witness’ version of how the collision occurred.
- **Talk to the driver:** hopefully you were able to sequester the driver before the police spoke to him. If the trucking company will represent the driver, counsel must conduct the interview to protect the interview from disclosure under the attorney-client privilege. During the interview, confront the driver with the facts. If the Garmin indicates a pre-impact speed of 51 MPH in a 45 MPH zone, present that information to a driver who claims a speed within the speed limit. Provide support to the driver, but explain the company version of the collision sequence based on the evidence. Make sure the driver is forthcoming about what happened because the trucking company client must know before suit is filed whether it can litigate this case with

this driver as its main witness. If the accident reconstructionist's video, diagram or recreation is available, show them to the driver. Before speaking with the injured motorist or the family, trucking company personnel must be satisfied with the driver's collision recreation. If any data exists to subvert that recreation, confront him with it.

3. Investigate the Injured Motorist or Family

Before participating in any settlement meeting, the trucking company must investigate the injured motorist. Check social media such as Facebook and Instagram. Review obituaries for information about the family representatives who might attend the meeting. Obtain information about the injured person's employment and education, religion, driving history, alcohol intake, marital status, property ownership, etc. If available, collect medical records and emergency response records. Have the accident reconstructionist provide a preliminary opinion on speed, braking distance, perception, and factors for why the collision occurred. For formal mediation sessions, obtain medical lien information. Lien holders can roadblock a settlement until the liens are satisfied in full or compromised. Determine the amount, if any, of the injured motorist's wage loss claim.

Finally, the company representative should understand the company's practices, applicable regulations, including hours of service, and at least appreciate the impact of the forum state's comparative negligence laws.

4. Who should attend?

The right person(s) to attend a pre-suit settlement meeting is anyone who can get the matter/dispute settled. Several options exist: insurer, claim personnel, the owner/operator, risk management specialist, corporate representative, or third-party claims consultant with experience resolving catastrophic injury claims. However, the attendee(s) should have certain traits to promote settlement potential:

1) Compassion, Communication and Listening

Arguably the most critical element of a successful mediation is compassion. Motor carrier personnel should genuinely express their sorrow and exhibit empathy. Say you're sorry for what happened, the motorist's injuries or the family's loss. Compassion influences the resolution of catastrophic commercial motor collision cases because it dictates who attends

the settlement session. If the owner of the company lacks the ability to connect with people, the owner's attendance may be counterproductive to resolving the case; the owner should stay away. Thus, the proper corporate representative with the skills and personality to effectively resolve claims should attend the meeting, thereby increasing the likelihood of settlement.

So much of demonstrating compassion is listening and communicating. The injured motorist may want to vent frustrations about why the collision happened, how the company's driver could drive so negligently, and how their injuries have destroyed them and ruined their lives. The company representative has to calmly and passionately listen and express genuine sorrow, compassion and empathy, yet effectively convey the company's position on settlement.

If your driver caused the wreck, consider admitting liability at the settlement session by stating:

We believe that we might be responsible for this accident, but we will contest it if you sue. A jury or judge will finally determine who is responsible. However, for purposes of today, in order to put this behind all of us, I am going to accept full responsibility for the accident.

Nothing builds credibility more than honesty.

2) First Impressions Are Key

This maxim applies to mediation as it does to job interviews. The first word out of the company representative's mouth are critical:

My name is John Smith. I am the Director of Safety for Trucking Company, the owner of the vehicle involved in the accident. I am very sorry for your loss. Together we are involved in this tragic loss. I would like to take a couple of minutes to talk with you, to express my condolences upon behalf of myself, our driver, John Doe, and our company. I want to tell you what I know and help you put the pieces together. Again, we are very sorry for what has happened.

5. Humanize the Company

People. Trucking companies are people who work to accomplish a goal—transport goods from state to state, collect garbage, excavate construction sites, etc.

Most people, *i.e.*, those who do not derive income from working for or at a trucking company, hate trucks, truckers, and trucking companies. They have similar feelings for insurance companies. Thus, the company representative has to explain that the company's people (and its insurers), especially the driver, are thinking about the injured person, praying for them, and have had them in their thoughts since first learning about the collision. This task is especially difficult but crucial if a pre-suit resolution is to be reached. This factor equally applies to formal mediation conducted after a suit is filed.

6. Share what you know

The trucking company typically has more information about the crash and crash investigation than the injured motorist, especially before the motorist hires an attorney. Share what you know: discuss the police report, what the weather was like, how you believe the collision happened. If the driver is not at fault, tell the family representatives that by explaining what the investigation has revealed. Building a rapport with the injured motorist and family representatives will facilitate settlement discussions.

7. "We want to help"

There is nothing a trucking company can do to relieve the injured motorist's pain and suffering. It cannot replace the lost loved one. It can help in only one way—by paying money. Offering to pay for ambulance transportation expenses, emergency room bills, and funeral expenses is a start. However, be prepared to talk "real dollars" at the first meeting.

Informal and formal settlement discussions collapse immediately when the trucking company is not prepared to discuss dollars. The discussion is delicate:

We also want to talk to you about resolving this matter. I know it is very difficult to think about money at this time, and no one can truly put a dollar amount on anyone's life, but if you decide to sue, which you can, your attorney will do just that. He or she would ask a jury or judge to award you money for your loss.

However, to get to that point, will take at least 2 years, if not more. There will be more pain associated with that as you have to live through these memories. We want to help you now. We are willing to pay you money now

to compensate you for your loss. There will be the benefit to you of not having to go through a lawsuit. There will be benefit to our driver to not have to go through a lawsuit. And there will be a benefit to us as well.

It helps to encourage them to think about what has been discussed. Further, offer to speak to their trusted advisor, a priest or rabbi, or other influential person in their life to explain what the company has offered.

Conclusion

Catastrophic litigation should be avoided like catastrophic accidents; the latter does not automatically have to yield the former. Early settlement discussions allow trucking companies to avoid committing unnecessary resources to document collection, record productions, answering discovery, sitting through depositions, hiring experts, and trying a matter, potentially two to three years or more after the collision. Because the how and why a collision happened are largely static—the facts rarely change once the scene is cleared, trucking companies should not hide from bad collision scene facts discovered during a RRT investigation. The better approach is to address the facts head on. Don't run from them.

Of course, some collision investigations will reveal that the driver is not at fault. Some claimants may prove too unreasonable to settle. These circumstances exist. However, early settlement should be considered to determine if the claim is appropriate for settlement. Thus, successful early resolution of catastrophic injury claims starts immediately after the trucking company representative hangs up the phone with the driver. As the process unfolds, the company and its counsel must gain insight into the how and why (of the collision) to determine the now (whether the matter should be settled). If that is the conclusion, and it might be, pursue settlement hard to avoid the resulting catastrophic litigation. ⚖️

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