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Investigation of Trucking Accidents

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INVESTIGATION OF TRUCKING ACCIDENTS

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ADVANTAGE OF LAWYER-LED INVESTIGATIONS

- Large losses/catastrophic injuries
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A major accident involving one of your vehicles will often occur at the most inopportune time. Nonetheless, it is crucial that you take immediate action to ensure proper handling of the investigation such that critical information and evidence is preserved.

Investigation of any accident from which litigation is likely to arise, should be directed by the lawyer from the outset. As such, retainment and consultation of legal counsel should be one of the first steps taken. The lawyer will have a ready stable of adjusters, accident reconstructionists and other experts that can be called upon for assistance. Initial contact with and direction to an expert should come from the lawyer, as this may make the critical distinction between communications ultimately being classified as privileged or not.

As a general rule, any communication between you and your lawyer, as well as any investigation directed by your lawyer can be protected as work product under litigation privilege. Even work performed by experts, including the adjuster, may be privileged and protected from disclosure, if initially engaged and directed by your lawyer. However, the court will look very closely at the circumstances giving rise to reports, statements and the like. Materials and reports prepared independently by a witness, or those which are prepared or requested by a representative of the insurer, especially those early on in the investigation, will garner greater scrutiny by the courts and place greater risk on privilege status.

Following retainer of your lawyer, an action plan should be put into place. Ensure your lawyer completes or directs the following to be completed, within the first 30 minutes of being informed:

- Collect as much information about the accident as possible, including the location and time of the accident, vehicles involved, and contact particulars of your driver/employee.
- Make contact with the driver and assure him that the lawyer is retained to represent both the company and the driver personally. If the driver has already given a statement, determine to whom he gave it. Obtain the driver's statement, whether already provided to another party or not. Advise him not to give a statement or any further statements to others without the lawyer present. Insofar as any drug or alcohol tests may be requested by authorities, instruct the driver to cooperate.
- Retain an independent adjuster and/or accident reconstructionist, who should be sent to the accident site to:

- Locate and isolate the driver if possible until the lawyer can speak to or meet with him.
- Identify and collect contact information of all potential claimants and witnesses.
- Record all agencies and their individuals, including police, fire, EMS, Coroner's Service, TSB, WorkSafeBC, and others who attended at the accident site.
- Thoroughly photograph the accident scene, including all emergency personnel and their vehicles, witnesses, road signage, the road itself and the approaches to the actual point of collision.
- Interview and obtain statements of those involved and those who witnessed the accident or events leading up to it.
- If an accident reconstructionist is engaged, take all relevant measurements of the road and map the scene, including the vehicles involved. Collect electronic control modules (ECM) or download the data, if possible.

Trucking accidents often produce severe consequences. Injuries can be catastrophic if not fatal, and the value of the property lost or damaged can be substantial. While an accident may be due to driver error, proper investigation will often reveal that other factors may be the cause or at least contribute to it. Given that the trucking company and its insurers are usually seen as being robed with "deep pockets" it is crucial that the company and its driver be aggressively defended in order to do away with litigious inclinations.

It is imperative that appropriate steps be taken by counsel, parties and witnesses to gather all relevant information and to safeguard the evidence. The collection of this evidence ought to be conducted in realization of the afore-mentioned issues so that the information can be protected from disclosure where permitted, and to prevent the claimant from obtaining excessive judgments.

While such efforts may not permit you to protect all of the collected information, following the suggested course will put you in a much better position to assess the issues and take appropriate and timely action. Such proactive behavior will be welcomed by your insured.

PRIVILEGE

- Litigation Privilege Generally

Litigation privilege provides a "zone of privacy" that protects from disclosure those documents created and used in the process of preparing for or engaging in litigation. Within that zone, litigants or their advocates can investigate, prepare and develop their respective positions and strategies, free from the intrusion of their adversaries.

Litigation privilege ensures that a party, insurer or solicitor may, for the purpose of preparing for legal proceedings, proceed with complete confidence that the information or material gathered for this purpose will not be disclosed to opposing parties. The claim for privilege extends to "interviews, statements, memoranda, correspondence, briefs and mental impressions".[1]

- Document Production and Litigation Privilege

Document production is a crucial step that can significantly direct the outcome of legal proceedings. It calls for sound knowledge of legal principles, readiness to investigate the relevant facts and good judgment. Unfortunately, counsel have a limited degree of control over which documents can be protected from disclosure. Actions taken before counsel become involved in proceedings have a far more significant impact on determinations of privilege and production. Accordingly, it is essential for all claims handlers to consider production and privilege concerns even at the earliest stage of any claim that has a prospect of proceeding to Court.

A more informed understanding of the law with respect to privilege and production issues may allow claims handlers to fully appreciate the importance of considering privilege issues at an early stage of the claims process.

- Litigation Privilege is different than Solicitor-Client Privilege

Solicitor-client privilege generally applies only to confidential communications between the solicitor and client and may or may not concern litigation, while litigation privilege may apply to a considerably greater variety of communications but always concerns litigation.

An appreciation of the rationale behind these two forms of privilege is helpful in understanding their application. In *Blank v. Canada (Minister of Justice)*, 2006 SCC 39

[1] *Hickman* v. *Taylor* 329 U.S. 495 (1947), as approved by the Supreme Court of Canada in *Lizotte c. Aviva Cie d'assurance du Canada*, 2016 SCC 52 at para. 53.

at para. 28, Fish J. of the Supreme Court of Canada cited R.J. Sharpe's "Claiming Privilege in the Discovery Process":

> […] The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.
>
> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded solicitor-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversarial process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

- The Test
    - Reasonable prospect of litigation
    - Dominant purpose

The requirements for litigation privilege are that the documents in question must have been created (1) in contemplation of litigation which is "in reasonable prospect", and (2) for the "dominant purpose" of use in litigation.[2] Accordingly, adjusters' reports are privileged only where the dominant purpose of the report is to aid in the conduct of the litigation, and not where that dominant purpose is to decide whether to honour a claim. Further, the mere fact that an adjuster's report *may touch upon* matters relevant to the *possibility* of litigation is likely insufficient to establish that its dominant purpose was to aid in the conduct of litigation.[3]

In *Shaughnessy Golf & Country Club v. Uniguard Services Ltd.* (1986), 1 B.C.L.R. (2d) 309 (CA) at p. 17, the British Columbia Court of Appeal noted that the recognition on the part of an adjuster that litigation was a possibility was insufficient to maintain a claim for privilege over the reports prepared by the adjuster:

> The fact that litigation is a reasonable prospect after a casualty, and the fact that that prospect is one of the predominant reasons for the creation of the report is now not enough. Unless such purpose is, in respect of the

2 *Hamalainen* v. *Sippola*, [1991] B.C.J. No. 3614 (BCCA).

3 *Shaughnessy Golf & Country Club* v. *Drake International Inc.*, [1986] B.C.J. No. 266 (CA) at p. 17.

> particular document, the dominant purpose for creating the document, it is not privileged.

In order to ensure that best efforts are made to cloak adjusters' reports with the safety of privilege status, all claims handlers should consider employing the following 5 key practices at the immediate receipt of any claim:

1. Document any Notice Respecting Legal Proceeding

The clearest indication that legal proceedings are within the reasonable contemplation of a party, and that litigation privilege may thus be triggered, is likely the receipt or delivery of notice respecting a potential court action (an "Action"). In preparing to defend a potential claim, claims handlers should make particular note of any notice received from the opposing party respecting an intention to proceed with an Action. In a subrogated context, it is important to consider whether privileged claims can be strengthened by delivering early notice to opposing parties respecting potential legal proceedings.

That said, it is not enough to simply receive or deliver notice of legal proceedings to ensure that all documents created thereafter will be privileged. Every document will be individually assessed to determine whether it was prepared in connection with the dominant purpose of litigation. However, to strengthen the assertion of privilege claims, claims handlers should preserve initial documents communicating intentions to proceed to an Action and should refer to those notice documents at the outset of any report created for the purpose of preparing for a potential Action. For example, an adjusters' report that opens as follows should assist counsel in arguing that a privilege claim over the document in question should be maintained:

> "Further to receipt of John Doe's letter of April 30, 2008 indicating that he is seeking the advice of counsel to proceed with a claim against your Insured, we have completed the following investigation and obtained statements from Bill and James".

Claims for privilege over adjusters' files have been more successfully upheld in cases where it is clear that the adjuster was taking steps as a direct result of a notice respecting potential litigation.[4]

2. Involve Counsel

While it is not necessary for adjusters' reports to be addressed to counsel to maintain claims of privilege over those reports, the early involvement of counsel is certainly a factor that a Court will consider when attempting to determine whether litigation privilege should apply to protect the confidentiality of documents. Privilege claims can be enhanced in circumstances where counsel have instructed the adjuster, and where adjusters' reports are addressed and directed to counsel.

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[4] *Catherwood v. Heinrichs*, [1996] B.C.J. No. 1971 (CA); *Raven* v. *City of Kamloops,* [1999] B.C.J. No. 1853 (SC).

In *Martin v. Blackcomb Skiing Enterprises Ltd.*, 2001 BCSC 1640, the Court considered an application by the plaintiff for production of adjusters' reports, and found that all reports prepared prior to the involvement of counsel were not privileged and had to be produced. Of particular interest, the adjuster and plaintiff had been attempting to negotiate a settlement of a personal injury claim throughout the entire period in which the adjusters' reports in question were being prepared, though both thought that a settlement could be negotiated without resorting to litigation. This case offers strong support for the proposition that involvement of counsel is a key consideration when determining privilege issues. Documents are not privileged unless they are truly prepared in contemplation of litigation. Actual litigation must be in the contemplation of parties before a claim of litigation privilege will attach; it is not enough to simply be involved in settlement negotiations and/or discussions respecting liability and quantum. The involvement of counsel makes it much more obvious that a party is acting under an assumption that there is in fact a real prospect of litigation.

The size and sensitivity of specific claims will govern all decisions respecting the manner in which a claim is handled. That said, if the value or sensitivity of a particular case is significant enough to make it worthwhile, claims handlers should consider involving counsel even before retaining an adjuster. While such a step will not protect documents that are not truly prepared in contemplation of litigation, claims of privilege over adjusters' files will be strengthened through the early involvement of counsel. Further, costs can still be controlled by instructing counsel to simply identify key issues respecting potential litigation, providing initial instructions to the adjuster, and then asking counsel to abey their file until the adjuster has had an opportunity to carry out all instructions.

3. Create Separate Files

There will be cases where an adjuster is required to perform duties and prepare reports that contain some information that should properly be privileged, and other information that will need to be produced to opposing parties. The most common situations that result in a mix of privileged and producible information and evidence involve cases that include both a first party property claim and a liability issue, and cases that require an assessment of coverage or the scope of coverage before or while a related liability issue is being addressed. Under such circumstances, information and documents relating to the first party property claim and coverage issues can be ordered to be produced by a court, while documents prepared for the dominant purpose of addressing liability concerns should remain privileged. In practice, separating information in documents upon receipt of an adjuster's file can be extremely difficult and, at times, impossible.[5] As a result, such situations can result in an order for the production of sensitive documents, including statements from the insured or third parties, photographs and even expert reports.

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[5] In *Kaiser* v. *Buften's Flowers Ltd.,* [1993] B.C.J. No. 1695, the Court specifically acknowledged that adjusters' reports and materials are often prepared for more than one purpose, and that it is not always clear which is the dominant purpose.

To strengthen privilege claims and protect against surprises respecting orders to produce documents that a party may have thought should be privileged, claims handlers should consider retaining two adjusters on sensitive claims containing multiple issues, or should instruct the adjuster to keep two separate files. An adjuster retained solely to address first party property or coverage issues should be aware that all documents within their file will likely be produced. Similarly, an adjuster that keeps two separate files, one for liability issues and the other for first party property or coverage, will know that materials prepared for the property/coverage folder, and reports pertaining to those issues, will eventually be delivered to the opposing party in legal proceedings.

4. Exercise Caution when Investigating Pursuant to a Liability Policy Only

Care should still be taken when an investigation is being completed pursuant to a liability policy alone, even in circumstances where there are no issues respecting first party property or coverage claims.

In *Wuest v. C.N.K. Holdings Ltd.*, [1996] B.C.J. No. 2880 (SC) [*Wuest*], the Court stated that:

> In my view, when we are only talking about liability insurance here, then that is the end of it. There is no need for the insurance company or the defendant or the adjuster to eliminate any other potential purposes for the investigation, simply because in a case of liability insurance there cannot be any ultimate purpose other than the investigation of potential liability. There is no reason for liability insurers to pay a penny to do anything unless the reason is apprehended litigation against their insured, and if there can be no other purpose, there is no need to eliminate such other theoretical purpose.

That said, the Court came to an opposite finding in *Raven, supra*. In *Raven*, the defendant began to investigate an incident after an employee of the defendant noticed an article in the newspaper reporting a significant personal injury. In response to this media report, and in an attempt to find out more information, the defendant's insurers became involved, an adjuster was retained and a number of significant documents were prepared. The Court, in considering an application for production of documents, found that the "investigation" documents (i.e. the adjuster's file) were not created for the dominant purpose of litigation, but rather for "information gathering". Accordingly, there is still a risk that documents may be deemed producible even in circumstances where adjusters are investigating under a liability policy alone.

The Court in *Raven* distinguished the *Wuest* case on the basis that, in *Raven*, neither the plaintiff nor the plaintiff's lawyer had advised the defendant of possible litigation. In fact, the Court in *Raven* at para. 13 explained:

> In this case, there is no evidence of direct involvement by counsel for the Plaintiff when the adjuster's first report was created. There was no notice at all from the Plaintiff that a claim was contemplated.

5. Engage Only Independent Experts

It is essential to ensure that all experts retained to prepare evidence respecting a particular claim are truly independent, and have had no prior involvement respecting the loss in question. If an expert has had prior involvement respecting the loss, their entire file, and not just their final report, may be ordered to be produced at the outset of legal proceedings.

Consider the following scenario:

> There is a significant collision between commercial and private vehicles on the Trans-Canada highway, resulting in property damage to either a vehicle insured by Underwriters, to cargo or to other property damage covered under your policy. Perhaps the collision also included a significant personal injury or death, triggering an investigation by the Coroner's Service, WorkSafeBC, and the RCMP. Throughout the course of completing their investigations, these agencies will discuss the incident with a number of experts, and allow access to physical evidence to those experts.

Under the circumstances detailed above, all experts that have been involved in the "initial investigation" have collected evidence and presumably prepared documents that will likely be required to be produced at the outset of legal proceedings. Further, opposing counsel may have significant opportunity to discredit such experts that later provide reports to be used in legal proceedings as counsel will not have had sufficient control over the facts and assumptions upon which the expert report was based.

Conclusion

The best defense against increased production of investigative materials and analyses is to be aware of when litigation privilege is likely to arise, to take steps to attempt to trigger privilege, and to attempt to separate tasks based on whether documents prepared to address those tasks will benefit from privileged status. All claims handlers should be aware of potential litigation triggers in order to strengthen privilege claims and protect against surprise production orders. Further, be aware and exercise caution when preparing documents that will likely be delivered to an opposing party throughout the course of litigation. There are no guarantees that a Court will see litigation privilege arising as early as you believe it attaches, but the tips and strategies detailed within this article may assist in ensuring that privilege is extended as far back in time as possible.

RETAINING EXPERTS

Different experts will be required depending on the mechanics and complexity of the collision. Counsel play a crucial role in determining what evidence will be required and assessing which experts should be retained. Proper retainment of experts, and communicating instructions on their investigations, management of files and compliance with Rules of Court, including service requirements, will help minimize issues in effectively presenting their evidence.

Accident Reconstructionist/Biomechanical Engineer

Vehicle collisions provide three types of physical data (1) damaged vehicles (2) skid marks (or accident site damage); (3) injuries to people. Accident reconstructionists are biomechanical engineers and can assist in understanding the mechanics of a collision.

i.) Role of an Accident Reconstructionist in a collision case:

Reconstructionists conduct in-depth collision analyses and reconstruction to identify causation and contributing factors to collisions, including the following:

1. Determine areas of contact and measure the severity of the damage. The orientation of the vehicles at impact can be determined by matching the damaged areas of each vehicle.

2. Estimate the speed of one or both vehicles on the basis of physical evidence. There is a wide array of electronic data available with which your expert should be familiar (ECMs and the data arising therefrom is discussed below).

3. Determine whether the driver(s) had time to take action to avoid a collision and what actions were available.

4. Determine whether the vehicle systems were in proper running condition.

ii.) Role of a Biomechanical Engineer in a collision case:

Biomechanical Engineers can use medical records, diagnostic images and scientific literature to assess the causal relationship between diagnosed injuries and loads applied during a collision. A Biomechanical Engineer can assist in determining the following:

1. Determine the identification of the driver. Injuries and interior damage to the vehicle can sometimes address this question.

2. Estimate the speed of the vehicle(s) and assess whether the injuries are consistent with the reported speed. He or she can determine whether the injuries support one version of events over another.

WORKING WITH OTHER AGENCIES

i.) Transport Safety Board Investigation

When accidents involving air, marine, rail and/or a pipeline occur, the Transportation Safety Board of Canada ("TSB") will become involved and conduct independent investigations to determine their cause. If the collision does not involve one of these types of transport or motor vehicles, then local or provincial police forces will lead an investigation where motor vehicle accidents occur on public roads or involve off-road vehicles. The TSB's sole aim is the advancement of transportation safety. It does not assign fault or determine civil or criminal liability.

Where a TSB investigator believes on reasonable grounds that a person is in possession of information relevant to the investigation, he or she may by notice in writing, require a person to give a statement. If the person refuses to comply, a court can penalize the individual as though they were in contempt of court for non-compliance.

The *Canadian Transportation Accident Investigation and Safety Board Act* (the "*Act*") provides that these statements are privileged. Subsection 30(1) of the *Act* provides an expansive definition of statements, which includes not only a statement in the classic or traditional sense, but also a summary by someone else of the whole or part of what the author of a statement may have said. Distribution of the statement is permitted by written authorization of the author of the statement.

Despite this privilege, the investigator will generate a report at the end of his or her investigation, which may provide sufficient information to potentially encourage litigation. Further, the TSB may have to provide the statement to a coroner and to the "court".[6] Section 30(5) of the *Act* notes that if the coroner or court conclude in the circumstances of the case that the public interest in the proper administration of justice outweighs the importance in preserving privilege attached to the statement, the coroner or court may order the production and discovery of the statements subject to such restrictions as the coroner or court may deem appropriate and may require the person to give evidence that relates to the statement.

Therefore, it is important that witnesses and your Insured be represented at these investigations to assist with the evidence and cast the evidence in the best possible light. We have been successful in attending the inquiry and guiding the evidence.

Paragraph 9(2)(b) of the TSB Regulations allow the interviewee to have a person attend the interview. Subsection 9(4) grants the investigator the power to excuse their

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[6] The Court is defined is section 30(6) of the *Act* as "person or persons appointed or designated to conduct a public inquiry into a transportation occurrence pursuant to this Act or the *Inquiries Act*."

attendance if the chosen person's behavior "interferes with the proper conduct of the interview". This exclusion has not been judicially considered, but we will continue to monitor whether this exclusion will impact the role of counsel in these investigations.

ii.) RCMP Investigation

The RCMP will invariably conduct a detailed investigation whenever there has been a catastrophic injury or fatality. Your insured and other witnesses will be asked to provide statements. In order to control the information provided to the RCMP, your insured and key witnesses should not provide a statement to the RCMP until they have spoken with counsel.

The RCMP will also collect evidence and may restrict some of the evidence from the parties. For instance, the RCMP may seize vehicles. When evidence is seized, it is important to take immediate steps to advise the RCMP to preserve the evidence and not to perform any destructive testing.

The RCMP file is typically not produced until litigation is underway and is typically only provided once a court order has been obtained for the production of same.

iii.) WorkSafeBC Investigation

WorkSafeBC, otherwise known as the WCB, will perform an inquiry into catastrophic or fatal incidents where a worker has become injured or deceased in the course of his or her employment.

WorkSafeBC will no doubt contact your insured or their driver for a statement about the accident and their understanding of the company's appropriate life safety policies and procedures. Counsel can be of assistance in answering the questions during the WorkSafeBC inquiry. From our experience, WorkSafeBC may provide a number of written questions to be answered by your insured but they may also request interviews. Counsel can assist in drafting responses or to attend interviews to ensure that the answers do not unnecessarily expose the insured to potential litigation or liability.

iv.) Coroner's Investigation[7]

The Coroners Service of British Columbia is responsible for the investigation of all unnatural, unexpected or unintended deaths. It makes recommendations to improve public safety and prevent death in similar circumstances.

An investigation is conducted and a coroner's report is written. When a death is reported to the Coroner, he/she has the authority to collect information, conduct

[7] https://www2.gov.bc.ca/gov/content/life-events/death/coroners-service/death-investigations-panels

interviews, inspect and seize documents and secure the scene. Such information typically includes all reports drafted by the above-noted bodies.

Upon conclusion, the facts as determined by the investigation, are released in a report. The report sets out the Coroner's findings, including a cause of death and whenever possible, recommendations to prevent future deaths. Again, as this report will be released, it can have an impact on whether litigation is pursued against your insured or have an impact on your insured's defence.

A public inquest may subsequently be held. Inquests are formal court proceedings, held to publicly review the circumstances of a death. The five-person jury hears evidence from witnesses under subpoena in order to determine the facts of the death. Pursuant to the *Coroners Act,*[8] your insured and other witnesses can be compelled to attend the Inquest and give evidence. What is concerning is that a witness must answer any question that may incriminate the witness in a criminal proceeding or establish the witness's liability in a civil proceeding. Section 35(3) of the *Corners Act* notes that the evidence provided by the witness is not to be used against the witness in any trial or other proceedings other than a prosecution for perjury in respect of the answer provided. Compelling a witness to give evidence respecting his or her liability, even though inadmissible in a proceeding, can provide sufficient information to invite the commencement of an action.

8 *Coroners Act*, SBC 2007, c15

PRESERVATION OF EVIDENCE

- Spoliation

The preservation of evidence is important whether your insured is a Plaintiff or a Defendant. For example, a defective product or part on the tractor or trailer which is destroyed or lost may have provided a defence that your driver's actions and/or the condition of the vehicle did not cause the accident.

Spoliation is the destruction of evidence. The law of spoliation in British Columbia has generally followed our American counterparts, which require that the destruction of evidence be intentionally done for some fraudulent purpose or in order to suppress the evidence.

The ramifications of a finding of spoliation can be severe. One or more of the following remedies could be granted:

A. Adverse Inference: A presumption, or inference, that the destroyed evidence would have damaged the spoliator's case or assisted that of the innocent party.
B. Impugned Credibility: Not unreasonably, where a witness destroys documents, it will likely reflect poorly on that person when he or she gives testimony.
C. Costs Sanctions: A common remedy is to reverse the presumption that a successful party receives its costs of an application or action in order to address the spoliation. Thus, even where the Court denies the non-spoliator's motion, the court may condemn the spoliation by giving costs to the unsuccessful party.
D. Striking of Claim or Defence: The entire claim or defence could be thrown out. This remedy is rarely used.
E. Exclusion of Expert Evidence: An example would be where a party's expert has destroyed relevant evidence while conducting destructive tests. The court may not accept the report into evidence.
F. Contempt of Court: Although a finding of contempt of court generally requires the breach of a pre-existing order, the destruction of evidence, either in the first instance, or in breach of a pre-existing order, could also ground a finding of contempt of court.

- Types of evidence to preserve

Preservation of evidence must occur immediately upon notice of an accident before any of the evidence has been removed. The following are key types of evidence that should be gathered:

1. Thorough photographs of the scene: Photographs should not only focus on the vehicles involved, but also on the individuals/witnesses at the scene, emergency personnel at the scene, as well as the incident scene itself. These photographs

may be used by experts later down the road and counsel to determine liability and quantum when litigation ensues. As such, the more photographs, the better.

2. Contact Information: Identify and obtain contact information regarding all potential claimants and potential witnesses.

3. Statements: As soon as feasible, statements should be taken from all witnesses and your insured.

4. Tractor and trailer: It is imperative that the tractor and trailer be preserved so your experts may inspect it to assist in prosecuting or defending the claim.

5. Various records: As part of the preservation of the vehicle, numerous records will also need to be secured and safeguarded, including:

    (a) Bills of lading

    (b) Log books

    (c) Toll, food and gas receipts

6. Electronic data: this will need to be secured such as from:

    (a) Black boxes/ECMs

    (b) GPS and other System

Please see the attached Checklist for a more comprehensive list of materials to obtain and secure.

BLACK BOXES

- ECMs

An Electronic Control Module (ECM) or "Black Box" may contain a number of data sources that will prove useful in providing information about a motor vehicle accident. Best known among these sources is the event data recorder ("EDR"). The EDR will contain information about:

- The vehicle's speed
- Engine RPMs
- Pre-crash vehicle dynamics and system status
- Driver inputs
- Whether the driver's seatbelt was buckled
- Post-crash data
- What warning lights were on

EDRs are now placed in most new passenger vehicles. EDRs are also installed in commercial trucks, although they tend to be more sophisticated and may provide significantly more information than those found in the passenger vehicles. These advanced EDRs often contain information regarding hours of operation, maintenance, etc... Accident investigators and accident reconstructionists routinely use the information from these sources to assist in determining causes and circumstances of an accident.

Despite the usefulness of these devices and the information they contain, retrieving and interpreting the data is not simple. Downloading the data generally requires specialized knowledge and training. Depending on the vehicle manufacturer, the data retrieval software may or may not be widely available. Similarly, interpretation of the data also requires specialized training. Generally, a good accident reconstructionist is well versed in ECM, data retrieval and interpretation. However, if the evidence from the ECMs are not properly preserved it may be disastrous to a proper defence of the litigation. EDRs can be overwritten by time or further operation of the vehicle after the collision, including possibly by the jostling created by the towing of the vehicle from the scene of the collision. Therefore the data therein should be downloaded as soon as possible.

- Privacy issues, Data retrieval, Admissibility

As the use and consideration of ECMs has been more prolific in the US courts, a number of issues relating to their uses have arisen there. Chief among these is the issue of ownership. In many states, an ECM or its data cannot be removed from a vehicle without the owner's consent. As it happens, the concern that valuable evidence may be suppressed and potentially lost has prompted some courts to take a common sense approach similar to the expectation of privacy notion often discussed in video

surveillance cases. Where the conduct in question, and in this case the driver's behaviour, was readily observable, there is no expectation of privacy. We are unaware of any case in Canada where black box data has not been admitted for privacy reasons, however we note the case of *R. v. Glenfield*, 2015 ONSC 1304 [*Glenfield*].[9] In *Glenfield,* the Court determined that the downloading of information from the EDR of a damaged vehicle at the accident scene violated s. 8 of the *Charter.* It found that the police could only access the EDR with the consent of the owner or on the authority of a properly issued warrant. The police must obtain a warrant to have the authority to download information from an EDR. However, the data collected was ultimately admitted under s. 24(2) of the *Charter.*

Other challenges that have been presented, include the question of degradation or spoliation of the ECM data. For this reason it is important that the data retrieved be properly safeguarded in the same way that any other physical evidence is cared for. A chain of custody must be maintained. Again, a competent accident reconstructionist usually has the capability to retrieve the data and move it to a more secure medium and retain it.

No less important is the issue of reliability. This is where the care and skill of the expert (usually accident reconstructionist) is so important. If the court is not convinced that the expert has properly and accurately interpreted the data, all of the efforts in retrieving, downloading, analyzing and interpreting the information may be for naught.

- GPS and other Systems

A global positioning system ("GPS") uses signal data to ascertain location information. While perhaps most commonly used for navigation purposes, accident reconstructionists can obtain significant information from GPS and other services like to provide more complete pictures of what may have occurred at the time of the collision and leading up to same. Most new cars are or can be equipped with GPS receivers; with commercial trucks having same for navigation purposes or to track operations and improve efficiency.

Depending upon the type of system in use, very useful data may be extracted from a GPS. For instance, some are capable of position accuracy of less then 50cm and speed accuracy of less than 0.1 km per hour. Other programs and data can provide information about an individual truck's hours of service, fuel usage, servicing, hard braking, roll stability, lane departures and other driver-initiated actions. When the information is properly interpreted and combined with digital photographic evidence or photogrammetry-based reconstructions it can provide a compelling accident reconstruction we have seen to date.

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[9] See also *R. v. Hamilton*, 2014 ONSC 447.

Summary

When combined with all other evidence gathered, the exceptionally detailed electronic data obtained from ECMs, GPS and other Systems can confirm or refute the various theories of what may have occurred immediately before a motor vehicle accident and who or what caused the loss in question. Not only can it answer the question of who was accelerating/decelerating, braking, swerving, but it can tell us the degree of such conduct, and give us a fairly precise location on the roadway where these actions occurred.

Understanding the use of these systems is the first step in considering their use in accident reconstruction. However, care must be taken to ensure that the information is obtained, collated, interpreted and presented so that we can best use it to reconstruct an accident and present it to the court in the most straightforward and understandable way.

CHECKLIST

Handling of a Motor Truck Carrier Claim - The Initial Steps & Considerations

A. Post-accident

- ☐ Contact driver immediately
  - If necessary, seek assistance of interpreter
  - If necessary, contact driver's family
  - Listen to driver and discuss details with open mind
- ☐ Ensure driver not injured, otherwise seek medical treatment
- ☐ Facilitate driver submission for alcohol or drug testing
- ☐ Determine if driver needs counselling
- ☐ Determine content of any statements given by driver to police or other authorities
- ☐ Obtain oral account of all facts and circumstances, including nature of load, weather and road conditions, and any problems with the truck
  - Consider lawyer-client privilege – talk in private
  - Determine inconsistencies or discrepancies and challenge driver's account in respectful but firm manner
- ☐ Determine location of driver's logs, shipping papers, any citations, vehicle inspections, fuel receipts, scale receipts, hotel receipts, bills of lading
- ☐ Obtain driver's authorization to permit release of driver's record and commercial driver's licence application
- ☐ Obtain driver's authorization to permit release of his medical records
- ☐ Record driver's home address and all contact particulars, including those of his/her spouse, next of kin, children, etc.
- ☐ Instruct driver on dealing with media, if warranted
- ☐ If criminal charges are made against the driver or seriously contemplated, retain criminal lawyer immediately and instruct driver not to speak to anyone until a lawyer is present
- ☐ Determine if the driver had any pre-accident medical or physical limitations
- ☐ If driver was cited, make arrangements to handle the citation
- ☐ If driver injured, consider WCB accident claim issues
  - Be careful of questioning driver's credibility on record if employer is opposing WCB accident claim

B. Document retention

- ☐ Driver's logs
- ☐ Equipment inspection reports
- ☐ Dispatch records for one week prior to accident

- ☐ Bills of lading for subject trip
- ☐ Fuel receipts for 30 days prior to accident
- ☐ Weight tickets for one week prior to accident
- ☐ Tow receipts for one week prior to accident
- ☐ Driver's qualification file
- ☐ Driver's drug and alcohol testing results
- ☐ Driver's payroll records for 30 days prior to accident
- ☐ All maintenance records for the tractor
- ☐ All maintenance records for the trailer
- ☐ Complete accident investigation file of trucking company, including statements, photographs
- ☐ Copies of all witness statements
- ☐ Copies of all correspondence, memos, e-mails addressing any aspect of accident
- ☐ Driver's cell phone records for 30 days prior to accident
- ☐ All call logs respecting contact between driver and trucking company
- ☐ Copy of trucking company's policies and procedures
- ☐ Copy of trucking company's training manual and materials

All data generated from electronic systems:

- ☐ ECM
- ☐ GPS etc.,